

# CHAPTER TWENTY: SMALL CLAIMS

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## CHAPTER TWENTY: SMALL CLAIMS

### I. FOREWORD

Most people with legal claims under \$25,000 are not lawyers and do not have the benefit of legal representation. It can be challenging to choose how to resolve a dispute and how much to claim. While this guide primarily focuses on the Small Claims Court, it briefly reviews other options for resolving disputes.

If you are a party to a small claims action, take the time to read this guide in its entirety. If you fail to comply with the rules, the process may be delayed, your claim or defence may be weakened, and you may be liable to pay costs and penalties to the other party. Reading this guide will help you be more prepared and minimise confusion.

This guide is meant to explain the general Small Claims Court process; it is not legal advice. Read the guide along with the Small Claims Court rules and obtain legal advice where necessary.

### II. DO YOU HAVE A CLAIM?

In order to have a legal claim, it must be recognised by the law. A frivolous claim is one that does not disclose a legal cause of action, is incapable of proof, or is otherwise bound to fail. A vexatious claim is one that is brought in order to annoy, frustrate, or antagonise the defendant. A claim may be both frivolous and vexatious.

If a claim is frivolous or vexatious, the claimant will lose and may be penalised up to 20% of the amount of the claim<sup>1</sup>. The penalty could be up to \$5,000 on a \$25,000 claim; it pays to research your cause of action and limit your claim to the proper amount.

#### A. *Types of Claims*

It is helpful to research each of the following types of claims to ensure that a claim falls within at least one of them. See Appendix G for a partial list of specific causes of action. If you are unable to fit your claim into one of the listed categories, you should consult a lawyer to see if you have a cause of action.

#### Tort

Torts are offences committed by one person against another. Examples include assault, battery, and negligence. Each tort has its own test and defences. Tort law continues to evolve and a person planning to bring a claim in tort should research what must be proven to be successful and which defences may be available to the defendant. Resources include CanLII.org, the courthouse library, and a practising lawyer.

#### Contract

Contract law governs voluntary relationships between parties. It is a complicated and nuanced area of the law and a person planning to bring a claim in contract should research what must be proven to be successful and which defences may be available to the defendant. Resources include CanLII.org, the courthouse library, and a practising lawyer.

#### **NOTE:**

Courts will generally not enforce illegal contracts or dishonest transactions (see *Faraguna v Storož*, [1993] BCJ No. 2114). However, *Transport North American Express Inc. v New Solutions Financial Corp.*, 2004 SCC 7 states that a court may enforce legal portions of a contract, thus effectively severing the illegal portion. A common example involves contracts purporting to charge interest rates prohibited under s 347 of the *Criminal Code*. The court will not enforce a term in a contract purporting to charge such a rate. (However, section 347.1 exempts payday loans from criminal sanctions, if certain conditions are met; see **Section V.G:**

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<sup>1</sup> Small Claims Rule 20(5).

## Regulation of Payday Lenders and Criminal Rate of Interest in Chapter 9: Consumer Protection).

### Equity

The usual remedy for torts and breaches of contract is monetary damages. In circumstances where monetary damages are inadequate or where a legal remedy is improper in the circumstances, the court may grant other relief such as an injunction. The Small Claims Court, pursuant to s 2 of the *Small Claims Act* [SCA]<sup>2</sup>, has a limited inherent jurisdiction to grant equitable remedies. A party seeking an equitable remedy such as an injunction should consult with a lawyer and will likely need to apply to the Supreme Court for relief.

### Restitution

The law of restitution<sup>3</sup> applies to circumstances where a party has benefited, the other party has suffered a loss as a result, and there is no legal basis for the party to have benefited. This claim is commonly referred to as “unjust enrichment” and is a complicated and evolving area of the law. A person planning to bring a claim for restitution should research what must be proved to be successful and which defences may be available to the defendant. Resources include CanLII.org, the courthouse library, and a practising lawyer.

### Statute

Certain statutes create a right of action that does not exist in the common law. The statute will set out what must be proved, the defences that apply, the types of damages that can be awarded, and how the claim must be brought. A person planning to bring a claim under a statutory cause of action should research the statute as well as how the courts have interpreted it. Resources include CanLII.org, the courthouse library, and a practising lawyer.

### ***B. Types of Damages***

Although the Small Claims Court has the jurisdiction to award \$25,000<sup>4</sup>, the awards in most cases are significantly less. There must be a principled basis for an award of damages and it is helpful to separate a claim into the following types of damages. Ensuring that there is a legal basis for a claim is a critical step as there are penalties for proceeding through a trial in Small Claims Court on a claim that is bound to fail<sup>5</sup>.

### General Damages

General damages are those that are not easy to quantify and for which a judge must assess the amount of money that, in the circumstances, will compensate for the loss. A common example of general damages is “pain and suffering”. The purpose of general damages is to compensate and not to punish; a party should not expect to profit or realise a windfall through an award of general damages. A person planning to claim general damages should provide evidence of the loss and research the case law to determine how the courts have assessed damages in cases with similar losses and circumstances. Resources include CanLII.org, the courthouse library, and a practising lawyer.

### Special Damages

Special damages are those that are easy to assess. For example, if a person has been put to expense and has receipts showing the amounts spent, these expenses would be classified as special damages. Each and every expense must be strictly proved with documents or other satisfactory evidence.

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<sup>2</sup> *Small Claims Act*, RSBC 1996, c 430 [SCA].

<sup>3</sup> *Garland v Consumers' Gas Co.*, 2004 SCC 25; *Kerr v Baranow*, 2011 SCC 10; *Skibinski v Community Living British Columbia*, 2012 BCCA 17.

<sup>4</sup> BC Reg 179/2005.

<sup>5</sup> Rule 20(5).

### Nominal Damages

Nominal damages are those where a wrong has been committed but there has been no, or insignificant, damages suffered as a result of the wrong. Certain torts, such as trespass, allow claims for nominal damages however there is little reward and much to be lost. A person who has suffered no damages yet still brings a claim may not recover the costs for bringing a claim that wastes the court's and the parties' time and money.

### Debt

Debt is a remedy for breach of contract. See: *Busnex Business Exchange Ltd. v Canadian Medical Legacy Corp.*<sup>6</sup> At paragraph 8, the court addresses the requirements for establishing a debt or liquidated demand:

“A liquidated demand in the nature of a debt, i.e., a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation, beyond mere calculation, then the sum is not a ‘debt or liquidated demand,’ but constitutes ‘damages.’”

### Liquidated Damages

Some contracts provide for a genuine pre-estimate of damages in the event of a breach and allow the non-breaching party to claim for that estimate without having to prove the amount they have actually lost. This amount can be recovered as a debt. If the amount of liquidated damages is not a genuine pre-estimate of damages or is manifestly inappropriate in the circumstances, a court may decline to award them.

### Statutory Damages

Statutory damages are those that arise from a breach by the defendant of an obligation found in a statute. The statute and relevant case law should be examined carefully to determine what damages may be claimed and the principles for assessing damages.

### Punitive Damages

Punitive damages, also called “exemplary damages”, are reserved for conduct that is so abhorrent that the court must impose an additional penalty to punish the wrongdoer and discourage others from engaging in similar conduct. Punitive damages are **rarely** awarded, especially in claims for breach of contract. Punitive damages are not compensatory and the amount, if any, is in the complete discretion of the judge.

A claimant who seeks punitive damages must ask for punitive damages in the Notice of Claim. Punitive damages **cannot** be awarded in addition to the \$25,000 monetary limit.

### Aggravated Damages

Aggravated damages provide additional compensation where the wrongdoer's actions have caused mental distress. Awards of aggravated damages are rare and depend heavily on the actions of the wrongdoer and the circumstances. The claimant must provide actual evidence of mental distress that results from the wrongdoing of the defendant.

A claimant who seeks aggravated damages must ask for aggravated damages in the Notice of Claim. Aggravated damages **cannot** be awarded in addition to the \$25,000 monetary limit.

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<sup>6</sup> *Busnex Business Exchange Ltd. v Canadian Medical Legacy Corp.*, 1999 BCCA 78.

## **Treble Damages**

Treble damages are a form of punitive damages that, in certain circumstances, automatically triple an award of compensatory damages. Treble damages do not exist in Canada.

### ***C. Limitation Periods***

After a certain amount of time has passed, a person loses the right to commence a claim. The amount of time that must pass before the limitation period expires depends on which act applies to the claim.

The new *Limitation Act*, SBC 2012, c 13 [*Limitation Act*] came into effect on June 1, 2013. A claim is governed by this Act if the claim was discovered after this date, unless the facts underlying the claim arose before the effective date and the limitation period under the old *Limitation Act*, RSBC 1996, c 266 [*Old Limitation Act*] has expired<sup>7</sup>. Under the new *Limitation Act*, the basic limitation period that applies to most claims is 2 years after the day on which the claim is discovered<sup>8</sup>.

Discovery occurs the day on which the claimant knew or reasonably ought to have known all of the following:

- a) That injury, loss or damage had occurred;
- b) That the injury, loss or damage was caused by or contributed to by an act or omission;
- c) That the act or omission was that of the person against whom the claim is or may be made;
- d) That, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage<sup>9</sup>.

Special rules for discovery apply in various circumstances. For example, when a person signs a document acknowledging liability for a claim, discovery is deemed to occur on the date the acknowledgement is made unless the limitation period has already expired<sup>10</sup>. Generally, there is an ultimate limitation period of 15 years from the date the basis of the claim occurred, regardless of when discovery happens<sup>11</sup>. If it has been close to 2 years since the events giving rise to your claim occurred, act quickly and refer to Appendix F or consult a lawyer.

Under this act, the limitation period depends on the type of claim and who the other party is. A claim may consist of several causes of action and each cause of action may have a separate limitation period. For example, if a claimant waits three years, they may be unable to bring a claim in negligence but may still be able to claim for breach of contract. Litigants should review the *Old Limitation Act* to determine which limitation period applies.

## **III. CHOOSING THE PROPER FORUM**

There are several options for resolving most civil disputes: Alternative Dispute Resolution, specialised tribunals, Small Claims Court, and the Supreme Court of British Columbia. On May 31, 2012, the *Civil Resolution Tribunal Act*, SBC 2012, c 25 [CRTA] was given Royal Assent and may be proclaimed in force by regulation. Once in force, the Civil Resolution Tribunal will become another option for resolving civil disputes.

Certain claims must be made through administrative tribunals instead of the courts. See, for example, Chapter 6: Employment Law, Chapter 7: Workers' Compensation, Chapter 8: Employment Insurance, Chapter 13: Landlord and Tenant Law, and Chapter 19: Human Rights.

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<sup>7</sup> *Limitation Act*, SBC 2012, c 13, s 30(3-4) [*Limitation Act*].

<sup>8</sup> *Limitation Act*, s 6(1).

<sup>9</sup> *Limitation Act*, s 8.

<sup>10</sup> *Limitation Act*, s 24(1).

<sup>11</sup> *Limitation Act*, s 21(1).



In order to bring a claim in British Columbia, the court or tribunal must have territorial jurisdiction. If either the subject matter of the claim (e.g., the contract or wrongful act) occurred in British Columbia or the Defendant resides or does business in British Columbia, this may be a sufficient connection for a court or tribunal to assert jurisdiction. It is sometimes unclear whether British Columbia has a sufficient connection to the claim and is the most appropriate forum. If the court's jurisdiction is not clear, a claimant should obtain legal advice and review applicable case law<sup>12</sup>.

Where the dispute is contractual, the existence of a "forum selection clause" may provide further jurisdictional difficulties. Forum selection clauses require the adjudication of claims in the named jurisdiction. Such clauses will generally be upheld absent a finding of "strong cause" to hear the matter in the jurisdiction of another court<sup>13</sup>.

### **A. Small Claims Court**

The Small Claims Court is the civil division of the British Columbia Provincial Court and is designed to accommodate unrepresented parties who do not have legal training. The overriding purpose of the Small Claims Court is to resolve disputes in a "just, speedy, inexpensive, and simple manner." The Court uses simplified forms, procedures, and rules and encourages settlement.

Small Claims Court is a formal court that applies the law. Although the procedures and rules of evidence are slightly relaxed in order to make it more accessible to the public, it is significantly more formal and principled than the courts portrayed in television programmes.

There are three primary considerations when choosing Small Claims Court: the amount claimed, the court's jurisdiction, and costs.

#### **Amount Claimed**

**Small Claims Court can award a judgment of up to \$25,000.** A person whose claim exceeds \$25,000 may still choose Small Claims Court but must expressly state in the notice of claim or counterclaim that they will abandon the amount necessary to bring their claim or counterclaim within the court's jurisdiction<sup>14</sup>. Interest and costs are not included in calculating the \$25,000 limit.

A claimant must sue all responsible parties for damages arising from a single event in **one** claim; the claimant cannot split claims for damages arising out of a single event into multiple claims in an attempt to circumvent the \$25,000 limit. If, however, there are multiple events giving rise to a claim, even if closely related, they may be brought in separate actions<sup>15</sup>. For example, if a contractor issues an invoice for \$15,000 at the end of January for work done in January and issues another invoice for \$15,000 at the end of February for work done in February and both invoices go unpaid, the contractor may sue on each invoice in a separate claim. Rule 7.1(4) permits certain related claims to be heard together.

Where a defendant has pleaded a set-off, contributory negligence, or shared liability, the court may consider these defences against the full amount of the claimant's claim provided that the net judgment does not exceed \$25,000. This also applies when a set-off forms the basis for a standalone counterclaim. For example, if the claimant proves a \$50,000 claim and the defendant establishes a \$25,000 set-off, the claimant will have a net judgment of \$25,000.

The SCA<sup>16</sup> permits the monetary limit to be set by regulation at any amount up to \$50,000. Claimants should confirm the current monetary limit prior to filing a claim.

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<sup>12</sup> *DreamBank Online Gifting v BeneFACT Consulting*, 2011 BCPC 459 (CanLII) [*DreamBank*]; *Teck Cominco Metals v Lloyds Underwriters*, [2009] 1 SCR 321; *Purple Echo Productions, Inc. v KCTS Television*, 2008 BCCA 85; *Jordan v Schatz*, 2000 BCCA 409.

<sup>13</sup> *Borgstrom v Korean Air Lines Co. Ltd.*, 2007 BCCA 263; *Procon Mining & Tunnelling Ltd. v McNeil*, 2007 BCCA 438.

<sup>14</sup> Rule 1(5).

<sup>15</sup> *Wah Loong Ltd v Fortune Garden Restaurant Ltd.*, 2000 BCPC 163 (CanLII).

<sup>16</sup> SCA, s 21(2).

## Jurisdiction

The Small Claims Court derives its authority from the SCA, the *Small Claims Rules*, BC Reg 261/93 [SCR], and other acts that expressly confer jurisdiction upon the Provincial Court.

The court has express jurisdiction in claims for:

- debt or damages;
- recovery of personal property;
- specific performance of an agreement relating to personal property or services; or
- relief from opposing claims to personal property.

The court does not have jurisdiction in claims for libel, slander, or malicious prosecution unless such authority is expressly granted in limited circumstances by another statute (e.g., s- s 171(3) of the *Business Practices and Consumer Protection Act*, SBC 2004, c 2).

The court cannot resolve disputes involving residential tenancy agreements nor can it grant remedies created by statute if there is another dispute resolution mechanism prescribed in the statute. For example, claims for overtime must be claimed through the Employment Standards Branch and not in Small Claims Court. The court has very limited jurisdiction in residential tenancy<sup>17</sup>, employment<sup>18</sup>, human rights<sup>19</sup>, and strata property<sup>20</sup> matters.

Other noteworthy areas of law often falling outside the jurisdiction of the Small Claims Division are divorce, trusts, wills (i.e., probate), prerogative writs, and bankruptcy. However, the court may have jurisdiction over cases where these areas of law are involved only circumstantially – where the pith and substance of the case does fall within the court’s jurisdiction<sup>21</sup>. In *AMEX Bank of Canada v Golovatcheva*, the claimant alleged that the defendant had committed fraud by running up a debt that she knew she would escape by declaring bankruptcy. The Small Claims court exerted jurisdiction over the issue of fraud.

The Small Claims Court has limited inherent jurisdiction. It cannot grant injunctions nor can it grant declaratory relief; however, subject to the SCA and SCR, the court may make any order or give any direction necessary to achieve the purpose of the SCA and SCR. Students should review the SCA and the SCR thoroughly. [See *LLC v PG*, sub nom. *Craig v Gidyk*, [1994] BCJ No. 1591 (Prov. Ct.); *RK v McBride*, [1994] BCJ No. 2791; and *Joey Beenz, Coffee Bar Ltd. v Di Stasio (cob Neon Sign Writers)*, 2011 BCPC 375 (CanLII).

## Costs

The cost to file a claim depends on the amount being claimed. The filing fee is \$100 for claims of \$3,000 or less and \$156 for claims over \$3,000. All Small Claims Court fees are listed in Schedule A of the SCR.

If a person is unable to afford the court’s fees, they can file an Application to the Registrar (Form 16) together with a Statement of Finances. If accepted, the party will be exempted under Rule 20(1) from paying fees with respect to that court file.

An unsuccessful litigant must, unless a judge or registrar orders otherwise, pay to the successful party:

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<sup>17</sup> *Residential Tenancy Act*, SBC 2002, c 78.

<sup>18</sup> *Employment Standards Act*, RSBC 1996, c 113; *Macaraeg v E. Care Contact Centers Ltd.*, [2008] BCCA 182; *UBC v Moore*, 2009, BCPC 186.

<sup>19</sup> *Human Rights Code*, RSBC 1996, c 210.

<sup>20</sup> *Strata Property Act*, SBC 1998, c 43; *Frechette and Meagher v Crosby Property et al*, 2007 BCPC 174 (CanLII); *Stettner v The Owners, Strata Plan PG 56*, 2011 BCPC 82 (CanLII); *Valana v Law et al*, 2005 BCPC 587 (CanLII); *Heliker et al v Strata Plan VR 1395*, 2005 BCPC 500 (CanLII); *David v Vancouver Condominium Services Ltd.*, [1999] BCJ No 1869; *McNeill v Strata Plan – KAS1099*, [1996] BCJ No. 2553; *Strata Plan LMS2064 v Biamonte*, [1999] BCJ No. 1267; *Seller v Singla Bros. Holdings Ltd*, [1995] BCJ No. 2826; *Beck v Andrews Realty Ltd. (cob RE/Max Real Estate Services)*, [1994] BCJ No 2796.

<sup>21</sup> *AMEX Bank of Canada v Golovatcheva*, 2007 BCPC 369.

- any fees the successful party paid for filing any documents;
- reasonable amounts the party paid for serving any documents; and
- any other reasonable charges or expenses that the judge or registrar considers directly relate to the conduct of the proceeding.

Under no circumstances can any party recover any fees paid to a lawyer with respect to the proceeding: s. 19(4) of the SCA; however, reasonable disbursements charged by a lawyer with respect to the proceeding may be awarded to the successful party.

***B. Supreme Court of British Columbia***

The Supreme Court has a broad jurisdiction. It is not bound by any monetary limits and there are few restrictions on the types of claims that it can hear. The Supreme Court can grant injunctions, conduct judicial reviews, and make new law.

The Supreme Court is not designed for lay litigants. Parties without legal training or legal advice may find it much more difficult to navigate than Small Claims Court. There are, however, a number of resources<sup>22</sup> to help lay litigants bring and defend claims in Supreme Court.

The court fees in Supreme Court are higher than in Small Claims Court; they can be waived, however, for those who cannot afford them.

In Supreme Court, the losing party will often be ordered to pay to the successful party a portion of that party’s reasonable legal costs. Costs are awarded using a tariff system and generally on a party and party basis that usually amounts to about twenty per cent of the successful party’s costs. While it is possible for the successful party to be fully indemnified through an award of special costs, also known as solicitor-client costs, this is rare and should not be expected.

***C. Civil Resolution Tribunal***

The Civil Resolution Tribunal is designed to be an alternative to Small Claims Court. It is anticipated that the tribunal will begin operations some time in 2015.

Although the regulations have not yet been enacted, the CRTA sets out the general process and jurisdiction.

**Jurisdiction**

The tribunal classifies claims as “Small Claims Matters”, “Strata Property Matters”, or “Other Matters”. These classifications are set out in the Schedule to the CRTA and may be further clarified by regulation.

***a) Small Claims Matters***

The tribunal’s jurisdiction is identical to that of the Small Claims Court except that the monetary limit may be different once it is set by regulation. If, however, a claim can be dealt with under either s 6 or s 7 of the Schedule, it must be brought as a strata property matter rather than a small claims matter.

***b) Strata Property Matters***

A person may make a request for tribunal resolution of a claim that concerns:

- the interpretation or application of the *Strata Property Act* or a regulation, bylaw, or rule under that Act;
- the common property or common assets of the strata corporation;
- the use or enjoyment of a strata lot;

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<sup>22</sup> Appendix E.

- money owing, including money owing as a fine, under the *Strata Property Act* or a regulation, bylaw or rule under that Act;
- an action or threatened action by the strata corporation, including the council, in relation to an owner or tenant;
- a decision of the strata corporation, including the council, in relation to an owner or tenant; or
- the exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

The foregoing list contains a number of limitations. A person considering tribunal resolution of a claim listed above should review ss 6-8 of the Schedule to ensure that a limitation does not deny jurisdiction to the tribunal.

**c) *Other Matters***

The tribunal may, by regulation, be granted jurisdiction over other matters that cannot be classified as either a small claims matter or a strata property matter.

**Process**

Using the tribunal to resolve a dispute is voluntary; a claimant can still go to Small Claims Court to resolve the dispute. The tribunal is designed to be more informal, faster, and less expensive than Small Claims Court. Unlike Small Claims Court, the tribunal generally, with some exceptions, requires the parties to be self-represented; lawyers are generally not permitted.

There is no guarantee, however, that tribunal adjudicators will be legally trained and there is no right of appeal. A party who is dissatisfied with the ruling can only seek limited judicial review in the Supreme Court of British Columbia. The standard of review is correctness unless the decision relates to:

- findings of fact for which the finding must either be unreasonable or made without any evidence to support it;
- discretionary decisions for which the decision must be arbitrary, made in bad faith, be based entirely or predominantly on irrelevant factors, or fail to comply with a statute; or
- natural justice and procedural fairness which are considered with the tribunal's mandate in mind.

Resolving a dispute through the tribunal has up to three phases. See Appendix J for more details on the Tribunal's procedures.

**General**

Once the tribunal has accepted the request for tribunal resolution, the limitation period is postponed until the tribunal notifies the parties of its refusal to resolve the claim, the parties withdraw pursuant to s 21, or, in relation to judicial review of a final decision, a circumstance prescribed by regulation applies.

A lawyer or another person cannot represent a party unless the party is a child or person with impaired capacity, the rules permit the party to be represented, or the tribunal, in the interests of justice and fairness, permits the party to be represented.

Tribunal orders are enforceable as an order of the court.

***D. Alternative Dispute Resolution***

Alternative dispute resolution is useful because it is efficient, inexpensive, **confidential**, informal, and flexible; the parties have control over the outcome. A trial, on the other hand, is formal, less flexible,

and can be more expensive. With few exceptions, everything that is said in a courtroom or written in a filed document can be accessed by any member of the public.

Parties who wish to preserve their relationship, avoid the stress of trial, keep the details of their dispute private, or resolve their dispute in months instead of more than a year should seriously consider alternative dispute resolution.

### Negotiations

Negotiation is cost and risk free. Any contact between the parties should be used to attempt to negotiate a settlement. Parties can negotiate a settlement at any point before a judgment is pronounced.

Ask the other party if he or she is represented by a lawyer. If so, all communication should be with the lawyer. If the other party is not represented, ask the other party if he or she is willing to discuss the claim.

Telephone technique should be **firm** but **not argumentative**. Students must try to negotiate the best offer possible.

Make a written plan and keep detailed notes of each conversation as it occurs. Plan how best to find out the other side's position and how best to put forward your position.

If a settlement is reached, a letter should be sent to the other party to confirm the agreement. Enclose a duplicate copy for the appropriate party to sign and return to you. Any settlement should include a mutual release agreement in which both parties agree to not bring any further claims against each other and to withdraw any other proceedings that may have been commenced.

NOTE – If there are multiple defendants, a claimant should obtain legal advice to ensure that an agreement with one defendant does not inadvertently release the other defendants from liability.

### Mediation

Mediation is a voluntary process in which an independent, neutral party listens to each party's position, focuses the issues in dispute, and assists the parties to come to a settlement agreement. While the mediator plays an active role in ensuring discussion remains productive, the ultimate responsibility for resolving the dispute rests with the parties. The purpose of mediation is not to determine who wins and loses, but to find solutions that meet the needs of the people involved.

Mediation as an alternative to litigation is often a more expedient, less expensive, and more satisfactory route than litigation. In order to mediate outside of the Small Claims Court process, all parties must agree. The parties typically share the cost of mediation.

The Small Claims Court requires that parties participate in either a settlement conference or mediation. See "How Will My Claim Proceed?". Both processes are highly successful in resolving disputes and there is no additional cost to either party.

Parties who choose to mediate outside of the Small Claims Court process can choose their mediator<sup>23</sup>, resolve the dispute sooner and on a more convenient timeline, and spend more time resolving the dispute than the approximately 2.5 hours allocated by the court. Also, since both parties would have agreed to mediate, settlement is more likely than if mediation is compulsory.

#### *a) Conflict Resolution Clinic (CoRe Clinic)<sup>24</sup>*

The CoRe Clinic provides mediation services on a flexible payment scale. Sessions are run by a professional mentor mediator paired with a trained student mediator. The mentors are often the same mediators available through the BCMediator

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<sup>23</sup> <http://www.mediatebc.com/Find-a-Mediator.aspx>.

<sup>24</sup> <http://faculty.law.ubc.ca/coreclinic/index.html>.

Roster Society but are available at greatly reduced rates while volunteering with CoRe. All mentors have extensive Small Claims mediation experience, and significant expertise in other areas of the law as well. Students working with CoRe have undergone training through the UBC Faculty of Law Mediation Clinic and Practicum courses. Consider using the CoRe clinic for mediations under Rule 7.3. CoRe may also be particularly useful where parties have not yet filed a court action. Mediations with CoRe are voluntary, and both parties must agree to mediate in order for CoRe to assist. CoRe offers a flexible process that can be designed to accommodate the individual needs of parties to a dispute. Where requested, mediation sessions can be held in a range of locations, or by teleconference. In some cases the process will run more smoothly if parties to a dispute are kept separate. Mediation in general and CoRe in particular can provide a faster, less expensive alternative to court. For more information, refer to CoRe's website: <http://faculty.law.ubc.ca/coreclinic>.

### **Arbitration**

Arbitration is a voluntary process in which an independent, neutral party will listen to each party's position and resolve the conflict by choosing one of the party's positions. If the arbitrator's decision is binding, the dispute is settled. If the arbitrator's decision is non-binding, the parties may accept it or proceed to litigation. Arbitration can offer a very quick resolution to disputes and encourages both parties to present reasonable offers in order to increase the likelihood that their proposal will be selected. In order to arbitrate, all parties must agree. The parties typically share the cost of arbitration. The Small Claims Court does not require or provide arbitration; parties who wish to arbitrate must do so on their own.<sup>25</sup>

## **IV. STARTING A CLAIM**

### ***A. Settlement Letter***

The fastest and least expensive way to resolve a dispute is to tell the other person what you are claiming from them and why you are claiming it. If the other person agrees with the amount or responds in a manner that leads to a settlement, both parties will save the time, effort, expense, and uncertainty of a lawsuit.

*Bona fide* attempts to settle may involve concessions and admissions of liability. For example, a claimant may offer to settle for less than the claim to account for the cost, time investment, and risk of going to trial. A defendant, for example, may admit liability but dispute the amount owed. Whenever parties can agree on certain points, the likelihood of settlement increases.

Because of the strong public interest in settlement, these *bona fide* settlement attempts are protected by settlement privilege. This means that, if the matter is not settled, any reductions in the claim or admissions made disappear and cannot be used against the party who made them<sup>26</sup>. It is prudent to include the words "WITHOUT PREJUDICE" in correspondence involving *bona fide* attempts to settle to indicate that the party sending the document wishes to rely on settlement privilege; settlement privilege will still apply, however, even if "WITHOUT PREJUDICE" is not included.

Settlement letters should be brief, factual, and clearly state the amount claimed even if that amount exceeds \$25,000. Settlement letters should have a courteous tone as a letter that invokes a hostile reaction from the recipient will be counter-productive. A party writing a settlement letter should never threaten criminal or regulatory penalties; **extortion is a criminal offence**.

### ***B. Identifying the Defendant(s)***

When drafting a notice of claim and throughout the litigation process, it is important to stick to the **relevant** facts. Court is not a forum for airing grievances that do not give rise to a claim. For

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<sup>25</sup> British Columbia Arbitration and Mediation Institute: <http://www.bcami.com>.

<sup>26</sup> *Schetky v Cochrane*, [1918] 1 WWR 821 (BCCA); *Greenwood v Fitts* (1961), 29 DLR (2d) 260 (BCCA).

example, in a claim for breach of contract, the fact that the defendant acted rudely is generally not relevant to the claim. Including irrelevant facts confuses the issues, wastes time, raises tensions, and makes it more difficult to successfully prove the claim. A good rule to follow for each type of claim is to include **only the facts necessary** to satisfy the legal test for that type of claim; brief is better.

It is important to make your cause of action (e.g., negligence, breach of contract, etc.), type of damages, and amount of damages very clear. Do not let the judge guess what you want.

### **Suing a Business**

#### **a) Corporation**

A corporation is a legal entity that is separate from its shareholders and employees. It is identified by a corporate designation such as Incorporated, Limited, Corporation, their abbreviations Inc., Ltd., or Corp., or their French equivalent following the business name.

A corporation may register a sole proprietorship or partnership and operate under that name. To sue such a company, a claimant should include both the corporate name and the name of the proprietorship or partnership: e.g., 0123456 BC Ltd. dba Joe's Bakery. The letters dba stand for "doing business as". Variations such as "coba" meaning "carrying on business as" are also acceptable.

A corporation can enter into contracts and can sue or be sued. Generally speaking, a corporation's shareholders, officers, directors, and employees are not liable for the actions or liabilities of the corporation or their own actions while acting within the scope of their office or employment. A person who feels that a shareholder, director, officer, or employee of a corporation might be liable should obtain legal advice.

Corporations may be either provincially or federally incorporated. A federal company is incorporated under the *Canada Business Corporations Act*, RSC 1985, c. C-44 [CBCA]. A BC corporation is incorporated under the *Business Corporations Act*, SBC 2002, c 57 [BCBCA]. Corporations may also be registered under the laws of the other provinces and territories.

Because a corporation can have multiple locations, every corporation, including non-BCBCA corporations, doing business in BC must provide an address where it can be served with notices of claim and other important documents. A claimant must perform a company search to obtain the current registered address for the defendant corporation<sup>27,28</sup>. This address must be listed as the corporation's address on the notice of claim form.

#### **b) Partnership**

A partnership can exist between one or more persons and is governed by the Partnership Act, RSBC 1996, c 348 [PA]. A person includes a corporation.

The rules for determining whether a partnership exists are set out in s 4 of the PA. Generally speaking, all partners are personally liable for the debts of the business: s 7 of the PA. As it is impossible to tell whether a business is a partnership or a sole proprietorship from the name alone, a claimant should perform a company search to learn the true structure of the business as well as the name and address of each partner.

The proper way to list each partner on the notice of claim is:

Jane Doe d.b.a. XYZ Partnership

John Doe d.b.a. XYZ Partnership

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<sup>27</sup> Rule 1(2.1); Rule 5(2.1).

<sup>28</sup> See Appendix E for instructions on conducting a company search.

ABC Company Ltd. d.b.a. XYZ Partnership

NOTE: “d.b.a.” stands for “doing business as”

NOTE: One should be careful to not confuse partnerships with limited partnerships (LP) or limited liability partnerships (LLP).

**c) *Sole Proprietorship***

A sole proprietorship allows a single person or corporation to do business under a business name. Sole proprietorships are registered under Part 4 of the PA. A sole proprietor is personally responsible for the debts of the business.

As it is impossible to tell whether a business is a partnership or a sole proprietorship from the name alone, a claimant should perform a company search to learn the true structure of the business as well as the name and address of the proprietor.

The proper way to list a sole proprietor on the notice of claim is:

Jane Doe d.b.a. XYZ Company

John Doe d.b.a. XYZ Company

ABC Company Ltd. d.b.a. XYZ Company

NOTE: “d.b.a.” stands for “doing business as”

**d) *Other***

For other forms of businesses such as limited partnerships (LP), limited liability partnerships (LLP), and unlimited liability corporations (ULC), legal advice is recommended.

**Suing a Person over 19 Years Old**

Do not use titles such as Mr., Mrs. or Ms. Use full names, not initials (i.e., “Dr. D. Smith” should be “Doris Smith”). Claimants may sue more than one defendant if the claim against each defendant is related. Divide the “To” space in half and use one half for the name and address of each defendant; alternatively, the notice of claim filing assistant<sup>29</sup> makes it convenient to add multiple defendants.

**Suing a Society**

A society is a type of not-for-profit corporation registered pursuant to the Society Act, RSBC 1996, c 433. The procedure and principles for suing a society are the same as for corporations. A company search is required to ascertain the society’s registered address<sup>30</sup>.

**Suing I.C.B.C.**

A claimant who is suing for the deductible portion of an insurance policy must name both the driver and the registered owner of the vehicle as defendants rather than ICBC.

A claimant who only has the number plate of the vehicle can obtain the owner’s name by writing a letter to ICBC’s Vehicle Records Office.

**ICBC Insurance Enquiries**

151 West Esplanade

North Vancouver, BC V7M 3H9

Telephone: (604) 661-2233

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<sup>29</sup> <https://eservice.ag.gov.bc.ca/FilingAssistant/index.do>.

<sup>30</sup> Rule 1(2.2); Rule 5(2.2).



**Note: If a motor vehicle has caused personal injury or property damage or a claimant has been denied coverage by ICBC, refer to the entire Law Students' Legal Advice Program's "Automobile Insurance (ICBC)" guide. Claims involving motor vehicles and motor vehicle insurance can be complicated; it is not possible to cover all possibilities in this Small Claims guide.**

A claimant should be alert to the following:

- a claim involving motor vehicle insurance may have a shorter limitation period;
- parties other than the driver (e.g., the owner of the vehicle) may also be liable;
- a lawsuit for Part 7 (No Fault) benefits should be filed if appropriate;
- ICBC may be liable if damage is caused by an unidentified (i.e., hit and run)<sup>31</sup>, under, or uninsured motorist<sup>32</sup>; and
- personal injury claims are very difficult to value and it may be appropriate to consider bringing the claim in Supreme Court if the injuries are more than trivial.

Many personal injury lawyers work on a contingency basis. A claimant may wish to consult a personal injury lawyer prior to filing the claim to ensure that the amount claimed is reasonable and all parties are properly listed on the Notice of Claim.

Whether or not ICBC is named as a defendant, in a claim for damages caused by a vehicle in British Columbia, a claimant **must** serve ICBC with a copy of the Notice of Claim and a blank Reply form in the same manner as serving a corporate defendant<sup>33</sup>.

Where ICBC is properly named as a defendant, its correct legal name is the **Insurance Corporation of British Columbia**. It is a special type of corporation and the usual corporate designation such as Inc. is not required.

### Suing the Government

#### *a) Federal Government*

The federal government should be named as either "Attorney General of Canada" or "Her Majesty in right of Canada". If an agency of the Crown is to be sued and **if a federal Act permits**, the agency may be sued in the name of that agency.<sup>34</sup>

#### *b) Provincial*

The provincial government should be named as "Her Majesty the Queen in right of the Province of British Columbia".<sup>35</sup>

### Suing the Police

The "Royal Canadian Mounted Police" is not a legal entity that can sue or be sued<sup>36</sup>. A claimant who wishes to sue for damages arising from the conduct of a police officer should sue the individual police officers and the Minister of Justice and Attorney General<sup>37</sup>.

A claimant who is suing a municipal police force should sue the individual police officers as well as the municipality employing the police officers. It is critical that a claimant provide written notice to the city within **60 days** of the event giving rise to the cause of action.

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<sup>31</sup> *Insurance (Vehicle) Act*, RSBC 1996, c 231, s 24.

<sup>32</sup> *Insurance (Vehicle) Act*, RSBC 1996, c 231, s 20.

<sup>33</sup> *Insurance (Vehicle) Act*, RSBC 1996, c 231, s 22.

<sup>34</sup> s 23(1) of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50; *Goodhead v The Law Society Of BC*, 1997 CanLII 4299 (BC SC).

<sup>35</sup> s 7 of the *Crown Proceeding Act*, RSBC 1996, c 89.

<sup>36</sup> *Dixon v Deacon Morgan McEwen Easson*, 1989 CanLII 2786 (BC SC).

<sup>37</sup> *Amezcu v Taylor*, 2010 BCCA 128 (CanLII); *Roy v British Columbia (Attorney General)*, 2005 BCCA 88 (CanLII).

### **Suing a Municipality**

Municipalities are special corporations incorporated by letters patent. Depending on its size, a municipality is referred to as a village, town, city, or a district municipality<sup>38</sup>. When letters patent are issued, the name of the incorporated municipality is published in the BC Gazette<sup>39</sup>. A claimant should search the BC Gazette<sup>40</sup> to obtain the legal name of the municipality.

### **Suing a Young or Mentally Incompetent Person**

A minor, also called an infant, is a person who is under 19 years of age at the time the claim is filed. Mentally incompetent persons as well as minors are persons with a legal disability. Rule 20-2 of the Supreme Court Civil Rules applies with the exception of Rule 20-2(4). Persons with a legal disability must be represented by a litigation guardian. With some limitations, a litigation guardian can be any person ordinarily resident in British Columbia.

If the claim involves personal injury, Rule 20-2(4) of the Supreme Court Civil Rules applies and requires that the litigation guardian act by a lawyer unless the litigation guardian is the Public Guardian and Trustee.

A party cannot take a step in default against a person with a legal disability without the court's permission. A settlement with a party under a legal disability is not binding unless the court approves it.

These rules also apply to a party who becomes mentally incompetent at any point in the proceeding.

### **Suing an Insurance Company other than ICBC**

Claims against insurers for coverage can be complicated. A claimant should research the law surrounding *uberrimae fidei*, an insurer's duty to defend, and an insurer's duty to indemnify. A claimant should be aware that claims against insurers may have a shorter limitation period.

### **Suing an Unknown Person**

If a claimant does not know the identity of one or more parties, the claimant can still file a claim using a misnomer. For example, the claimant would list the unidentified defendant as either John Doe or Jane Doe as the case may be. If there are multiple unknown parties, the claimant could add a number to each misnomer (e.g., John Doe 1; John Doe 2). Misnomer also applies to unknown companies.

A claimant should research the law surrounding misnomer and ensure that both the unidentified party and its actions are described in as much detail as possible.

If the party is unknown because of a motor vehicle hit and run, the claimant may sue ICBC as a nominal defendant.

#### ***C. Can the Defendant(s) Pay?***

One cannot squeeze blood from a stone. If a defendant has insignificant assets or income, the defendant may have no means to pay a judgment; such a person is "judgment-proof" and a claimant with an uncollectible judgment is said to be holding an "empty judgment". A claimant should consider whether it is worth the time, expense, and stress of suing a judgment-proof defendant.

A judgment is enforceable for ten years after it is issued<sup>41</sup>; after this time, unless it is renewed, the judgment expires and becomes uncollectible. On some occasions, a previously judgment-proof defendant will "come into money" by receiving an inheritance or winning the lottery. This is a rare occurrence and a claimant must invest time and effort to monitor the defendant's circumstances over

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<sup>38</sup> s 17(1) of the Local Government Act, R.S.B.C. 1996, c 323.

<sup>39</sup> Local Government Act, R.S.B.C.1996, c 323: s 15(1)(a).

<sup>40</sup> [http://www.qplegaleze.ca/BCLaw\\_Gazette.htm](http://www.qplegaleze.ca/BCLaw_Gazette.htm).

<sup>41</sup> Limitation Act, R.S.B.C.1996, c 266; Limitation Act, S.B.C.2012, c 13.

the ten years that the judgment is enforceable. A more common change in a judgment-proof defendant's circumstances is the defendant securing a higher-paying job.

A claimant should also consider the likelihood of the defendant going bankrupt. If the defendant goes bankrupt, the claimant may recover little or none of the amount of the judgment. For more detail on bankruptcy, see "Enforcement of a Judgment".

A claimant must decide whether or not to sue before the limitation period expires. If the limitation period expires, a claimant cannot later sue on that cause of action if the defendant's circumstances change.

#### ***D. Drafting the Notice of Claim***

The Notice of Claim is the document that starts an action in Small Claims Court. The Notice of Claim form is comprised of several sections and each section must be completed. The form can be either typed or handwritten. Hard copies are available from the court registry<sup>42</sup> and an electronic copy is available online<sup>43</sup>. Where possible, a claimant should type the Notice of Claim form.

A sample Notice of Claim<sup>44</sup> is attached and may be a helpful guideline when drafting a Notice of Claim.

#### **"From"**

This section must contain the claimant's full legal name, address, and telephone number. The claimant has an on-going duty to notify the court registry of any changes to the information in this section. Failure to provide the registry with current and accurate contact information may result in the claimant's claim being dismissed and/or the claimant being liable for costs or penalties.

#### **"To"**

The claimant must list the full legal name, address for service, and, if available, the telephone number for each defendant. If additional space is required, the claimant may attach a piece of paper listing this information for each defendant. Alternatively, the Notice of Claim filing assistant<sup>45</sup> can neatly add multiple defendants onto one Notice of Claim form.

Failure to list the proper legal name of a defendant may result in the claimant's claim against that defendant being dismissed or the judgment against that defendant being unenforceable. If the limitation period<sup>46</sup> has already expired, the claimant may not be able to correct the error.

#### **"What Happened?"**

In this section, the claimant must list the facts that support the claimant's cause(s) of action and the damages that the claimant has suffered. The claimant should adhere to the following general rules:

1. Don't plead evidence – state what you will prove, not how you will prove it
2. Don't plead law – unless you have a statutory cause of action
3. Use paragraphs – use one paragraph for each fact that you will prove
4. Claimant must prove every fact – therefore, stick to material facts

In this section, one must set out the facts that give rise to the cause of action, and the loss or damage that resulted. This description should be brief, but must inform the opposing party of the case to be met and give the judge an outline of what will be argued. The Notice of

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<sup>42</sup> Appendix A.

<sup>43</sup> <http://bit.ly/UO7v9l>.

<sup>44</sup> Appendix C.

<sup>45</sup> <http://bit.ly/UO1Lwd>.

<sup>46</sup> Appendix F.

Claim (Form 1) has little space for the facts, but the facts can continue onto another piece of paper. The additional facts must be attached to each copy of the Notice of Claim. In general, the pleadings should be brief, complete, and as accurate as possible.

The facts as alleged must give rise to a legal cause of action. After the facts, state the legal cause of action(s) that entitle you to the relief you are seeking. If there is more than one cause of action, plead the strongest one and plead the other ones in the alternative. For example, in a claim for a bad car repair, a claimant can sue for breach of contract and negligence. A pleading might read: "In addition, or in the alternative, the claimant claims damages as a result of the defendant's negligent repair of the automobile".

The pleadings should describe:

- a) the relationship of the parties (e.g., buyer and seller); and
- b) the dates, places, and details of amounts, services, or practices involved.

Claimants will usually be bound by the facts in the pleadings. If the facts or legal basis need to be changed, the claimant may be able to amend the Notice of Claim.

When there is more than one defendant, the claimant should make it clear whether their liability is joint, several, or joint and several. This distinction affects enforcement of a judgment and any subsequent actions arising out of the same cause. Liability stated as joint and several is more inclusive.

If liability is joint, the defendants must be sued as a group however the claimant can recover the full amount from any or all of the defendants.

Where liability is several, the claimant can sue any or all of the defendants however each defendant is obligated to repay only his own portion of the debt.

Where liability is joint and several, the claimant may sue any or all of the defendants and may recover the full amount from any or all of the defendants. The debtors can then litigate among themselves to apportion the debt between them.

#### **"Where?"**

The claimant should enter the name of the municipality as well as the province where the cause of action arose. If the cause of action arose outside of British Columbia, the claimant must state in the "What Happened?" section how the court has jurisdiction over the claim<sup>47</sup>.

#### **"When?"**

List the date or dates when the cause(s) of action arose. Unless the date is very clear or the limitation period is about to expire, stating the month and year is sufficient. It is prudent to state the date as follows:

- when the date is known: "On or about August 15, 2012";
- if only the month is known: "In or about August 2012"; or
- if the cause(s) of action arose over time: "From about May 2012 to August 2012".

#### **"How Much?"**

This is where the claimant describes the remedy. In most cases, this will be an amount of money however a claimant may request an alternative remedy. For example, the claimant could request the return of an item or, in the alternative, the value of it, as well as damages. A claimant who wants items returned should consider what condition they will be in, and whether he or she really wants them back.

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<sup>47</sup> *Dreambank*.

a) **Interest**

If there is no mention of interest in a contract between the parties, the court will award interest to the successful claimant from the date the matter arose until the date of judgment<sup>48</sup>. This is called “pre-judgment interest”. Interest in a claim for debt is calculated from the date the debt became due and, in a claim for damages, from the date the damages arose.

The court sets the interest rate every six months and publishes a table listing the rates applicable to each six-month period. The Notice of Claim should indicate a claim for “Interest pursuant to the *Court Order Interest Act*” but leave the amount area blank; the registry will calculate the amount according to the table.

**Note: While a claimant may be paying a higher interest rate on a credit card or loan as a result of the defendant’s actions, the claimant is limited to the pre-judgment interest rate set by the court unless the parties have expressly agreed that interest will be paid.**

If the parties have agreed on a rate of interest, the Notice of Claim should indicate a claim for contract interest, the applicable interest rate, and the date from which the interest began to accrue. The amount of interest that has accrued up to the date of filing should be included on the Notice of Claim as well as the amount of interest that accrues each day. It is important to note that a claim for contract interest is, in substance, a claim for contractual damages. Accordingly, the claim for contract interest together with the principal amount must be within the Small Claims Court’s monetary jurisdiction. If a claim for contract interest has or could cause the total claim to exceed the court’s monetary jurisdiction, it would be prudent to state on the Notice of Claim that the claimant abandons the amount necessary to bring the claim within the Small Claims Court’s monetary jurisdiction.

If the parties have agreed that interest will be paid but have not agreed on a rate of interest, the rate of interest is five per cent per annum<sup>49</sup>.

Generally, even if the parties agree to a rate of interest expressed with reference to a period other than one year (e.g., 2% per month), a claimant can only recover a maximum of five per cent per annum unless the contract expressly states a yearly rate or percentage of interest that is equivalent to the other rate (e.g., 24% per annum)<sup>50</sup>.

It is a criminal offence to receive, or enter into an agreement to pay or receive, interest at a rate that exceeds 60% per annum<sup>51</sup>. Interest has a broad definition and includes fees, fines, penalties, commissions, and other similar charges including costs relating to advancing credit.

If the judgment is not paid immediately, post-judgment interest may be awarded. The court has the discretion to vary the rate of interest or to set a different date from which the interest commences<sup>52</sup>.

b) **Claims Over \$25,000**

In order to sue in Small Claims Court for a claim exceeding \$25,000, the claimant must state, “The Claimant abandons the portion of any net judgment that exceeds \$25,000”<sup>53</sup>. At any time prior to trial, the claimant can decide to sue for the full amount and apply to transfer the claim to the Supreme Court of British

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<sup>48</sup> *Court Order Interest Act*, s. 1(1); *Red Back Mining Inc v Geysler Ltd*, 2006 BCSC 1880 (CanLII).

<sup>49</sup> *Interest Act*, RSC 1985, c I-15, s 3.

<sup>50</sup> *Interest Act*, RSC 1985, c I-15, s 4.

<sup>51</sup> *Criminal Code*, RSC 1985, c C-46, s 347(1).

<sup>52</sup> *Court Order Interest Act*: s 8.

<sup>53</sup> Rules 1(4) and (5).

Columbia<sup>54</sup>. Once the trial has been heard, however, the abandonment is likely permanent.

There is an exception to the \$25,000 limit. If more than one claimant has filed a Notice of Claim against the same defendant(s) concerning the same event, or, if one claimant has filed Notices of Claim against more than one defendant concerning the same event, the judge may decide each claim separately, even though the total of all the claims (not including interest and expenses) exceeds \$25,000.<sup>55</sup> Such claims often have a trial at the same time although the claimant(s) must request this.

**c) *Filing Fees***

Filing fees are those fees paid to file the Notice of Claim and are either \$100 or \$156 unless the fees have been waived. The registry staff will enter this amount. Filing fees are recoverable if the claimant is successful.

**d) *Service Fees***

Service fees are an estimate of the cost of serving the defendant(s). The amount varies based on the method of service and the number of defendants. The registry staff will enter this amount. Service fees are recoverable if the claimant is successful; however, as the claimed amount is only an estimate, a judge has discretion to either increase or decrease the allowed service fees.

**e) *Other Expenses***

Unless a judge or the Registrar orders otherwise, an unsuccessful party **must** pay to the successful party<sup>56</sup>:

- any fees the successful party paid for filing any documents;
- reasonable amounts the successful party paid for serving any documents; and
- any other reasonable charges or expenses directly related to the proceedings.

An example of a reasonable expense related to the proceedings is a company search. If such expenses are known at the time of filing, they should be stated on the Notice of Claim. If they occur afterwards, the successful party may request them at the conclusion of the trial.

Although legal fees **cannot** be recovered, legal disbursements may be recoverable if they fit one of the criteria above.

Parties are not compensated for the time they spend preparing for or attending court.

***E. Filing a Notice of Claim***

**Cost**

The cost to file a notice of claim is \$100 if the claim is for \$3,000 or less. The cost increases to \$156 for claims above \$3,000 and up to \$25,000. A person who is unable to afford the filing or other fees may apply to the registrar for a fee waiver<sup>57</sup> by filing an Application to the Registrar and a Statement of Finances.

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<sup>54</sup> *Der v Giles*, 2003 BCSC 623.

<sup>55</sup> Rule 7.1(4).

<sup>56</sup> Rule 20(2).

<sup>57</sup> Rule 20(1).

### Where to File<sup>58</sup>

A claimant must file the notice of claim at the Small Claims registry<sup>59</sup> nearest to where:

- the defendant lives or carries on business<sup>60</sup>; or
- the transaction or event that resulted in the claim took place.

This can sometime be unclear in the case of contracts that are executed by fax or email or in other claims, such as negligence, where the conduct complained of took place in a number of locations<sup>61</sup>. A claimant may wish to obtain legal advice if there is any uncertainty regarding where to file.

If two different Small Claims registries have jurisdiction, the claimant should choose the one that is most convenient. If the defendant disputes the claimant's choice, the defendant can file an application for change of venue and a judge will decide the most appropriate location.

A company can live in multiple locations including where it is registered, where it carries on business, and where its records are kept<sup>62</sup>.

### How to File

The claimant must file at least four complete and identical copies of the notice of claim. One copy is for the court, one is for the claimant, one is a service copy, and one is required for **each** defendant.

Once the notice of claim has been filed and stamped by the registry and the fee, unless waived, has been paid, the claimant must, within one year, serve a copy on the defendant.

### ***F. Serving a Notice of Claim***

A copy of the filed Notice of Claim **together with a blank Reply form** (available from the registry) must be served on each defendant<sup>63</sup>. A claimant has one year from the date of filing to serve the defendants. If more time is required, the claimant can apply to the registrar for an extension<sup>64</sup>.

The permissible methods for serving a defendant depend on who the defendant is. The table below sets out how each category of defendant can be served. If a defendant is evading service or, after a diligent search, cannot be found, a claimant may apply to a judge for an order for substitutional service.

<b>Defendant</b>	<b>Permitted Methods of Service</b>
Individual Over 19 Years Old <sup>65</sup>	<ul style="list-style-type: none"><li>• Personal service</li><li>• Registered mail to residence</li></ul>
Individual Under 19 Years Old	<ul style="list-style-type: none"><li>• Personal service on the minor's mother, father, or guardian</li><li>• Personal service on another person as directed by a judge upon application</li></ul>
Individual outside BC	<ul style="list-style-type: none"><li>• See "Individual Over 19 Years Old" or "Individual Under 19 Years Old"</li><li>• Defendant has 30 days to respond</li></ul>
BC Corporation <sup>66</sup>	<ul style="list-style-type: none"><li>• Leaving a copy at the <b>delivery address</b> for the registered office</li></ul>

<sup>58</sup> Rule 1(2).

<sup>59</sup> Appendix A.

<sup>60</sup> *DreamBank*.

<sup>61</sup> *DreamBank*; *Rudder v Microsoft Corp.*, 1999 CanLII 14923 (ON SC).

<sup>62</sup> *DreamBank*; *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28.

<sup>63</sup> Rule 2(1).

<sup>64</sup> Rules 2(7), 16(2)(a), and 16(3).

<sup>65</sup> Rule 2(2).

<sup>66</sup> Rule 2(3).

	<ul style="list-style-type: none"> <li>Registered mail to the <b>mailing address</b> for the registered office</li> <li>Personal service on a receptionist or manager at the company's place of business</li> <li>Personal service on a director, officer, liquidator, trustee in bankruptcy, or receiver manager</li> <li>If the company's registered office has been eliminated, as directed by a judge on application</li> </ul>
Extrajurisdictional Corporation	See Rule 2(4)
Unincorporated Company (Proprietorship)	<ul style="list-style-type: none"> <li>Personal service on proprietor</li> <li>Registered mail to proprietor's residence</li> </ul>
Unincorporated Company <sup>67</sup> (Partnership)	<ul style="list-style-type: none"> <li>Personal service on a partner</li> <li>Personal service on a receptionist or manager at the place of business</li> <li>Registered mail to a partner's residence</li> </ul>
Company outside BC	See Rule 18(6.1)
Strata Corporation <sup>68</sup>	<ul style="list-style-type: none"> <li>Personal service on a council member</li> <li>Registered mail to its most recent mailing address on file in the Land Title Office</li> </ul>
Society <sup>69</sup>	<ul style="list-style-type: none"> <li>Personal service on anyone at the address for service</li> <li>Personal service on a director, officer, receiver manager, or liquidator</li> <li>Registered mail to the address for service</li> </ul>
Unincorporated Association <sup>70</sup>	<ul style="list-style-type: none"> <li>Personal service on an officer</li> <li>Registered mail to the registered office</li> </ul>
Incorporated Association <sup>71</sup> Housing Cooperative Community Service Cooperative	<ul style="list-style-type: none"> <li>Personal service on a director or officer</li> <li>Registered mail to the registered office</li> <li>Personal service on anyone at the registered office</li> </ul>
Trade Union <sup>72</sup>	<ul style="list-style-type: none"> <li>Leaving with the business agent</li> </ul>
Municipality <sup>73</sup>	<ul style="list-style-type: none"> <li>Personal service on the Clerk, Deputy Clerk, or similar official</li> </ul>
ICBC	<ul style="list-style-type: none"> <li>Personal service on a receptionist at 800 – 808 Nelson Street, Vancouver, BC V6Z 2L5</li> </ul>
Estate <sup>74</sup>	<ul style="list-style-type: none"> <li>Personal service on the administrator, executor, or executrix</li> <li>Registered mail to the residence of the administrator, executor, or executrix</li> </ul>

If a defendant is served incorrectly, a claimant cannot obtain a default order until after the defendant has been properly served. If the defendant has been served incorrectly but files a Reply, the claimant does not have to serve the defendant again.

If the claim involves a motor vehicle accident, the other driver and ICBC must be served, even though ICBC may not be named as a defendant.<sup>75</sup>

<sup>67</sup> Rule 2(5).

<sup>68</sup> *Strata Property Act*, SBC 1998, c 43, s 64.

<sup>69</sup> *Society Act*, RSBC 1996, c 433, s 12.

<sup>70</sup> Rule 18(5).

<sup>71</sup> *Cooperative Association Act*, SBC 1999, c 28, s 28.

<sup>72</sup> Rule 18(5).

<sup>73</sup> Rule 18(1).

<sup>74</sup> *Estate Administration Act*, RSBC 1996, c 122, s 60(2).

<sup>75</sup> *Insurance (Vehicle) Act*, RSBC 1996, c 231, s 22.



### **Personal Service**

Personal service is effected when the claimant gives the notice of claim and blank reply form to the defendant in a manner that ensures that the nature of the document is brought to the defendant's attention. For example, a notice of claim inside an unmarked and sealed envelope or rolled inside of a newspaper is not properly served.

If a defendant knows the nature of the document and has touched it, service has likely been effected. If the defendant knows of the nature of the document and refuses to touch it, the claimant may place it at the defendant's feet.

Personal service can be effected by any adult who is not under a legal disability. A claimant may wish to have a friend or a process server serve the Notice of Claim.

**NOTE: Personal service should not be used as a means of intimidating or exacting revenge on a defendant. While it may seem satisfying to personally serve the defendant, alternative methods should be employed if there is a risk of a heated exchange. Such an exchange may lead to physical violence and, in any event, negative encounters in the course of the litigation will be counterproductive to settlement discussions.**

### **Registered Mail**

Registered mail is a service offered by Canada Post. In order to prove that a document was served by registered mail, a party must either obtain a copy of the signature obtained by Canada Post at the time of delivery or obtain a printout of the delivery confirmation from [www.canadapost.ca](http://www.canadapost.ca).

### **Substitutional (Alternate) Service**

When, after a diligent search, a claimant is unable to locate the defendant or the defendant is evading service, the claimant can apply to the registrar<sup>76</sup> for permission to serve the defendant in another manner<sup>77</sup>. An affidavit and a hearing are not required.

The alternate method of service that is ordered should be sufficient to bring the claim to the defendant's attention. Suggested methods of alternate service include a Facebook message, email, facsimile, regular mail, and text message to all known addresses and phone numbers for the defendant. Other methods include posting the Notice of Claim on the defendant's door. The claimant should seek an order requiring service in as many methods as will be reasonably necessary to make the defendant aware of the claim.

### ***G. Proof of Service***

Once the defendant has been served, the claimant should complete a Certificate of Service<sup>78</sup> and file it along with the service copy of the Notice of Claim. If there are multiple defendants, the claimant should file a Certificate of Service and service copy of the Notice of Claim for each defendant. Other methods of written proof of service are available<sup>79</sup>. Rarely, a judge may allow sworn oral evidence of personal service<sup>80</sup>.

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<sup>76</sup> Rule 16(3).

<sup>77</sup> Rules 16(2)(e) and 18(8).

<sup>78</sup> Form 4.

<sup>79</sup> Rule 18(14).

<sup>80</sup> Rule 18(15).

## V. RESPONDING TO A CLAIM

### A. *Possible Strategies*

#### 1. Notify Insurance Company

Many insurance policies cover more liabilities than their description would suggest. For example, many homeowner and tenant policies cover claims for damages or injuries arising from acts or omissions by the insured anywhere in the world. An example would be accidentally tripping a person who falls and breaks their hip. These policies also tend to include most people in the household including young children and foster children.

There are many exclusions and limitations but it is always best to let the insurer know about a claim against you. If the insurer will defend you, the insurer will bear the costs of your defence and possibly pay any damages that are awarded.

**Note: It is important to contact the insurer as soon as possible and to not make any admissions that might jeopardise a defence. Failing to promptly notify the insurer, admitting liability, or taking steps in the claim may permit the insurer to deny coverage.**

#### 2. Apologising

Many lawsuits arise or continue because a wrongdoer has not apologised to the party who was wronged. The Apology Act, SBC 2006, c 19 allows a person to apologise for a wrongful act or failure to act without the apology becoming an admission of liability. A sincere apology can often avert litigation or form an important foundation for a settlement.

#### 3. Option to Pay all or Part

If a defendant pays the entire amount of the claim directly to the claimant,<sup>81</sup> the defendant need not file a Reply. The defendant should retain a receipt as proof of payment and request that the claimant withdraw the claim. Only the claimant may withdraw a claim and, if a withdrawal is filed, all parties who were served with the Notice of Claim must be served with a copy of the withdrawal.

When considering this option, a defendant should be aware of other possible problems aside from the lawsuit. For example, if the claimant has placed derogatory information on the defendant's credit file, the defendant should ask the claimant to remove this negative information as part of the settlement. If the claimant is unwilling to remove the information, the defendant may still settle the claim but may find it difficult or impossible to remove the information from the credit file. The process for removing incorrect information from a person's credit file is outside the scope of this guide.

If the entire claim is admitted but the defendant requires time to pay or only part of a claim is admitted,<sup>82</sup> the defendant must file a reply form but may also propose a payment schedule for what is admitted. The payment schedule must detail how the amount will be paid back. The Registrar can order the proposed payment schedule if the claimant consents to it<sup>83</sup>. If the claimant does not consent to the proposal or no payment schedule is proposed, the claimant may summon the defendant to a payment hearing<sup>84</sup>.

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<sup>81</sup> Rule 3(1)(a).

<sup>82</sup> Rule 3(1)(b) or (c).

<sup>83</sup> Rule 11(10)(b).

<sup>84</sup> See Section XVI: Enforcing a Judgment.

### **Option to Oppose all or Part**

A defendant who opposes all or part of the claim<sup>85</sup> must file a Reply form detailing what is admitted, what is opposed, or what is outside the defendant's knowledge. The reply should list reasons for any parts that are opposed. A defendant should avoid a general denial of the entire claim; a detailed examination of each element of the claim and why the defendant thinks it is wrong is much more persuasive.

Before deciding to oppose a claim, a defendant should ensure that there is a legal defence to the claim. A penalty can apply if a defendant proceeds through trial with a Reply that is bound to fail<sup>86</sup>.

### **Counterclaim**

Whether or not a defendant agrees or disagrees with all or a part of the claim, the defendant can counterclaim<sup>87</sup>. A defendant who wishes to counterclaim should review the "Do You Have a Claim" and "Choosing the Proper Forum" sections of this guide. A counterclaim is essentially a notice of claim but on a different form. A counterclaim must have a legal basis; there are penalties for proceeding to trial if there is no reasonable basis for success<sup>88</sup>.

Although a defendant can start a separate claim either in Small Claims Court or another forum instead of counterclaiming, if the parties and witnesses are the same and the claim falls within the Small Claims Court jurisdiction, it is preferable that the defendant file a counterclaim so that both matters are heard together. If the defendant has commenced an action in a different forum, this should be mentioned in the Reply.

A counterclaim is made on the Reply form by following the instructions and paying the required fee. The fee for a counterclaim is the same as the fee for a notice of claim and is eligible for a fee waiver.

The relationship between a counterclaim and a set-off should be noted<sup>89</sup>. A counterclaim is a standalone claim and it is possible for a defendant to succeed on a counterclaim when the claimant has been unsuccessful. A set-off is a defence. If the claimant is successful, a set-off will reduce the amount payable to the claimant. If the claimant is unsuccessful, the set-off defence does not apply; the defendant is not awarded the amount of the set-off.

#### **a) *Filing and Service***

As the counterclaim is on the reply form, it must be filed at the same time as the Reply<sup>90</sup>, within the time allowed for filing a Reply<sup>91</sup>, and at the registry where the notice of claim was filed<sup>92</sup>.

The registry will serve the claimant with the reply and counterclaim within 21 days of it being filed<sup>93</sup>.

#### **b) *Replying to a Counterclaim***

Once served, the claimant (now a defendant by counterclaim) must follow the same rules as replying to a Notice of Claim<sup>94</sup>. The claimant should review this section of the guide in its entirety.

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<sup>85</sup> Rule 3(1)(d).

<sup>86</sup> Rule 20(5).

<sup>87</sup> Rule 4(1).

<sup>88</sup> Rule 20(5).

<sup>89</sup> *Johnny Walker Bulldozing Co Ltd v Foundation Co of Canada Ltd*, 1997 CanLII 3726 (BCSC); *Gnil Industries Inc v Sovereign Yachts (Canada) Inc*, 2002 BCSC 713 (CanLII); *Lui v West Granville Manor Ltd*, 1985 CanLII 155 (BC CA).

<sup>90</sup> Rule 4(1) and (2).

<sup>91</sup> Rule 3(4).

<sup>92</sup> Rule 3(3).

<sup>93</sup> Rules 3(5) and 4(2).

### **Third Party**

If the defendant who has filed a Reply believes that a person or legal entity other than the claimant should pay all or part of the claim, he or she may make a claim against that other party by completing a Third Party Notice<sup>95</sup>. If a settlement conference, mediation session, or a trial conference has not been held, leave of the court is not required<sup>96</sup>. If any of these have been held, the defendant must apply to the court for an order permitting the counterclaim to be filed against the third party<sup>97</sup>.

A third party claim is different from a claim against the incorrect defendant. A third party claim is made when a defendant believes that a third party should reimburse them if they are found to be liable to the claimant. For example, if a defendant is sued for a credit card debt, the defendant may third party the cardholder who actually spent the money giving rise to the debt.

A defendant who wishes to issue a third party notice should review the “Do You Have a Claim” and “Choosing the Proper Forum” sections of this guide. A third party claim is essentially a notice of claim but on a different form. A third party claim must have a legal basis and there are penalties for proceeding to trial if there is no reasonable basis for success.

#### ***a) Filing and Service***

To start a third party claim, the defendant must complete Form 3 and file it in the same registry where the Notice of Claim was filed<sup>98</sup>. The defendant must serve the third party with a copy of the filed Form 3, a blank Reply form, a copy of the Notice of Claim, a copy of the Reply to the Notice of Claim, and all of the documents and notices the other party would have received<sup>99</sup>; all of these documents are to be served in the same manner as serving a Notice of Claim. A defendant has only **30 days** after filing to serve the third party and file a certificate of service<sup>100</sup> at the registry. If the third party is not served and the certificate of service is not filed within 30 days, the third party notice expires but can be renewed<sup>101</sup>.

The registry will serve the claimant with the third party notice within 21 days of its being filed<sup>102</sup>.

#### ***b) Replying to a Third Party Notice***

Once served, a third party must follow the same rules as replying to a Notice of Claim<sup>103</sup>. The third party should review this section of the guide in its entirety.

### ***B. Time Limits***

Unless a defendant pays the amount of the claim directly to the claimant and asks the claimant to withdraw the claim<sup>104</sup>, the defendant must file a Reply within the required time limit. **Failure to file a Reply may result in the claimant obtaining a Default Order.**

The time limits for filing a Reply are generally the same whether the defendant is:

- a defendant served with a Notice of Claim<sup>105</sup>;

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<sup>94</sup> Rule 5(7).

<sup>95</sup> Form 3.

<sup>96</sup> Rule 5(1)(a).

<sup>97</sup> Rule 5(1)(b).

<sup>98</sup> Rule 5(2).

<sup>99</sup> Rule 5(3).

<sup>100</sup> Form 4; Rule 5(5).

<sup>101</sup> Rule 5(5.1).

<sup>102</sup> Rule 5(6).

<sup>103</sup> Rule 5(7).

<sup>104</sup> Rule 3(1)(a).

- the claimant served with a counterclaim<sup>106</sup>; or
- a third party served with a third party notice<sup>107</sup>.

If the defendant was served inside British Columbia, a Reply must be filed within **14 days after service**. If the defendant was served outside British Columbia, a Reply must be filed within **30 days after service**. The one exception is where the claimant is served with a counterclaim. The claimant is required to file a Reply within 14 days after service even if the claimant is served outside British Columbia.

### ***C. Defences***

For every cause of action, there is usually at least one possible defence. Some of the more common defences are listed here however a defendant should research the claimant's cause of action or obtain legal advice to determine which defences might be applicable.

#### **Common Defences**

##### ***a) Contributory Negligence***

Where a claimant was careless **and** this carelessness contributed to the damages suffered, a defendant might plead the defence of contributory negligence. An example is where a claimant tripped over a bag that was carelessly left in a walkway. The defendant may be liable but the claimant may have been contributorily negligent for failing to keep watch for obstacles.

A defendant who believes that the claimant was partially at fault should state in the reply: "The defendant pleads and relies upon the *Negligence Act*<sup>108</sup>". Each party is liable to the degree that they are at fault; where degrees of fault cannot be determined, liability is apportioned equally.

##### ***b) Consent***

Where, by express or implied agreement, a claimant knew of and understood the risk he was incurring and voluntarily assumed that risk, the defendant will not be liable. Because voluntary assumption of risk is a complete defence, it is very difficult to prove.

##### ***c) Criminality or Immorality*<sup>109</sup>**

Where a claimant stands to profit from criminal behaviour or compensation would amount to an avoidance of a criminal sanction, the claimant cannot recover damages. This is narrowly construed and a claimant should read Hall before relying upon it.

##### ***d) Inevitable Accident*<sup>110</sup>**

If the defendant can show that the accident could not have been prevented even if the defendant had exercised reasonable care, the defendant cannot be liable. For this defence to apply, the defendant must have had no control over whatever occurred and its effect could not have been avoided even with the best effort and skill.

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<sup>105</sup> Rule 3(4).

<sup>106</sup> Rule 4(3.1)(b).

<sup>107</sup> Rule 5(7).

<sup>108</sup> *Negligence Act*, RSBC 1996, c 333.

<sup>109</sup> *Hall v Hebert*, [1993] 2 SCR 159.

<sup>110</sup> *Rintoul v X-Ray and Radium Industries Ltd*, [1956] SCR 674.

**e) *Illegality***

If the claimant is suing on a contract that is illegal (e.g., it calls for a criminal interest rate), the defendant may ask the court to decline to enforce the illegal provision or possibly the entire contract. Depending on the circumstances, the court may consider modifying the contract to remove the illegality.

**f) *Self Defence***

If the defendant honestly and reasonably believed that an assault or battery was imminent and used reasonable force to repel or prevent the assault or battery, the defendant may not be liable for any injuries or damage suffered by the claimant as a result<sup>111</sup>.

**g) *Defence of Third Parties***

The same general rules apply as for self-defence provided that the use of force is reasonable<sup>112</sup>.

**Statutory Defences**

Certain statutes such as the *Business Practices and Consumer Protection Act*, SBC 2004, c 2 provide a party with a cause of action that would not otherwise exist. A defendant should carefully read the statutes that the claimant is relying upon to see if the statute creates or prescribes certain defences.

Where the claim is for remuneration in relation to real estate or property management services, the claimant must have either been licensed when the services were rendered or have been exempt from the requirement to be licensed<sup>113</sup>. If the claimant was required to be licensed but was not licensed, the claimant cannot legally charge a fee.

The first step in replying to a claim by an entity such as a real estate management company is to establish whether the claimant was licensed with the Real Estate Board.

**D. *Filing a Reply***

The Reply must be filed in the same registry where the Notice of Claim was filed<sup>114</sup>. There is a filing fee except where the defendant admits and agrees to pay the entire claim or obtains a fee waiver. Generally, a Reply cannot be filed late however, in practice, the registry may allow a Reply to be filed late as long as the registrar has not made a default order or set a date for a hearing<sup>115</sup>.

**E. *Serving a Reply***

The registry will serve the Reply and Counterclaim, if any, on each of the other parties<sup>116</sup>.

## **VI. DEFAULT ORDER**

If a defendant chooses not to defend a claim, the claimant wins by default. Evidence of the defendant's choice not to defend the claim can include the defendant's failure to file a Reply.

A claimant should not rush to the registry to file an Application for Default Order. Sometimes, a defendant may have a good reason for not filing a Reply on time and may have a defence to the claim that the court wishes to explore. In these circumstances, the court will set aside the default order and the claim will proceed

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<sup>111</sup> *R. v Lavallee*, [1990] 1 SCR 852; *Wackett v Calder*, [1965] BCJ No 129; *Brown v Wilson*, [1975] BCJ No. 1177; and *R v Beckford*, [1987] All ER 425.

<sup>112</sup> *Gambriell v Caparelli*, [1974] OJ No. 2243.

<sup>113</sup> *Real Estate Services Act*, SBC 2004, c 42, s.4.

<sup>114</sup> Rule 3(3).

<sup>115</sup> Rule 3(4)(b).

<sup>116</sup> Rules 3(5) and 5(6).

in the ordinary course. A default order should only be used where the defendant has truly elected not to defend against the claim.

Where a defendant has not filed a Reply on time, it is a good idea to contact the defendant to determine why the Reply was not filed and to advise the defendant that a default order will be obtained if a Reply is not filed.

A default order can also be obtained if a defendant does not attend a mediation session<sup>117</sup>. If the defendant does not attend a settlement conference<sup>118</sup>, trial conference<sup>119</sup>, or trial<sup>120</sup>, the judge or justice of the peace may grant a payment order instead of the claimant having to apply for a default order.

#### **A. Requesting a Default Order**

Unless the defendant was served outside of British Columbia or the court has otherwise ordered, a defendant has fourteen full days to file a Reply. This does not include the date the Notice of Claim was served and the date that the Application for Default Order is filed<sup>121</sup>.

To apply for a default order, the claimant must file Form 5 and pay a \$25.00 fee. A certificate of service (Form 4) confirming service of the Notice of Claim and blank Reply form must also be in the file<sup>122</sup>. The claimant can ask the court to add the \$25.00 fee plus reasonable expenses to the amount of the default judgment.

If the claim is for a specific amount of debt, the registrar will grant a default order for the amount claimed plus expenses and interest<sup>123</sup>. If the claim is for anything other than a specific amount of debt, the registrar will schedule a hearing before a judge<sup>124</sup>. Once a hearing has been set, the defendant cannot file a Reply without a judge's permission<sup>125</sup>. If another defendant to the claim has filed a Reply and a date has been set for either a settlement conference, trial conference, or trial, the hearing will be held on that date<sup>126</sup>. A defendant is not entitled to notice of the hearing date<sup>127</sup>.

At a hearing, a default order is not automatic. The claimant must give evidence and produce documents to prove the amount owing as well as convince the court that the default order should be granted<sup>128</sup>.

#### **B. Setting Aside Default Orders and Reinstating Claims**

If a party obtains a default order or a hearing for assessment of damages is scheduled, the party in default can apply to a judge to set aside the default order<sup>129</sup> and file a Reply<sup>130</sup>. The party in default must file the application as soon as possible upon learning of the default order and attach to the application an affidavit containing<sup>131</sup>:

- a reasonable explanation for not filing a Reply (or failing to attend a mediation session);
- a reasonable explanation of any delay in filing the application;
- the facts supporting the claim, counterclaim, or defence; and
- why permitting the order would be in the interests of justice.

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<sup>117</sup> Rules 7.2(24), 7.3(40), and 7.4(33).

<sup>118</sup> Rule 7(17).

<sup>119</sup> Rule 7.5(17).

<sup>120</sup> Rules 9.1(26), 9.2(11), and 10(9).

<sup>121</sup> Rule 17(10).

<sup>122</sup> Rule 6(3).

<sup>123</sup> Rule 6(4).

<sup>124</sup> Rule 6(5).

<sup>125</sup> Rule 6(8).

<sup>126</sup> Rule 6(6).

<sup>127</sup> Rule 6(7).

<sup>128</sup> Rule 6(9).

<sup>129</sup> Rules 16(6)(j) and 17(2).

<sup>130</sup> Rule 16(6)(d).

<sup>131</sup> Rule 17(2)(b); *Miracle Feeds v D. & H. Enterprises Ltd. (1979)*, 10 BCLR 58 (Co. Ct.) [*Miracle Feeds*]; *Lin v Tang*, 1997 CanLII 2675 (BCCA).

The party in default must show that<sup>132</sup>:

- the failure to file a Reply (or failure to attend a mediation session) was not wilful, deliberate or blameworthy;
- the application to set aside the default order was made as soon as reasonably possible after obtaining knowledge of the default order<sup>133</sup>;
- if there has been a delay in applying to set aside the default order, an explanation for the delay; and
- if the party in default is the defendant, there is a defence that is not bound to fail.

Where the party in default is a defendant who has not filed a Reply, the defendant should also bring copies of the Reply and be prepared to file them immediately if the judge grants permission.

If the default order is cancelled, the party who obtained it may ask the court to award reasonable expenses that relate to the cancellation. These expenses may include the cost of filing the application for default order, significant travelling expenses, and lost wages that were incurred only as a result of the cancellation.

## VII. HOW YOUR CLAIM WILL PROCEED

A number of pilot projects have been implemented at some of the busier court registries. To anticipate how your claim will proceed and which rules will apply, find the court location where your claim will be heard and the heading that best describes your claim.

The length of time it will take to resolve a claim depends on:

1. how busy the court is (to find out how far ahead dates are being set at your location, ask at the court registry or the Judicial Case Manager);
2. how much time the trial is expected to take (a matter requiring a full day trial will often be scheduled later than a simpler matter);
3. whether the documents can be served without delay;
4. whether the claim is disputed; and
5. the number of applications filed.

Complying with all of the court's rules and orders will ensure that the claim is heard as soon as possible.

### ***A. Vancouver (Robson Square)***

#### **Claims of \$5,000 or Less**

Where the claim and counterclaim, if any, are each \$5,000 or less (not including interest or expenses) and are not for either personal injury or financial debt, a simplified trial will be scheduled pursuant to Rule 9.1; except for the trial, no other court appearances are typically required. The trial will be held in the evening for one hour before a Justice of the Peace.

#### **Claims for Financial Debt**

If the claimant or counterclaimant **is in the business** of lending money or extending credit and is suing for a debt that arises from a loan or the extension of credit, a summary trial will be scheduled pursuant to Rule 9.2; except for the trial, no other court appearances are typically required. The trial will be held before a judge and usually takes fewer than 30 minutes to complete.

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<sup>132</sup> *Miracle Feeds; Hubbard v Acheson*, 2008 BCSC 970 (CanLII); *McEvoy v McEachnie*, 2008 BCSC 1273 (CanLII); *Anderson v T.D. Bank*, 1986 CanLII 897 (BC CA); *Doyle v Lunny Design and Production Group Inc.*, 2009 BCSC 925 (CanLII); and *Innovest Development Corp. (Receiver of) v Lim*, 1999 CanLII 5356 (BCSC).

<sup>133</sup> *Cannex Marketing Inc. v Aberdeen Financial Group*, 2009 BCSC 763 (CanLII).



**Claims Exceeding \$5,000 or Personal Injury Claims (Any Amount)**

If the claim exceeds \$5,000 or is for personal injury in any amount, the parties must attend mediation pursuant to Rule 7.4. Following mediation, a trial conference will be scheduled pursuant to Rule 7.5. The final step is a trial pursuant to Rule 10.

***B. Richmond***

**Claims of \$5,000 or Less**

Where the claim and counterclaim, if any, are each \$5,000 or less (not including interest or expenses) and are not for personal injury, a simplified trial will be scheduled pursuant to Rule 9.1; except for the trial, no other court appearances are typically required. The trial will be held during the day for one hour before a Justice of the Peace.

**Claims Exceeding \$5,000 or Personal Injury Claims (Any Amount)**

If the claim exceeds \$5,000 or is for personal injury in any amount, a Settlement Conference will be scheduled pursuant to Rule 7.

For claims greater than \$10,000, either party may also initiate mediation pursuant to Rule 7.3. Following mediation or if mediation is not initiated, a settlement conference will be scheduled unless the claim relates to a motor vehicle accident where only liability for property damage is disputed. The final step is a trial pursuant to Rule 10.

***C. Surrey, North Vancouver, Victoria, or Nanaimo***

**Claims of \$10,000 or Less**

Rule 7.2 mediation applies automatically to some construction-related claims and can otherwise be commenced by a party. Following mediation or if mediation is not initiated, a settlement conference will be scheduled unless the claim relates to a motor vehicle accident where only liability for property damage is disputed. The final step is a trial pursuant to Rule 10.

**Claims Exceeding \$10,000**

Any party to a proceeding where the amount of a claim, counterclaim, or third party notice exceeds \$10,000 **may** initiate Rule 7.3 mediation. Following mediation or if mediation is not initiated, a settlement conference will be scheduled unless the claim relates to a motor vehicle accident where only liability for property damage is disputed. The final step is a trial pursuant to Rule 10.

***D. Other Registries***

**Claims of \$10,000 or Less**

A settlement conference will be scheduled unless the claim relates to a motor vehicle accident where only liability for property damage is disputed. The final step is a trial pursuant to Rule 10.

**Claims Exceeding \$10,000**

Any party to a proceeding where the amount of a claim, counterclaim, or third party notice exceeds \$10,000 **may** initiate Rule 7.3 mediation. Following mediation or if mediation is not initiated, a settlement conference will be scheduled unless the claim relates to a motor vehicle accident where only liability for property damage is disputed. The final step is a trial pursuant to Rule 10.

## VIII. PRE-TRIAL APPLICATIONS AND PROCEDURES

### **A. Offers to Settle<sup>134</sup>**

If a party rejects a formal offer to settle, the trial judge may order a party who rejected an offer to settle to pay a penalty of up to 20 per cent of the offer. This can happen in one of two ways. If the defendant makes an offer that the claimant rejects and, at trial, the claimant is awarded an amount including interest and expenses that is equal to or less than the offer, the penalty is deducted. If the claimant makes an offer the defendant rejects, and the claimant is awarded a sum including interest and expenses that equals or exceeds the claimant's offer, the penalty is added onto the award.

A formal offer to settle must be made using Form 18 and served on the party to whom the offer is made as if it were a Notice of Claim. The party offering to settle may also fill out a certificate of service. Neither the Form 18 nor the certificate of service are filed at the registry; if the party making the offer wishes the penalties to apply, these forms should be presented to a judge for the first time *after* a decision is given at trial.

A formal offer must be made within 30 days of the conclusion of a:

- settlement conference;
- mediation under either Rule 7.2 or 7.4; or
- trial conference.

Once the first of any of these hearings has concluded and 30 days have elapsed, formal offers cannot be made without the permission of a judge.

### **B. Withdrawing a Claim, Counterclaim, Reply, or Third Party Notice**

A party may withdraw a claim, counterclaim, reply, or third party notice at any time<sup>135</sup>. To do so, a party must file a notice of withdrawal<sup>136</sup> at the registry and then promptly serve the notice of withdrawal on all parties who had been previously served with the claim, counterclaim, reply, or third party notice. A Notice of Withdrawal may be served by ordinary mail or personal service<sup>137</sup>.

Once a pleading is withdrawn, it cannot be reinstated, used, or relied upon without the permission of a judge<sup>138</sup>.

Withdrawing a claim does **not** result in the dismissal of a counterclaim. The counterclaim may still proceed, unless it is also withdrawn<sup>139</sup>.

### **C. Adjournments and Cancellations**

Once a date for a hearing, settlement conference, or trial has been set, any party can apply for an adjournment or to cancel the hearing<sup>140</sup>.

If seeking an adjournment, try to first obtain the consent of the opposing party prior to applying to a judge. If consent is given, Form 17 must be filed in the registry as soon as possible.

A trial will only be adjourned if a judge is satisfied that it is unavoidable and if an injustice will result to one of the parties if the trial proceeds<sup>141</sup>. There is a \$100 fee for adjournments where the application is made less than 30 days before a trial and notice of the trial was sent 45 days before the

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<sup>134</sup> Rule 10.1.

<sup>135</sup> Rule 8(4).

<sup>136</sup> Rule 8(4)(a), Form scl019.

<sup>137</sup> Rule 18(12).

<sup>138</sup> Rules 8(6) and 16(7).

<sup>139</sup> *Isbikawa v Aoki and Japanese Auto Centre Ltd.*, 2002 BCPC 683 (CanLII).

<sup>140</sup> Rule 17(5).

<sup>141</sup> Rule 17(5.1).

trial's date<sup>142</sup>. The fee must be paid within 14 days<sup>143</sup> or else a judge may dismiss the claim, strike out the reply, or make any order he or she deems fair<sup>144</sup>.

#### ***D. Pre-Judgment Garnishment***

If the claim is for debt, a “garnishing order before judgment” may be issued at the same time a Notice of Claim is filed. Except for wages and interest, almost any debt can be garnished before a judgment. Since injustice can sometimes occur from the procedure, few garnishing orders are issued before judgment. Practically, the court will grant a garnishing order before judgment in only certain circumstances, for instance where the claimants will be unable to collect if they succeed<sup>145</sup>.

To obtain a pre-judgment garnishing order, the claimant must file an affidavit stating that a Notice of Claim has been filed, the date of its filing, the nature of the cause of action, the amount of the debt, claim, or demand, and the true amount owing after discounts and deductions<sup>146</sup>.

If the registry grants the order, the claimant must serve both the garnishee and the defendant. If the garnishee is a bank, the garnishing order must be served on the branch where the account is located. If the garnishee is a credit union, the order must be served on its head office. A separate order must be obtained for each garnishee. The Garnishee must pay the greater of the amount owed to a Defendant and the amount shown on the garnishing order to the Court Registry. It is extremely important to find out the correct legal name of the Garnishee. This is because if you use the wrong name on the Garnishment documents, the Garnishee can refuse to pay to the Court money owed to the Defendant. If the Garnishee is a company, a search at the BCCorporate Registry Office would be useful.

In some cases of fraud, the Supreme Court can issue a Mareva Injunction<sup>147</sup> freezing the defendant's worldwide assets; this prevents the defendant from dealing with **any** of their assets in any way.

It is also possible to apply for a “garnishing order before action”. This is a separate form from a pre-judgment garnishment. This form is used before a Notice of Claim has been registered at a Small Claims Court Registry<sup>148</sup>.

#### ***E. Transfer to Supreme Court***

A judge at the settlement/trial conference, at trial, or after application by a party at any time, **must** transfer a claim to Supreme Court if he or she is satisfied that the monetary outcome of a claim (not including interest and expenses) may exceed \$25,000<sup>149</sup>. However, the claimant may expressly choose to abandon the amount over \$25,000 to keep the action in the Small Claims Court<sup>150</sup>. For personal injury claims, a judge must consider medical or other reports filed or brought to the settlement conference by the parties before transferring the claim to Supreme Court<sup>151</sup>.

If a counterclaim for more than \$25,000 is transferred under this rule, the original claim can still be heard in Small Claims Court if the claim is \$25,000 or less<sup>152</sup>.

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<sup>142</sup> Rule 17(5.2).

<sup>143</sup> Rule 17(5.3).

<sup>144</sup> Rule 17(5.4).

<sup>145</sup> *Webster v Webster*, [1979] BCJ No 918; *Affinity International Inc. v Alliance International Inc.*, [1994] MJ No 471; *Intrawest Corp. v Gottschalk*, 2004 BCSC 1317 (CanLII); and *Silver Standard Resources Inc. v Joint Stock Co. Geolog*, [1998] BCJ No. 2887

<sup>146</sup> *Court Order Enforcement Act*, RSBC 1996, c 78: s 3(2)(d).

<sup>147</sup> *Aetna Financial Services v Feigelman*, [1985] 1 SCR 2.

<sup>148</sup> [http://thelawcentre.ca/self\\_help/small\\_claims\\_factsheets/fact\\_19](http://thelawcentre.ca/self_help/small_claims_factsheets/fact_19).

<sup>149</sup> Rule 7.1(1).

<sup>150</sup> Rule 7.1(2).

<sup>151</sup> Rule 7.1(3).

<sup>152</sup> *Shaugnessy v Roth*, [2006] BCJ 3125 (BCCA).

## ***F. Amendments***

A party who wants to amend, change, add, or remove anything in a filed document, such as the amount, the name of a party<sup>153</sup>, or a fact, must follow Rule 8. Amendments can sometimes be granted long after the expiration of the limitation date, but only at the discretion of the trial judge<sup>154</sup>.

### **Permission to Amend**<sup>155</sup>

Anything in any filed document can be changed by the party who filed it. Permission is not required unless **any** of the following have begun:

- a settlement conference;
- a mediation under Rule 7.4;
- a trial conference under Rule 7.5;
- a trial under Rule 9.1; or
- a trial under Rule 9.2.

If any of these steps have commenced, the party must apply to a judge for permission to amend the document<sup>156</sup>.

### **Amendment Procedure**

Changes on the document must then be underlined in red. The document itself must be initialled, dated, and list the date that the document was originally filed. If a judge has allowed the amendment, the document should reference the order. For example, the document might state, “Amended Pursuant to Rule 8(1)(b) by Order of the Honourable Judge Law on September 1, 2012.”

### **Serving Amendments**

Before taking any other step in the claim, the party must serve a copy of the amended document on each party to the claim<sup>157</sup>.

If the amended document is a Notice of Claim, Counterclaim, or Third Party Notice, it must be served as if it was an original. If the amended document is a Reply or some other document, it can be sent by regular mail to the address of each party to the action<sup>158</sup>. Documents served by ordinary mail are presumed served 14 days after it was mailed<sup>159</sup>. While proof of service is not required, it is recommended.

### **Responding to Amendments**<sup>160</sup>

Generally, there is no obligation to respond to an amendment. For example, a defendant’s current Reply may satisfactorily respond to a minor change to a Notice of Claim. If the defendant chooses not to file an amended Reply, the claimant cannot apply for a default order.

A party who wishes to respond to an amendment should follow the same procedures outlined in this section.

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<sup>153</sup> *Royal Bank of Canada v Olson*, 1990 CanLII 1555 (BCSC).

<sup>154</sup> *Med Finance Co. S. A. v Bank of Montreal*, 1993 CanLII 1428 (BCCA).

<sup>155</sup> Rule 8(1).

<sup>156</sup> Rules 8(1)(b) and 16(7).

<sup>157</sup> Rule 8(3).

<sup>158</sup> Rule 18(12)(b).

<sup>159</sup> Rule 18(13).

<sup>160</sup> Rules 8(3.1) and 8(3.2).

## IX. MEDIATION

There are three types of mediation under the Small Claims court rules. Parties are free to mediate on their own. See Section III. D.: Alternative Dispute Resolution.

### **A. Claims of \$10,000 or less - Rule 7.2**

There is no cost to mediate under this rule unless a party requires an interpreter. Rule 7.2 mediations operate in four of the registries, namely: Surrey, Victoria, Nanaimo, and North Vancouver.

Rule 7.2 applies<sup>161</sup> to all claims of \$10,000 or less:

- that involve a claim relating to the construction, renovation, or improvement of a building;
- that are one of the first 10 to 16 cases in which replies are filed in the month (number varies by registry);
- where the parties consent and a judge refers to mediation; and
- where, prior to the notice of settlement conference being mailed, a party completes and files Form 21.

Rule 7.2 does not apply to claims arising from a motor vehicle accident where only **liability** for property damage is disputed or where there is a claim for personal injury. This rule also does not apply where a party is a person under disability<sup>162</sup>.

Parties must attend the mediation session in person unless an application is filed for an adjournment<sup>163</sup>, a teleconference<sup>164</sup>, or an exemption<sup>165</sup>. If a party fails to attend the mediation session, the party in attendance will receive a verification of non-attendance (Form 22) that can be filed with the Registrar<sup>166</sup>. After filing Form 22, the party in attendance can file a request for judgment or dismissal (Form 23), which dismisses the claim if the party not attending is the claimant or gives a default order if the party not attending is the defendant<sup>167</sup>.

### **B. Claims Exceeding \$10,000 – Rule 7.3**

This rule applies to all registries except the Vancouver (Robson Square) court registry. Parties pursuing mediation under Rule 7.3 should consider mediating through the Conflict Resolution Clinic (CoRe) – See Section III. D.: Alternative Dispute Resolution.

Any party to a proceeding where the amount of a claim, counterclaim, or third party notice exceeds \$10,000 **may** initiate mediation by filing a Notice to Mediate (Form 29) and serving it on every other party to the proceeding<sup>168</sup>. If mediation has been scheduled all parties must select a mediator, attend the mediation, and agree on the amount that each party will pay towards the costs of mediation<sup>169</sup>; by default, the parties will split the cost. If the parties cannot agree on a mediator, the BCMediator Roster Society may be requested to appoint one.

Parties must attend the mediation session in person unless an application is filed for adjournment<sup>170</sup>, for a teleconference<sup>171</sup>, or for an exemption<sup>172</sup>. If a party fails to attend as required, the mediator will fill out a verification of default (Form 31) and provide it to the party in attendance. After filing Form

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<sup>161</sup> R 7.2(2).

<sup>162</sup> Rules - Schedule E: ss 1-5.

<sup>163</sup> Rules 7.2(11), (11.1), and (12).

<sup>164</sup> Rule 7.2(14).

<sup>165</sup> Rule 7.2(9).

<sup>166</sup> Rule 7.2(22).

<sup>167</sup> Rules 7.2(23)-(26).

<sup>168</sup> Rules 7.3(2), (3), and (5).

<sup>169</sup> Rules 7.3(9)-(10), (17)-(23), and (33)-(36).

<sup>170</sup> Rule 7.3(30).

<sup>171</sup> Rule 7.3(25).

<sup>172</sup> Rule 7.3(28).

31, the party in attendance can file a request for judgment or dismissal (Form 23) which dismisses the claim if the party not attending is the claimant or gives a default order if the party not attending is the defendant<sup>173</sup>.

### ***C. Mediation in Vancouver (Robson Square) – Rule 7.4***

Claims exceeding \$5,000 or personal injury claims in any amount are subject to mandatory mediation<sup>174</sup>. There are a few exceptions<sup>175</sup> including where the claim is for a financial debt and Rule 9.2 applies. The Registrar will serve the parties with a Notice of Mediation (Form 27) informing them of the date, time, and place of the mediation session<sup>176</sup>.

If the claim is for damages for personal injuries, the claimant must file and serve the other parties with a certificate of readiness (Form 7) and required documents<sup>177</sup>. The claimant should review the applicable rules for the proper timeline and how to obtain extensions.

Each party must attend the mediation session in person unless an application is filed for adjournment<sup>178</sup>, for a teleconference<sup>179</sup>, or unless an exemption is granted<sup>180</sup>. If a party fails to attend the mediation session, the party in attendance will receive a verification of non-attendance (Form 22) that can be filed with the Registrar<sup>181</sup>. After filing Form 22, the party in attendance can file a request for judgment or dismissal (Form 23), which dismisses the claim if the party not attending is the claimant or gives a default order if the party not attending is the defendant<sup>182</sup>.

### ***D. Preparing for Mediation***

Preparation is essential in order to achieve the most from mediation. Each party should provide copies of relevant documents to the other party. Parties have the ability to create their own resolution and should consider creative settlement options. Mediation is not a forum to assess blame or resolve legal questions; it is designed to end the dispute in a manner that satisfactorily addresses the interests, legal and otherwise, of each party. It is important to listen to the other party expressing his or her interests and allow the mediator to help the parties resolve the dispute.

### ***E. Procedure***

Mediation is a flexible process that allows the mediator to help the parties achieve a settlement. A mediator is not necessarily a lawyer, but is a skilled, experienced professional. Although mediation sessions can vary with respect to process, there are generally some standard steps that are followed.

All parties and representatives will be seated at a table with one to three mediators. The mediators will describe the mediation process, and ask each person attending to sign an Agreement to Mediate. This must be signed in order for the mediation process to proceed. The Agreement to Mediate form includes a confidentiality clause (any information disclosed in the session that is not otherwise discoverable is inadmissible and mediators cannot be called to testify in later proceedings), and ensures that the parties present have full authority to settle the case.

After signing the Agreement to Mediate, both parties will have a short time to tell their story. The mediator will summarize the key points in dispute. Once the main issues are identified, the mediator will look for common interests in an attempt to assist parties to resolve the dispute. The mediator will assist the parties to negotiate and reach an amicable resolution. During the process, it is not uncommon for a mediator to have a private conference with each party.

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<sup>173</sup> Rules 7.3(38)-(41).

<sup>174</sup> Rule 7.4(2).

<sup>175</sup> Rule 7.4(3).

<sup>176</sup> Rule 7.4(17).

<sup>177</sup> Rules 7.4(12)-(16).

<sup>178</sup> Rules 7.4(18), (19), and (20).

<sup>179</sup> Rule 7.4(23).

<sup>180</sup> Rules 7.4(5) and (6).

<sup>181</sup> Rule 7.4(31).

<sup>182</sup> Rules 7.4(32)-(35).

If the parties agree to a resolution, the mediator will draft an Agreement setting out the terms of the resolution. It may include monetary and non-monetary terms, and may have a non-compliance clause setting out consequences for failing to fulfil the obligations set out in the Agreement. If there is no non-compliance clause, the default amount will be the original amount claimed in the action. The mediator will file the agreement in the Small Claims Court registry after each party signs the agreement.

## X. SETTLEMENT CONFERENCE<sup>183</sup>

Settlement conferences are held in all court registries except for Vancouver (Robson Square). Settlement conferences are mandatory for all cases except motor vehicle accident cases where only liability for property damage is disputed<sup>184</sup>.

### A. *Who Must Attend*<sup>185</sup>

The registry will serve the parties by mail with a Notice of Settlement Conference (Form 6) at least 14 days in advance<sup>186</sup>.

All parties, with or without legal representation, must attend the settlement conference. If a party is not an individual (e.g., a company), someone who has authority to settle the claim for the company must attend<sup>187</sup>. If a party sends a lawyer or articled student and does not attend personally or send a company representative, that party will be deemed to have not attended the settlement conference. A party may appear by telephone if an application is made to and approved by the Registrar prior to the date set for the conference<sup>188</sup>. If a party does not attend or does not have full authority to settle, the judge can dismiss a claim, grant a payment order, or make any other appropriate order<sup>189</sup>. If a party attends but is unprepared, a judge may order the unprepared party to pay the other party's reasonable costs<sup>190</sup>.

Witnesses cannot attend except in unusual and exceptional cases. A witness who does attend the settlement conference will usually be asked to wait outside.

### B. *What to Bring*<sup>191</sup>

Each party must bring to a settlement conference **all relevant documents and reports** whether the party intends to use them at trial or not. Documents include any contracts, invoices, bills of sale, business records, photographs, and summaries of what each witness will say in court ("will-say" statements).

Each party should prepare a brief chronological summary of its case and support it with evidence. Claimants should bring more than one written estimate or quote, if there is a large sum of money involved.

If the claim is for personal injury, the claimant must file and serve a Form 7 certificate of readiness and required records<sup>192</sup> before a settlement conference will be scheduled. There can be consequences for failing to file the certificate of readiness on time<sup>193</sup>.

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<sup>183</sup> Rule 7.

<sup>184</sup> Rule 7(2).

<sup>185</sup> Rule 7(4).

<sup>186</sup> Rule 7(3).

<sup>187</sup> *Kamloops Dental Centre v Mcmillan*, 1996 CanLII 377 (BCSC).

<sup>188</sup> Rule 16(2)(c.1).

<sup>189</sup> Rules 7(17); Trial Conference - 7.5(17) and (18).

<sup>190</sup> Rules 7(6) and 20(6).

<sup>191</sup> Rule 7(5).

<sup>192</sup> Rules 7(9)-(13).

<sup>193</sup> *Yenchak v Cleland*, 2002 BCPC 200 (CanLII); *Irving v Irving*, 1982 CanLII 475 (BC CA); *Busse v Robinson Morelli Chertkov*, [1999] BCJ No. 1101 (BCCA).

### **C. What May Happen<sup>194</sup>**

A settlement conference is scheduled for 30 to 60 minutes before a judge in a conference room at the courthouse. The judge at the settlement/trial conference will not be the judge at trial, if a trial is necessary. The parties will sit at a table with the judge. The judge will say a few words and ask each party to give a brief summary of their case. The judge may then lead both the claimant and defendant into a discussion on what, if anything, the parties can agree on. If the parties agree on the final result, the judge will make the order. However, the parties may agree on some issues and leave issues in dispute to be resolved at trial. The judge will assess how much time is required for trial.

A judge at a settlement conference may make any order for the just, speedy, and inexpensive resolution of the claim. This includes mediating and making orders regarding admissibility of evidence, inspections of evidence, or production of evidence to the other party. The judge may also dismiss a claim<sup>195</sup> that discloses no triable issue, is without reasonable grounds, is frivolous, or is an abuse of the court's process. Examples include claims that are outside the court's jurisdiction, where the claimant presents no evidence, or where the limitation period at the date of filing the Notice of Claim had expired. A judge cannot dismiss a case at the settlement conference on the basis of issues relating to the credibility of witnesses or evidence.

A judge may also order that multiple claims be heard at the same time, or consolidated into one claim<sup>196</sup>. The distinction is important. Claims heard at the same time may each individually be awarded up to \$25,000, while claims which are consolidated into one claim may only be awarded \$25,000 combined.

Any agreement valid under contract law can result in a binding settlement. Agreements entered into by lawyers with their client's knowledge and consent are binding but can be set aside in some circumstances<sup>197</sup>.

If all claims are not settled, the parties should acquire a record of the settlement conference, which may outline all of the issues in the case, all admissions, the number of witnesses, the anticipated length of trial, and anything that must be disclosed.

#### **NOTE:**

If the settlement pertains to an action against a lawyer for which a complaint has been filed with the Law Society, a party cannot use complaint withdrawal as a bargaining technique; it is improper during settlement negotiations to offer to withdraw a complaint against a lawyer as a part of the settlement<sup>198</sup>.

### **D. Disclosure**

Trial by ambush is not permitted. Each party is entitled to know the evidence for and against its position. If the parties cannot reach a settlement, the focus will turn to trial preparation. The judge at a settlement conference has the power to order production of documents and evidence. Each party should attend the settlement conference with a list of documents and evidence that is believed to be in the possession of the other party.

A judge will order the parties to exchange copies of all documents or allow for their inspection before trial. Disclosure must be timely<sup>199</sup>. These documents should be compiled in a tabbed binder for easy reference at trial.

Each party must be prepared to disclose the name of each witness that party intends to call, indicate what evidence each witness will give, and provide a time estimate. If expert evidence will be used, it is helpful if a written report (or at least a draft copy) is available for the settlement conference. If an expert report is not available, parties will be ordered to exchange those reports prior to trial. There is a

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<sup>194</sup> Rule 7(14).

<sup>195</sup> *Belanger v AT&T Canada Inc.*, [1994] BCJ No. 2792; *Cohen v Kirkpatrick*, 1993 CanLII 2059 (BCSC); and *Artisan Floor Co. v Lam*, 1993 CanLII 2138 (BCSC).

<sup>196</sup> *Schab v Active Bailiff Service Ltd.*, [1993] BCJ No. 2936.

<sup>197</sup> *Harvey v British Columbia Corps of Commissionaires*, 2002 BCPC 69 (CanLII).

<sup>198</sup> *Gord Hill Log Homes Ltd. v Cancedar Log Homes*, 2006 BCPC 480 (CanLII).

<sup>199</sup> *Golden Capital Securities Ltd. v Holmes*, 2002 BCSC 516 (CanLII).



minimum deadline of 30 days before trial<sup>200</sup> however the judge at the settlement conference can be asked to change the time limits.

If a party does not comply with a disclosure order, a judge may adjourn the trial, the settlement conference, or both, order that party to pay expenses, order the trial to proceed without allowing that evidence to be used, or dismiss the action.

**NOTE:** For case law relating to the disclosure of medical documents and ethical obligations of physicians to their patients see *Halliday v McCulloch*, 1986 CanLII 1004 (BC CA), *Hope v Brown*, [1990] BCJ No. 2586, *Davies v Milne*, 1999 CanLII 6654 (BC SC), and *Cunningham v Slubowski*, 2003 BCSC 1854 (CanLII).

**NOTE:** For case law on obtaining disclosure from the Crown (e.g., from a related criminal case) in a civil case see *Huang (litigation guardian of) v Sadler*, [2006] BCJ No. 758 and *Wong v Antunes*, [2008] BCSC 1739 (CanLII). For case law pertaining to the admissibility of evidence obtained through electronic surveillance (e.g., recording telephone conversations and videotaping) and whether it will be considered a violation of the *Privacy Act*, RSBC 1996, c 373 see *Watts v Klaemt*, 2007 BCSC 662 (CanLII) and *Cam v Hood*, 2006 BCSC 842 (CanLII). For case law on obtaining evidence from third parties see *Lewis v Frye*, 2007 BCSC 89 (CanLII).

A judge may also order the exchange of all case law prior to the trial date.

Parties should consider writing to the other side after the settlement conference to confirm the deadline, the documents required, and remedies that will be pursued if there is no disclosure. When sending documents, it is important to include a list or outline of what material is enclosed.

### ***E. Enforcing a Settlement Agreement***<sup>201</sup>

If an agreement reached at a settlement conference includes payment, and if a party does not comply, the agreement can be cancelled. After filing an affidavit describing the non-compliance, the person entitled to payment may file a payment order for either the amount agreed to by the parties as the default amount and noted on the record as the default amount endorsed by the judge at the settlement conference or the full amount of the original claim if there was no default amount endorsed by the judge.

## **XI. TRIAL/PRE-TRIAL CONFERENCES**

### ***A. Trial Conference***

A trial conference only applies to claims at the Vancouver (Robson Square) registry. Parties should read the settlement conference section of this guide for general advice regarding the purpose of, preparation for, and conduct of a trial conference. A trial conference is similar to a settlement conference with a few notable exceptions, such as:

- The focus will be on trial preparation rather than on settlement.
- a party does not have to attend if a lawyer, articling student, or other representative attends on that party's behalf<sup>202</sup>;
- a Trial Statement (Form 33) must be filed at least 14 days before the trial conference and served on all other parties at least 7 days before the trial conference<sup>203</sup>;
- a certificate of readiness is not required as it will have been provided prior to Rule 7.4 mediation;
- the judge may require the parties to jointly retain an expert; and
- the judge may give a non-binding opinion regarding the probable outcome of the trial.

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<sup>200</sup> Rules 10(3) and (4).

<sup>201</sup> Rule 7(20).

<sup>202</sup> Rule 7.5(12).

<sup>203</sup> Rules 7.5(9) and (10).

There may be consequences for failing to file and serve the Trial Statement on time<sup>204</sup>.

The Registrar must serve a Notice of Trial Conference (Form 32) at least 30 days prior to the date set for the conference. A judge may make any order for the just, speedy, and inexpensive resolution of the claim including those enumerated in Rule 7.5(14).

### ***B. Pre-Trial Conference***

At most registries, a pre-trial conference will be scheduled for claims with trials that are scheduled to be longer than one half-day. In many ways this is similar to a settlement conference. There are basically no rules for pre-trial conferences. The general purpose is to ensure that the parties are prepared for trial, that all orders have been complied with, that all disclosure has been made, and that all witnesses will attend the trial. The judge will try to narrow the number of witnesses to reduce court time. In addition, the judge will review the admissibility of documentary evidence, particularly that of written evidence. The judge will also ensure that the matter falls within the jurisdictional limits of the Small Claims Court and that the claim is not beyond its limitation period. Finally, even at this late date, the judge will encourage the claimants and defendants to settle the matter. The parties may receive an order allowing another 30 days after the pre-trial conference to serve a formal settlement offer to the opposing party. The offer to settle must be made according to Rule 10.1 and penalties may apply to parties who refuse the formal offer to settle. For example, if the court after trial grants the claimant a sum that is equal to or less than the defendant's formal settlement offer, the claimant can be ordered to pay the defendant a penalty of up to 20 per cent of the settlement offer.

It is not uncommon for Judges at a pre-trial conference to decide the case based on the law without hearing any evidence. Some consider this to be an improper use of pre-trial conferences. However, as stated above, there are no rules governing pre-trial conferences so you should be aware of this going into a pre-trial conference.

## **XII. PREPARATION FOR TRIAL**

Many, if not most, litigants find trials to be extremely unnerving. While a small claims trial is not predictable, preparing well in advance can help a party to avoid surprises, present a more compelling case, and alleviate fears about the process.

It is important to consider the merits of a claim before proceeding to trial. If there is no reasonable or admissible evidence, the claim is bound to fail (e.g., a statute prohibits recovery), or a limitation period has passed, the judge may impose a penalty. A penalty of up to 10 per cent of the amount of the claim may be imposed if a party proceeds to trial without any reasonable basis for success<sup>205</sup>.

### ***A. Trial Binder***

A tabbed trial binder helps a party to effectively present its case at trial. A suggested format is:

- Tab 1:** Opening Statement: a brief summary of the issues in the case.
- Tab 2:** Pleadings: all filed documents in chronological order with a list or index.
- Tab 3:** Orders: all court orders that have been made.
- Tab 4:** Claimant's Case: anticipated evidence of the claimant and claimant's witnesses, including reminders for introduction of exhibits and blank pages for taking notes of the cross-examination.
- Tab 5:** Defendant's Case: blank pages for notes of the direct examination of defendant and defendant's witnesses and anticipated cross-examination questions.

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<sup>204</sup> Rule 20(6); *Yevchak v Cleland*, 2002 BCPC 200 (CanLII); *Irving v Irving*, 1982 CanLII 475 (BCCA); and *Busse v Robinson Morelli Chertkow*, [1999] BCJ No. 1101 (BCCA).

<sup>205</sup> Rule 20(5).

- Tab 6:** Closing Arguments/Submissions: brief review of the evidence, suggested ways to reconcile conflicts in the evidence, a review of only the most persuasive case law and its application to the facts.
- Tab 7:** Case Law: prepare three copies of each case relied on (for you, the judge, and the opposing party). Carefully scrutinize the need for multiple cases to support your argument and limit yourself to as few as possible.
- Tab 8:** Exhibits: you will need the original (the exhibit) and three copies (for you, the judge, and the opposing party). You need to be able to prove when, why, and by whom the exhibit was created, and also be able to argue why it is relevant (i.e. document plan or photograph).
- Tab 9:** Miscellaneous: any additional documents, notes, lists, and correspondence.

### ***B. Expert Witnesses***

Expert witnesses should only be permitted when their expertise and special knowledge is **necessary** for the court to understand the issues<sup>206</sup>. The expert's testimony cannot include the expert's assessment of the credibility of either the claimant or the defendant<sup>207</sup>. Expert witness testimony is inadmissible if it relates to issues that the court is capable of understanding and analysing without assistance<sup>208</sup>.

Evidence may be given by an expert at trial or through a written report. An expert report must be the opinion of only **one** person. Written reports or a notice of expert testimony must be served at least 30 days before trial<sup>209</sup>.

An expert witness report should include the resume or qualifications of the expert, a brief discussion of the facts of the case supporting the opinion or conclusion, the opinion or conclusion itself, and what was done to arrive at that conclusion.

An exception to the "in person" rule for expert witnesses is permitted for estimates and quotes. A party may bring a written estimate for the repair of damage or a written estimate of the property value and present it as evidence at trial without calling the person who gave the estimate or quote. Parties should obtain more than one estimate or quote, especially if the sum of money involved is large. Estimates of repairs or value of property are not considered to be expert evidence<sup>210</sup>, but must be served on all other parties at least 14 days before trial.

If the claimant does not serve the estimate in time, they can ask the trial judge for permission to present it anyway at trial. The claimant may or may not get permission to do so. The other party may ask for a trial adjournment to obtain his own estimate or quote. If the adjournment is granted, the claimant could be penalised and ordered to pay the other party's expenses.

### ***C. Witness Preparation***

A party should review the evidence of its witnesses at least one week before trial and confirm the witnesses' attendance. Witnesses should understand how a trial is conducted, the role of a witness, and the requirement that witnesses tell the truth.

### **Ensuring Attendance**

Each party must ensure that its witnesses will attend court. If a party is not absolutely certain that a witness will attend, the witness should be personally served with Form 8: Summons to a Witness together with reasonable estimated travelling expense at least 7 days before the witness is required to appear<sup>211</sup>. The minimum travelling expenses must cover round-trip,

<sup>206</sup> *R. v Mohan*, [1994] 2 SCR 9.

<sup>207</sup> *Movabed v Leung*, [1998] BCJ No. 1210; *Brough v Richmond*, 2003 BCSC 512 (CanLII); and *Campbell v Sveinungsen*, 2008 BCSC 381 (CanLII).

<sup>208</sup> *Sengbusch v Priest*, 1987 CanLII 2796 (BCSC).

<sup>209</sup> Rules 10(3) and (4).

<sup>210</sup> Rule 10(8).

<sup>211</sup> Rules 9(1)-(3).

economy fare such as bus fare to and from the court. While lost salary and other expenses do not have to be paid, a party should be reasonable and generous if possible to avoid making a witness bear the cost of litigation.

If a witness who has been served with a summons does not appear at trial, the summoning party may ask the judge for an adjournment or a warrant of arrest<sup>212</sup>.

### **Telling the Truth**

Giving evidence in court is a solemn and serious affair. Lying to the court can be a criminal offence and result in imprisonment. A witness must be well prepared to give evidence.

To emphasise the formality of the proceeding, witnesses must either swear an oath to or solemnly affirm that they will tell the truth. Sworn and affirmed testimony are equally regarded; the choice of whether to swear or affirm is the witness'.

Swearing an oath involves the witness placing their right hand on a religious text and swearing to tell the truth with reference to their chosen religion. While the bible is the default, several religious texts are available if pre-arranged with the court. The standard oath, "Do you swear that the evidence you are about to give the court in this case shall be the truth, the whole truth and nothing but the truth, so help you God?", can be modified according to religious preference.

A witness who does not want to swear a religious oath should give a solemn affirmation. The wording of the solemn affirmation is: "Do you solemnly affirm that the evidence you are about to give the court in this case shall be the truth, the whole truth and nothing but the truth?".

A witness does not need to know the details of each party's position. If a witness has been told the merits and legal arguments of each side, there is a risk that the witness may advocate for a party by including arguments while testifying. Such conduct is not persuasive, suggests that the witness may be biased, and may undermine the witness' credibility.

### **Arranging an Interpreter**

Trials and hearings are conducted in English. If a party or the party's witness does not speak English, the party must arrange for an interpreter to be present. There is a list of interpreters available from the court registry however the court does not certify interpreters<sup>213</sup>. A party may use any person who is competent to reliably, accurately, and competently translate what is said in court; the judge has, however, discretion to reject the party's choice of interpreter.

An interpreter should be prepared to testify as to their experience and training. An interpreter who is related to a party may be rejected on the basis of potential bias and an interpreter who is inexperienced or untrained may be rejected on the basis of incompetence. If a party does not arrange an interpreter for a hearing or if the court rejects the interpreter, the party may be liable for a penalty and the reasonable costs of the other party. The party requiring an interpreter should ask the judge at the settlement or trial conference to decide whether the chosen interpreter is acceptable.

The party requiring the interpreter is responsible for the costs of the interpreter; these costs can be, however, recovered if the party is successful at trial.

### **General Advice for Witnesses**

- Discuss whether the witness will swear or affirm their testimony.
- The microphones in court do not amplify; they are for recording purposes only. Face the judge when testifying and speak slowly, clearly, and loudly enough for the judge to hear.

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<sup>212</sup> Form 9; Rules 9(7) and 14.

<sup>213</sup> *Sandhu v British Columbia*, 2013 BCCA 88.

- Witnesses should wear appropriate business attire.
- Witnesses should never guess, assume, or argue with the judge or one of the lawyers.
- If a lawyer or other party says, “Objection”, or the judge starts speaking, the witness should stop testifying and wait for the judge’s instructions.
- On direct examination, the witness should answer questions fully.
- On cross-examination, the witness should answer as briefly and succinctly as possible.

#### ***D. Documentary Evidence***

Each party should have the original and three copies of each document to be entered as an exhibit. The original will be marked as an exhibit and the other three are for the judge, the opposing party, and you to work from during the trial. Keep track of the exhibits and always refer to them by the correct number.

Before a document can be marked as an exhibit, it must be authenticated. The witness must identify its origins and that it is a true copy. Give the original document and a copy to the clerk and ask the clerk to show the original to the witness. Ask the witness to identify it: “I’m showing you a letter dated...”, “Do you recognize it?”, “Is this your signature?” or “Is it addressed to you?” When the witness has identified its origins and there are no objections, ask the judge to accept it as an exhibit: “May this be marked exhibit #1?”

**NOTE:** In exceptional circumstances, the judge may permit a witness to provide evidence by affidavit rather than testifying at trial<sup>214</sup>.

**NOTE:** A judge may examine and compare headshots or handwriting, but should only place very limited weight on their own judgement in these situations<sup>215</sup>.

### **XIII. TRIAL**

A trial is often very difficult, stressful, and unpredictable. If possible, it is generally in the best interests of all parties to settle. However, if the matter cannot be resolved at the settlement/trial conference, a trial will be scheduled<sup>216</sup>. The notice of trial will be sent by mail to the parties’ address on file. If a claimant does not attend the trial, the claim will be dismissed. If a defendant or third party does not attend, the claim will be allowed and judgment granted against the absent party.

Statements made by the claimants or the defendants at the settlement/trial conference are protected by settlement privilege and **cannot be used at trial**. A statement made during the settlement/trial conference is **not** admissible in cross-examination. Also, the judge at the settlement/trial conference will not be the trial judge. This allows the parties to discuss all issues without fear that their statements will be used against them at trial.

Parties should remember that settlement is possible at any time before the judge decides the case. This includes after evidence and arguments are heard at trial.

Parties should watch at least one trial in order to familiarise themselves with the correct procedure.

#### ***A. Simplified Trial for Claims up to \$5,000***

A Rule 9.1 simplified trial is set for one hour before an adjudicator. An adjudicator will usually be a justice of the peace but may occasionally be a judge. A justice of the peace adjudicator is referred to as “Your Worship”. Simplified trials are held in the evening in Vancouver and during the day in Richmond.

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<sup>214</sup> *Withler and Fitzsimonds v Attorney General (Canada)*, 2005 BCSC 1044 (CanLII), para 18; and *Sangha v Reliance*, 2011 BCSC 371.

<sup>215</sup> *R. v Nikolovski*, [1996] CanLII 158 SCC; and *R. v Abdi*, [1977] CanLII 4448 Ont CA.

<sup>216</sup> Rule 10.

The parties must each file a Trial Statement at least 14 days before the trial date and serve each other party at least 7 days before the trial<sup>217</sup>. There are penalties for failing to comply with these timelines<sup>218</sup>.

The trial does not need to comply with formal rules of procedure and evidence<sup>219</sup>. The adjudicator will ask questions and control the proceedings to stay within the one-hour timeframe.

### ***B. Summary Trial for Financial Debt***

At the Vancouver (Robson Square) registry, financial debt claims will be set for a half-hour summary trial before a judge. Financial debt claims are claims in which one of the parties is in the business of loaning money or extending credit. Often, little in the way of defence can be offered in situations of financial debt and the summary trial may in some ways come to resemble a payment hearing. Where a defence with some merit is advanced, the judge may send the claim to mediation, order a trial conference, or order a traditional trial<sup>220</sup>. The judge may conduct the trial without complying with the formal rules of evidence or procedure<sup>221</sup>. Note the rules requiring early disclosure of all relevant documents<sup>222</sup>.

### ***C. Regular Trial***

Rule 10 trials are held at all registries and are the most common form of small claims trial.

#### **Courtroom Etiquette**

- Be on time. If you are late, apologize and be prepared to give an excellent explanation.
- Introduce yourself and state your name clearly. Remember to spell your surname for the record.
- Use simple words; do not use “legalese”.
- Do not speak directly with opposing parties. Make submissions only to the judge and have him or her ask questions to the opposing party.
- Never call witnesses by their given name. Use Mr., Ms., Miss, or Mrs. followed by their last name.
- A judge of the Provincial Court is referred to as “Your Honour” and the clerk is referred to as “Madame Clerk” or “Mister Clerk”. When referring to another party, use Mr., Ms., Miss, or Mrs. followed by their last name or refer to them according to their status in the claim (e.g., the defendant).
- Generally you should limit objections to issues that are of central importance to your case. If you have an objection, stand up quickly and say “objection”. The judge will acknowledge you and may ask for the reason you are objecting.

#### **Court Room Layout**

The judge’s bench is usually elevated above the rest of the court so the judge has a good view of the proceedings. The litigants’ table is in front of the judge, and the parties will come and sit there when their case is called. Often there is a raised lectern to hold papers when a litigant stands to ask questions. The court clerk’s table is beside the witness box and between the litigants’ table and the judge’s bench. The witness box will be on either the judge’s left or right. The public gallery will fill up the remaining part of the courtroom. Parties will wait in the gallery until their case is called.

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<sup>217</sup> Rules 9.1(17) and (18).

<sup>218</sup> Rule 9.1(19).

<sup>219</sup> Rule 9.1(20).

<sup>220</sup> Rule 9.2(13).

<sup>221</sup> Rule 9.2(9).

<sup>222</sup> Rules 9.2(7) and (8).

There will be microphones throughout. They do not amplify your voice and are for recording purposes only. **Speak at a moderate speed and project your voice.**

### **Check-In Procedure**

The court clerk will ask ahead of time for the names of each party and, if they have one, their lawyer. Each party must tell the court clerk or judge as soon as possible if there are any preliminary motions or applications that should be heard first, whether there are any problems with witnesses and possible delays, and whether the number of witnesses or issues has changed from the settlement conference. This will help to determine the schedule of cases for the day and avoid as many delays as possible.

If all matters on a given day proceed to trial, the courtroom will often be overbooked, and you will be asked about the urgency of your trial. If you are not heard first, you may be given a choice to wait and see if another judge becomes available, or to adjourn to another date. If the trial has been previously adjourned, or expert or out of town witnesses are present, the trial will likely be given priority.

When the clerk has everyone organized, the judge will be called in. The clerk will announce, "order in court" and everyone must stand. The judge will bow before sitting and all parties should then bow in return before sitting. Next, the court clerk will call out the name of a case, at which time all parties in that case will come to the front and identify themselves to the judge.

### **General Order of Proceedings**

- a)** Preliminary Motions
- b)** Claimant's Case
  - Claimant's opening statement
  - Claimant's direct examination of its witnesses
  - Defendant's cross-examination of the claimant's witnesses
  - Claimant's re-examination of its witnesses
  - Defendant's re-examination of the claimant's witnesses
- c)** Defendant's Case
  - Defendant's opening statement
  - Defendant's direct examination of its witnesses
  - Claimant's cross-examination of the defendant's witnesses
  - Defendant's re-examination of its witnesses
  - Claimant's re-examination of the defendant's witnesses
- d)** Closing Arguments
  - Claimant's closing
  - Defendant's closing
  - Claimant's rebuttal
- e)** Judgment

### **Opening Statement**

The claimant's opening statement should summarise the facts surrounding the claim, the legal basis for the claim, and the relief that is sought. The defendant's opening statement should summarise the defendant's version of the facts and the reasons it opposes the claimant's claim or the relief the claimant is seeking.

The opening statement should also alert the court to the types of evidence that will be presented and from whom the court will hear. Opening statements should not contain legal arguments and should be as brief as possible.

If there are witnesses other than the parties, the claimant should ask for an order excluding those witnesses from the courtroom.

### **Direct Examination**

When each party is examining its own witness, it is that party's direct examination. The party calling the witness should tell the court whether the witness will swear or affirm their testimony.

Witnesses can be led on matters that are not in issue (e.g., their name, where they work, etc.). Leading questions tend to be ones where the answer is either yes or no. Leading the witness at the start will help the witness to relax.

When asking questions about issues that are in dispute or are related to a party's claim or defence, that party should refrain from suggesting answers to the witness. The witness must be allowed to give evidence in his or her own words.

A witness must authenticate all documents that are entered into evidence unless the parties have agreed to their authenticity. When authenticating a document, pass three copies to the clerk: one for the judge, one for the court record, and another for the witness. Once the witness has identified the document, it will be entered into evidence and given an exhibit number.

When the other party is conducting its direct examination, take detailed notes for cross-examination and closing arguments.

### **Cross-Examination**

Once the direct examination of a witness has concluded, the witness may be cross-examined by the other party. There are two main purposes of cross-examination: to point out inconsistencies and omissions and to introduce facts or conclusions. If the witness has performed poorly or has not been damaging, it may not be necessary to cross-examine that witness.

Some questions can make the situation worse. A witness should never be asked to repeat what he or she said in "chief". This only emphasizes the point and allows the witness to clarify or minimise weaknesses.

At some point in cross-examination, the opposing version of the facts should be put to the witness to allow them to comment. This is known as the rule in *Browne v Dunn* and, if not followed, can result in less weight being placed on a witness' evidence or the recall of adverse witnesses<sup>223</sup>.

A witness should not allow the cross-examiner to misconstrue their evidence. If a question is unclear, the witness should ask for clarification. Only the question asked should be answered and additional information should not be volunteered. It is okay if the witness does not know the answer to a question; the witness should not guess the answer.

#### **NOTE:**

Parties should not speak to their witnesses after cross-examination and before or during re-examination about the evidence or issues in the case without the court's permission<sup>224</sup>. If such a discussion occurs, the witness' evidence may be tainted and the court may not believe it.

### **Re-Examination**

If new evidence is introduced during cross-examination that was not reasonably anticipated in direct examination or if a witness' answer needs to be clarified or qualified, the judge may

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<sup>223</sup> *Budnark v Sun Life Assurance Co. of Canada*, 1996 CanLII 1397 (BCCA).

<sup>224</sup> *R. v Montgomery*, 1998 CanLII 3014 (BCSC).



give permission to re-examine the witness on the new evidence<sup>225</sup>. During re-examination, leading questions cannot be asked.

### **Closing Arguments**

Closing arguments are an opportunity for each party to persuade the judge of its position. Evidence that strengthens the case should be highlighted and evidence that weakens the case should be explained and addressed. The weaknesses should be addressed in the middle of the closing so that the closing may start and finish on positive notes.

It may be necessary to comment on the credibility of witnesses, conflicts in testimony, and the insufficiency of evidence. The comments should be factual and allow the judge to arrive at a conclusion.

It is also important to summarise the relevant law and refer to specific cases that are on point. All case law should have been shared with all other parties well in advance of the trial.

Closing is not an opportunity to introduce new evidence. If something has been omitted, it can only be introduced if the judge grants permission to re-open that party's case.

### **Judgment**

When the evidence, submissions, and closing arguments are finished, the judge must give a decision. The judge may give a decision orally at the end of the trial, at a later date, or in writing<sup>226</sup>. The registrar will notify the parties of the date to come back to court for reasons or, if the decision is in writing, when it was filed in the registry<sup>227</sup>.

When payment from one party to another is part of the judgment, the judge must make a payment order at the end of the trial and ask the debtor whether he or she needs time to pay<sup>228</sup>. If the debtor does not require time to pay, the judgment must be paid immediately<sup>229</sup>. If time to pay is needed, the debtor may propose a payment schedule, and if the successful party agrees, the judge may order payment by a certain date or by instalments<sup>230</sup>. If the creditor does not agree to the debtor's proposal, the judge may order a payment schedule or a payment hearing<sup>231</sup>.

If a payment schedule is not ordered, the debt is payable immediately and the creditor is free to start collection proceedings<sup>232</sup>.

## **XIV. COSTS AND PENALTIES**

The court expects parties to act reasonably and follow the rules. Parties who do not follow the rules or are unsuccessful may be liable for certain costs and penalties.

### ***A. Costs to Successful Party***

Generally, the unsuccessful party must pay the successful party's expenses<sup>233</sup>. Any reasonable expenses directly related to the proceedings may be claimed. This includes filing fees, costs for document reproduction, and other costs incidental to the trial process.

A list of expenses should be brought to trial and can include expenses incurred due to the lateness, unpreparedness, or general misconduct of a party<sup>234</sup> as long as the party claiming the expenses has actually spent that amount of money<sup>235</sup>.

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<sup>225</sup> *R v Moore*, [1984] OJ No. 134; and *Singh v Saragoca*, 2004 BCSC 1327 (CanLII) at para. 40.

<sup>226</sup> Rule 10(11).

<sup>227</sup> Rules 10(12) and (13).

<sup>228</sup> Rules 11(1) and (2).

<sup>229</sup> Rule 11(7).

<sup>230</sup> Rules 11(2)(b), (3), and (4).

<sup>231</sup> Rule 11(5).

<sup>232</sup> Rule 11(7).

<sup>233</sup> Rule 20(2).

Wages lost for attending court cannot generally be recovered<sup>236</sup>. Where a claim before the small claims court has been withdrawn and there are no appropriate grounds to recall it, neither costs nor penalties can be assessed<sup>237</sup>.

In circumstances where the successful party has acted unfairly, withheld information, misled the court, or wasted the court's time, the successful party may have to pay the unsuccessful party's costs<sup>238</sup>.

**NOTE:** A lawyer's fees cannot generally be claimed as expenses<sup>239</sup>. The only exception is where the contract between the parties requires the reimbursement of legal costs however this only applies to legal **fees** that are not related to the claim<sup>240</sup>.

### ***B. Frivolous Claims***

A judge has discretion to order a penalty of up to 10 per cent of the amount claimed or the value of the counterclaim if the party proceeded through trial with no reasonable basis for success<sup>241</sup>.

### ***C. Failure to Settle***

If there has been a formal offer to settle under Rule 10.1 that was not accepted, a penalty, in addition to any other expenses or penalties – up to 20 per cent of the amount of the offer to settle – may be imposed if the offer was the same or better than the result at trial.

## **XV. APPEAL**

Any party to a proceeding may appeal to the Supreme Court an order to allow or dismiss a claim if the judge made the order after a trial<sup>242</sup>. An appeal must be started within 40 days, beginning on the day after the order of the Provincial Court is made<sup>243</sup>. A review of the order under appeal may be on questions of fact or law<sup>244</sup>. A mistake of fact could involve a misunderstanding by the Judge of evidence given by a witness. For example, if a witness reported that a particular event happened and in the decision the Judge bases his/her decision on the fact that event didn't happen, there could be a basis for an appeal. A mistake of law occurs where the Judge makes an error in deciding which law should apply. Not every error made by a Small Claims Court judge will be the basis for a successful appeal. The test which the Supreme Court Judge must apply is called the "clearly wrong test". If the Small Claims Court judge's decision about the facts or the law is not clearly wrong, the appeal will fail. An appeal is usually not a new trial; it will be based on the transcripts of the trial in Small Claims Court. The Supreme Court may, however, exercise its discretion to hear the appeal as a new trial<sup>245</sup>. No new evidence may be adduced at the appeal without leave of the court<sup>246</sup>.

For claims that do not fit the criteria for an appeal, the Judicial Review Procedure Act allows the Supreme Court of British Columbia to review decisions made by Provincial Court judges prior to trial. This includes interlocutory orders, the dismissal of a claim at a settlement conference, and adjudicator decisions in Simplified Trials under Rule 9.1. The appropriate standard of review for orders subject to judicial review is

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<sup>234</sup> Rule 20(6).

<sup>235</sup> *Weeks v Ford Credit Canada Ltd*, [1994] BCJ No 1737.

<sup>236</sup> *McIntosh v De Cotiis Properties Ltd*, 2002 BCPC 57 (CanLII).

<sup>237</sup> Rule 8; and *Northwest Waste Systems v Szeto*, 2003 BCPC 431 (CanLII).

<sup>238</sup> *Tilbert v Jack*, [1995] BCJ No 938.

<sup>239</sup> *Small Claims Act*: s 19(4); and *Weeks v Ford Credit Canada Ltd*, [1994] BCJ No 1737.

<sup>240</sup> *Wetterstrom et al. v Craig Management Enterprises Ltd*, 2009 BCPC 165 (CanLII).

<sup>241</sup> Rule 20(5).

<sup>242</sup> SCA, s 5.

<sup>243</sup> SCA, s 6.

<sup>244</sup> SCA, s 12(a)

<sup>245</sup> SCA, s 12(b).

<sup>246</sup> Practice Direction Standard Directions for Appeals from Provincial Court - Small Claims Act SCA, s 10.

reasonableness<sup>247</sup>. For further information on judicial review, refer to the “Public Complaint Procedures” chapter of the LSLAP manual<sup>248</sup>.

If an order dismissing a claim is appealed to the Supreme Court, that appeal does not automatically appeal the counterclaim to the Supreme Court, nor vice versa. Each appeal is a separate matter and needs to be filed separately in the Supreme Court. Both appeals will, of course, be heard together<sup>249</sup>.

### ***A. Filing an Appeal***

You must act quickly if you wish to appeal a decision as there are many steps involved and only a short a period of time. Within 40 days of the order being made,<sup>250</sup> an appellant must, in one day, do all of the following:

- file a Notice of Appeal in the Supreme Court registry closest to the Provincial Court where the order being appealed was made<sup>251</sup>;
- deposit with the Supreme Court \$200.00 as security for costs plus the amount of money required to be paid by the order under appeal<sup>252</sup> or apply to the Supreme Court to reduce the amount required to be paid<sup>253</sup>;
- apply to the registrar of the Supreme Court for a date for hearing the appeal that is at least 21 days, but not more than 6 months, after the filing date<sup>254</sup>;
- file a copy of the Notice of Appeal in the Provincial Court registry where the order under appeal was made<sup>255</sup>.

An application to reduce the amount required to be deposited does not need to be served on any person; however, if the court reduces the amount required to be deposited, the appellant must serve notice of this order on the other parties to the appeal<sup>256</sup>.

The cost to file a Notice of Appeal in Supreme Court is \$200.00 and the cost for filing an application to reduce the amount of the deposit is \$80.00. An appellant who cannot afford these fees can apply to the Supreme Court registrar for indigent status.

A copy of both the Notice of Appeal and the Notice of Hearing must be served on every party affected by the appeal<sup>257</sup>. Fourteen days after filing the Notice of Appeal, the appellant must provide the Registrar with proof that the Notice of Appeal and the Notice of Hearing have been served on the respondents.

The Appellant must also order transcripts of the oral evidence given at the Small Claims Court trial and the Judge's reasons for judgment. The Appellant must pay for a copy of the transcript for the Court and one for each party to the appeal. Transcripts cost several dollars per page. So, depending on how long the trial lasted, the transcript could be many, many pages and cost hundreds and even thousands of dollars.

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<sup>247</sup> *0763486 BCLtd. v Landmark Realty Corp*, 2009 BCSC 810 (CanLII); *Wood and Lauder v Sivak*, 2000 BCSC 397 (CanLII); *Der v Giles*, [2003] BCJ No 938; and *Nicholson v Lum*, [1996] BCJ No 860.

<sup>248</sup> [www.lslap.bc.ca](http://www.lslap.bc.ca).

<sup>249</sup> *Shaughnesy v Roth*, 2006 BCSC 531 (CanLII).

<sup>250</sup> SCA, s 6.

<sup>251</sup> SCA, s 7.

<sup>252</sup> SCA, s 8(1) and (2).

<sup>253</sup> SCA, s 8(3).

<sup>254</sup> SCA, s 10.

<sup>255</sup> SCA, s 7.

<sup>256</sup> SCA, s 8(6).

<sup>257</sup> SCA, s 11(1).

**B. For a detailed checklist of the steps you must take to make an appeal please see Appendix N. The Decision of the Supreme Court**

On hearing an appeal, the Supreme Court may make any order that could be made by the Provincial Court, impose reasonable terms and conditions on an order, make any additional order it considers just, and award costs to any party under the Supreme Court Civil Rules<sup>258</sup>.

**There is no further appeal from a Supreme Court order**<sup>259</sup>.

## **XVI. ENFORCEMENT OF A JUDGMENT**

A judgment is valid for 10 years<sup>260</sup>. During that time, a judgment creditor may use whatever means permitted by law to enforce the order<sup>261</sup>. First, the successful party must fill out a payment order form<sup>262</sup> and file it in the registry. Interest and expenses need to be included, and a plain piece of paper showing those calculations should be attached. Although it is called a “payment order”, the form is used even if no payment of money is ordered. There is space at the bottom of the form for a description of a non-monetary order. The registry will compare it with the court record for accuracy and it will then be signed and ready for pick-up or mailed within a day or two.

The judgment creditor should send a copy of the payment order with a demand letter to the debtor. If the court did not give the debtor a deadline, the judgment debt is due immediately<sup>263</sup>. The demand letter should warn that, if payment is not received by a certain date (e.g., 10 days later), other enforcement proceedings will be pursued.

The Small Claims Court has an excellent procedural guide entitled “Getting Results”. Once an enforcement strategy has been decided upon, a judgment creditor should consult the booklet for detailed instructions on how to commence enforcement proceedings.

To enforce payment, a creditor may use any of the following methods<sup>264</sup>:

**A. Prohibition on Enforcement**

While a debtor is in compliance with a payment schedule, the judgment creditor cannot take any additional steps to collect the debt<sup>265</sup>. If a payment hearing is ordered because the creditor did not agree with the debtor’s proposed payment schedule, the creditor may not take any steps to collect the debt before the hearing<sup>266</sup>. If a summons to a payment hearing is otherwise filed, the creditor may not attempt to collect the judgment debt until after the hearing is over or the summons is either withdrawn or cancelled<sup>267</sup>.

**If the debtor defaults on the payment schedule, the balance becomes due immediately and the creditor may then take other steps to collect the balance**<sup>268</sup>.

The Small Claims Court may be **unable** to enforce a mediation agreement if doing so would exceed its jurisdiction. Other mediation agreements and the decisions of adjudicators in simplified trials can be enforced<sup>269</sup>.

It may not be possible to enforce a judgment against a debtor who has discharged the judgment debt in bankruptcy. A judgment creditor who learns that a judgment debtor plans to file for bankruptcy

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<sup>258</sup> BC Reg 168/2009 and amendments thereto.

<sup>259</sup> SCA, s 13(2).

<sup>260</sup> *Limitation Act*, RSBC 1996, c 266: s 3(3)(f).

<sup>261</sup> *Court Order Enforcement Act*, RSBC 1996, c 78.

<sup>262</sup> Form 10.

<sup>263</sup> *Court Order Enforcement Act*, RSBC 1996, c 78: s 48(1).

<sup>264</sup> Rule 11(11).

<sup>265</sup> Rule 11(6).

<sup>266</sup> Rule 11(8).

<sup>267</sup> Rule 11(17).

<sup>268</sup> Rule 11(14).

<sup>269</sup> *Carter v Ghanbari*, 2010 BCPC 0266; *Wood v Wong*, 2011 BCSC 794.

should review s 178 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 and obtain independent advice.

### **B. Order for Seizure and Sale**

An order for seizure and sale allows for personal property belonging to the debtor to be seized by a bailiff and sold at public auction. Examples of personal property that can be seized include vehicles, furniture, and electronics. A personal judgment debtor (i.e., not a corporation) is entitled to retain certain personal property up to a certain value set by regulation<sup>270</sup>.

The net proceeds (after deduction of the bailiff's fees and expenses) are given to the judgment creditor. Once a judgment creditor has filed Form 11, the registrar can grant an order for seizure and sale if there is no payment schedule or if the debtor has not complied with a payment schedule<sup>271</sup>.

The debtor is not notified of the order prior to seizure. A seizure and sale is not carried out by the creditor and must be done by private bailiffs. Before an order is issued, the creditor must deposit the estimated fees and expenses of the bailiffs. An order for seizure and sale is valid for one year.

### **C. Garnishment After Judgment**

Garnishment requires a third party, often the debtor's employer or bank, to pay money owing to the debtor into court instead of to the debtor. The creditor must file an affidavit that describes the amount of the payment order, the amount still owing and the name and address of the garnishee. The affidavit must be sworn before a notary, a lawyer, or a justice of the peace at the registry. Certain assets such as social assistance payments (welfare, disability) and joint accounts may not be garnished. With some exceptions, only 30 per cent of the debtor's salary can be garnished<sup>272</sup>.

The creditor must also fill out a garnishing order identifying the garnishee (the bank or the employer) with its full legal name and address. In the case of a bank, the specific branch must be identified and must be located in British Columbia. The garnishee will pay the entire amount it owes the debtor (i.e., the positive balance in a bank account). The garnishing order does not freeze the account; the claimant may re-garnish the bank at any time.

Once the creditor receives a garnishing order, he or she must serve both the garnishee and the debtor either personally, or by registered mail.

Once an order for garnished wages is served on the garnishee, the order is only valid for wages due and owing within **seven** days<sup>273</sup> – it is therefore critical to have some knowledge relating to the debtor's pay schedule. If the garnishee owes money to the debtor, he or she must pay the amount owed into court. All money paid into court is held until further order of the court.

A creditor may apply for the garnishment of a debtor's bank account and accounts receivable *before* a judgment is reached. This is called a pre-judgment garnishing order. For more information, refer to the chapter of the LSLAP manual entitled "Creditors' Remedies and Debtors' Assistance" and, specifically, the section entitled "Garnishment of Bank Accounts and Other Accounts Receivable".

### **D. Payment Hearing**

A payment hearing may be scheduled before a judge or justice of the peace<sup>274</sup>. It will determine the debtor's ability to pay and whether a payment schedule should be ordered<sup>275</sup>. Such a hearing may be requested by a creditor or debtor or ordered by a judge<sup>276</sup>. However, if a creditor has an order for seizure and sale, he or she must get the permission of a judge to also have a payment hearing. The debtor must bring records and evidence of income and assets, debts owed to and by the debtor, any

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<sup>270</sup> *Court Order Enforcement Act*, RSBC 1996, c 78: s 71(1); *Court Order Enforcement Exemption Regulation*, BC Reg 28/98, s 2.

<sup>271</sup> Rules 11(11)(a) and 11(14)(b).

<sup>272</sup> *Court Order Enforcement Act*, RSBC 1996, c 78, s-s 3(5)-(7).

<sup>273</sup> *Court Order Enforcement Act*, RSBC 1996, c 78, s 1.

<sup>274</sup> Rule 12.

<sup>275</sup> Rule 12(1).

<sup>276</sup> Rule 12(2).

assets the debtor has disposed of since the claim arose, and the means that the debtor has, or may have in the future, of paying the judgment<sup>277</sup>. Costs to the applicant in such a proceeding are added onto the sum of the judgment.

A creditor who requests a hearing must file Form 12: Summons to a Payment Hearing. The registry will set a date on the form and the person named in the summons must be served **personally** at least seven days before the date of the hearing<sup>278</sup>; service by mail is not permitted.

If the debtor is having difficulty paying, he or she can request a hearing by filing Form 13: Notice of Payment Hearing which must be served on the creditor at least seven days before the date of the hearing, but may be served by regular mail as long as it is mailed at least 21 days in advance of the hearing date<sup>279</sup>.

If a person who was properly summoned or ordered by the court to attend a payment hearing does not attend, the creditor may ask that the judge or justice of the peace issue a warrant (Form 9) to arrest that person<sup>280</sup>.

If a creditor does not appear, the hearing may be held, cancelled, or postponed<sup>281</sup>.

### ***E. Driver's Licence Suspension***

If damages are a result of a motor vehicle accident involving property damage exceeding \$400, bodily injury, or death<sup>282</sup>, the creditor may apply to the Superintendent of Motor Vehicles within 30 days of the judgment to have the debtor's driver's licence suspended. The Superintendent may suspend the licence upon receiving the judgment.

### ***F. Default Hearing***

If the debtor does not comply with a payment schedule, the creditor may request a default hearing by filing Form 14: Summons to a Default Hearing. The creditor should request from the debtor the same documents as would be requested for a Payment Hearing. The summons must be served personally by **either** a court bailiff or a sheriff (i.e., not the creditor) at least seven days before the hearing<sup>283</sup>. The judge at the hearing may confirm or vary the terms of the payment schedule<sup>284</sup> or imprison the debtor if the defendant does not appear or if the reason for failing to comply with the payment schedule amounts to contempt of court<sup>285</sup>.

The Registrar's authority to waive fees extends only to registry services and **not** court bailiff or sheriff's services. If a creditor cannot afford a court bailiff's or the sheriff's services, the claimant can complete an Application to a Judge seeking, pursuant to Rule 13(8), to hold the debtor in contempt and obtain a Warrant of Imprisonment to imprison the debtor for up to 20 days. This application can be served personally by the applicant to avoid the court bailiff's or sheriff's fees. If the creditor will testify at the hearing as to the debtor's failure to comply with the payment schedule, an affidavit is not required.

### ***G. Execution Against Land***

If the debtor owns land in British Columbia, the creditor can register the judgment against the land<sup>286</sup>. If you do not know whether the debtor owns land, you can do a name search at the land title office, for a fee. If the property is sold or transferred after registration of certificate of judgement, some or all of the judgment may be paid.. Registering a certificate of judgment prevents the Debtor from selling

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<sup>277</sup> Rule 12(12).

<sup>278</sup> Rules 12(7) and 18(12)(b).

<sup>279</sup> Rules 12(11), 18(12)(b), and 18(13).

<sup>280</sup> Rule 12(15).

<sup>281</sup> Rule 12(14).

<sup>282</sup> *Motor Vehicle Act*, s 91(1).

<sup>283</sup> Rule 13(5).

<sup>284</sup> Rule 13(7).

<sup>285</sup> Rules 13(8) and (9).

<sup>286</sup> *Land Title Act*, RSBC 1996, c 250, ss 197 and 210.

or mortgaging the land unless the debt owed to the Creditor is paid off. Even if the Debtor owns land jointly with another person, it may be useful to register a certificate of judgment against the land. A certificate of judgment is subject to a prior registered mortgage and the rights of a *bona fide* purchaser who, before registration of the certificate of judgement, has acquired an interest in land in good faith and for valuable consideration under an instrument not registered at the time of the registration of the judgment<sup>287</sup>

Once the judgment is registered, the creditor may apply for an order to sell the property, but only through the Supreme Court of BC. It is outside the jurisdiction of the Provincial Court to order a lien to be placed or removed against property. The process of having a Debtor's land sold to pay off a debt owed to a creditor is very complicated, costly and time-consuming. For example, if the land is used by the Debtor as principal residence in the Capital Regional District or the Greater Vancouver Regional District, and the Debtor's equity in the land is less than \$12000 the land is exempt from being taken and sold. If the land is located elsewhere in BC and is used by the Debtor as a principal residence and the Debtor's equity is less than \$9000 the land is exempt from being taken and sold.<sup>288</sup> Because of this complicated process, legal advice should be obtained to determine whether it would be financially worthwhile to apply for an order to sell.

A certificate of judgment can be obtained at the Small Claims Court Registry from the Registrar. The cost is \$30.00. The certificate of judgment can then be registered at the Land Title Office where the land is registered. The cost of filing the certificate of judgment at the Land Title Office is \$25.00. The certificate is effective for two years. After the two years expires, a new certificate of judgment must be obtained and filed again.

## ***H. Bankruptcy***

If a person files a consumer proposal or becomes bankrupt, the law automatically puts in place a "stay of proceedings". With a few exceptions, a stay prevents any legal action from being commenced or continued against bankrupt. The person's trustee will send legal notice of the stay to any person or business currently engaged in legal action against the person declaring bankruptcy. The stay is also sent to the Court that is handling the person's legal action and if a creditor has already obtained a judgment against the person, a copy is sent to debtor's employer as well to stop the garnishee.

The Stay of Proceedings is only effective against debts that are dischargeable (i.e., can be eliminated) by bankruptcy law. Things like child support, spousal support, restitution orders, repayment of debts based on fraud or misrepresentation and some others are not stopped by a stay. A complete list of the debts can be found under s. 178 of the Bankruptcy and Insolvency Act of Canada.

There are ways for creditors to circumvent a Stay of Proceedings. However, clients with a judgment awarded in Small Claims Court are advised to speak with a trustee and discuss the mechanism of submitting a proof of claim. This form must be filled out to share in the dividends and vote at the first meeting of creditors (if one is held). The form contains the name of the creditor and the bankrupt and the nature and amount of the claim, as well as other information. A list of instructions is usually included. You must attach a Statement of Account providing the details of the claim along with supporting documents or other evidence that establishes the validity of your claim.

## ***I. Debt collection***

Part 7 of the *Business Practices and Consumer Protection Act* (BPCPA) deals with debt collection practices and applies to all transactions, including consumer to consumer, business to consumer, and consumer to business. A collector is defined as "any person, whether in British Columbia or not, who is collecting or attempting to collect a debt". Collectors should be aware of the proscriptions in this BPCPA because there are penalties and fines associated with violating the provisions. For example, Part 10 s. 171 of the Act gives rise to a statutory cause of action in Provincial Court to recover

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<sup>287</sup> *Court Order Enforcement Act*, RSBC 1996, c 78, s 86.

<sup>288</sup> *Court Order Enforcement Act*, RSBC 1996, c 78, s 71.1.

damages caused by contraventions of the Act and also gives the Provincial Court jurisdiction for defamation and malicious prosecution.



## ***APPENDIX A: SMALL CLAIMS REGISTRIES***

Metro Vancouver

### **ABBOTSFORD**

32203 South Fraser Way  
Abbotsford, BC V2T 1W6

Telephone: (604) 855-3200  
Fax: (604) 855-3232

### **CHILLIWACK**

46085 Yale Rd  
Chilliwack, BC V2P 2L8

Telephone: (604) 795-8350  
Fax: (604) 795-8345

### **PORT COQUITLAM**

Unit A – 2620 Mary Hill Rd  
Port Coquitlam, BC V3C 3B2

Telephone: (604) 927-2100  
Fax: (604) 927-2222

### **NEW WESTMINSTER**

651 Carnarvon St  
New Westminster, BC V3M 1C9

Telephone: (604) 660-8503  
Fax: (604) 660-1937

### **NORTH VANCOUVER**

200 East 23rd St  
North Vancouver, BC V7L 4R4

Telephone: (604) 981-0200  
Fax: (604) 981-0234

### **RICHMOND**

7577 Elmbridge Way  
Richmond, BC V6X 4J2

Telephone: (604) 660-6900  
Fax: (604) 660-1797

### **SURREY**

14340 57th Ave  
Surrey, BC V3X 1B2

Telephone: (604) 572-2200  
Fax: (604) 572-2280

### **VANCOUVER (ROBSON SQUARE)**

Box 21, 800 Hornby St  
Vancouver, BC V6Z 2C5

Telephone: (604) 660-8989  
Fax: (604) 660-8950

### **VICTORIA**

200 - 850 Burdett Ave  
Victoria, BC V8W 9J2

Telephone: (250) 356-1478  
Fax: (250) 387-3061

Rest of Province

### **ATLIN**

Box 100 Third Street  
Atlin, BC V0W 1A0

Telephone: (250) 651-7595  
Fax: (250) 651-7707

### **BURNS LAKE**

508 Yellowhead Hwy  
PO Box 251  
Burns Lake, BC V0J 1E0

Telephone: (250) 692-7711  
Fax: (250) 692-7150

### **CAMPBELL RIVER**

500 – 13<sup>th</sup> Ave  
Campbell River, BC V9W 6P1

Telephone: (250) 286-7650  
Fax: (250) 286-7512

**CLEARWATER**

Box 1981, RR #1 363 Murtle Cres  
 Clearwater, BC V0E 1N1

Telephone: (250) 674-2113  
 Fax: (250) 674-3092

**COURTENAY**

100 – 420 Cumberland Rd  
 Courtenay, BC V9N 2C4

Telephone: (250) 334-1115  
 Fax: (250) 334-1191

**CRANBROOK**

147 – 102 11<sup>th</sup> Ave S  
 Cranbrook BC V1C 2P3

Telephone: (250) 426-1234  
 Fax: (250) 426-1352

**DAWSON CREEK**

205 – 1201 103 Ave  
 Dawson Creek, BC V1G 4J2

Telephone: (250) 784-2278  
 Fax: (250) 784-2339

**DUNCAN**

238 Government St  
 Duncan, BC V9L 1A5

Telephone: (250) 746-1219  
 Fax: (250) 746-1244

**FORT NELSON**

Bag 1000  
 Fort Nelson, BC V0C 1R0

Telephone: (250) 774-5999  
 Fax: (250) 774-6904

**FORT ST. JOHN**

10600 100 St  
 Fort St. John, BC V1J 4L6

Telephone: (250) 787-3231  
 Fax: (250) 787-3518

**GOLDEN**

837 Park Dr  
 Box 1500  
 Golden, BC V0A 1H0

Telephone: (250) 344-7581  
 Fax: (250) 344-7715

**KAMLOOPS**

223 – 455 Columbia St  
 Kamloops, BC V2C 6K4

Telephone: (250) 828-4344  
 Fax: (250) 828-4332

**KELOWNA**

1 – 1355 Water St  
 Kelowna, BC V1Y 9R3

Telephone: (250) 470-6900  
 Fax: (250) 470-6939

**MACKENZIE**

64 Centennial Dr  
 Mackenzie, BC V0J 2C0

Telephone: (250) 997-3377  
 Fax: (250) 997-5617

**MASSET**

1066 Orr St  
 Box 230  
 Masset, BC V0T 1M0

Telephone: (250) 626-5512  
 Fax: (250) 626-5491

**NAKUSP**

415 Broadway St  
 Box 328  
 Nakusp, BC V0G 1R0

Telephone: (250) 265-4253  
 Fax: (250) 265-4413

**NANAIMO**

35 Front St  
Nanaimo, BC V9R 5J1

Telephone: (250) 741-3805  
Fax: (250) 741-3809

**NELSON**

320 Ward St  
Nelson, BC V1L 1S6

Telephone: (250) 354-6165  
Fax: (250) 354-6539

**PENTICTON**

100 Main St  
Penticton, BC V2A 5A5

Telephone: (250) 492-1231  
Fax: (250) 492-1378

**PORT ALBERNI**

2999 4<sup>th</sup> Ave  
Port Alberni, BC V9Y 8A5

Telephone: (250) 720-2424  
Fax: (250) 720-2426

**PORT HARDY**

9300 Trustee Rd  
Box 279  
Port Hardy, BC V0N 2P0

Telephone: (250) 949-6122  
Fax: (250) 949-9283

**POWELL RIVER**

103 – 6953 Alberni St  
Powell River, BC V8A 2B8

Telephone: (604) 485-3630  
Fax: (604) 485-3637

**PRINCE GEORGE**

250 George St  
Prince George, BC V2L 5S2

Telephone: (250) 614-2700  
Fax: (250) 614-2717

**PRINCE RUPERT**

100 Market Pl  
Prince Rupert, BC V8J 1B8

Telephone: (250) 624-7525  
Fax: (250) 624-7538

**QUESNEL**

350 Barlow Ave  
Quesnel, BC V2J 2C2

Telephone: (250) 992-4256  
Fax: (250) 992-4171

**ROSSLAND**

2288 Columbia Ave  
Box 639  
Rossland, BC V0G 1Y0

Telephone: (250) 362-7368  
Fax: (250) 362-9632

**SALMON ARM**

550 – 2<sup>nd</sup> Ave NE  
PO Box 100 Stn Main  
Salmon Arm, BC V1E 4S4

Telephone: (250) 832-1610  
Fax: (250) 832-1749

**SECHELT**

5480 Shorncliffe Ave  
PO Box 160  
Sechelt, BC V0N 3A0

Telephone: (604) 740-8929  
Fax: (604) 740 8924

**SMITHERS**

3793 Alfred St  
#40 Bag 5000  
Smithers, BC V0J 2N0

Telephone: (250) 847-7376  
Fax: (250) 847-7710

**TERRACE**

3408 Kalum St  
Terrace, BC V8G 2N6

Telephone: (250) 638-2111  
Fax: (250) 638-2123

**VALEMOUNT**

1300 4<sup>th</sup> Ave  
PO Box 125  
Valemount, BC V0E 2Z0

Telephone: (250) 566-4652  
Fax: (250) 566-9732

**VERNON**

3001 27<sup>th</sup> St  
Vernon, BC V1T 4W5

Telephone: (250) 549-5422  
Fax: (250) 549-5621

**WESTERN COMMUNITIES**

1756 Island Hwy  
PO Box 9269  
Victoria, BC V8W 9J5

Telephone: (250) 391-2888  
Fax: (250) 391-2877

**WILLIAMS LAKE**

540 Borland St  
Williams Lake, BC V2G 1R8

Telephone: (250) 398-4301  
Fax: (250) 398-4459

## ***APPENDIX B: SAMPLE DEMAND LETTER***

Law Students' Legal Advice Program  
Room 158, Faculty of Law  
University of British Columbia  
Vancouver, BCV6T 1Z1

18 June 2007

WITHOUT PREJUDICE

Mr. Wilfred Laurier  
321 Confederation Drive  
Vancouver, BCV1K 5L2

Attention : Mr. Laurier

Dear Sir:

Re: Contract with Macdonald Painting & Restoration. Dated January 5, 2000 and amended by way of an oral contract.

Mr. John A. Macdonald has consulted us with respect to his difficulties arising out of the work he did for you at 321 Confederation Drive.

On January 5, 2000 you signed a detailed Contract outlining the work that was to be completed for \$6000.00. In addition, in August 2000 you asked Mr. Macdonald to repair some damage that a moving company had created and to pressure wash the house. At that time Mr. Macdonald informed you that this additional work would cost \$1400.00.

On or about January 5, 2000 you issued Mr. Macdonald a \$2500 cheque as a deposit for the work to be completed on the home and garage at 321 Confederation Drive. Mr. Macdonald advised me there were problems with the work that was done. He corrected the problems you listed and on March 10, 2000 he notified you that there was \$4900.00 due. This amount has not yet been paid.

Please note that, Mr. Macdonald is considering starting a legal action in the Small Claims Division of the Provincial Court for debt. Such action could result in a judgment in the amount of \$4900.00 plus all disbursements, costs, and interest.

Mr. Macdonald does not want to litigate and will forgo further action upon receipt of \$4,900 in the form of a certified cheque or money order made payable to Mr. Macdonald but mailed to the Law Students' Legal Advice Program at Room 158, Faculty of Law, University of British Columbia, Vancouver, British Columbia, V6T 1Z1. Non-payment within 14 days of the receipt of this letter will result in the commencement of action without further notice. Correspondence should be directed to my attention at our offices. If you have any questions or comments do not hesitate to call.

Yours truly,

Robert Borden  
Law Student  
Cc: Mr. John A. Macdonald

# APPENDIX C: SAMPLE NOTICE OF CLAIM

## NOTICE OF CLAIM

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

REGISTRY FILE NUMBER
REGISTRY LOCATION Richmond

### FROM:

Fill in the name, address and telephone number of the person(s) or business(es) making the claim.

NAME	John A Macdonald			CLAIMANT(S)
ADDRESS	123 Parliament Way			
CITY, TOWN, MUNICIPALITY	Richmond	British Columbia	V6K1H6	TEL # (604) 555-5785
		PROV.	POSTAL CODE	

### TO:

Fill in the name, address and telephone number of the person(s) or business(es) the claim is against.

NAME	Wilfred Laurier			DEFENDANT(S)
ADDRESS	321 Confederation Drive			
CITY, TOWN, MUNICIPALITY	Richmond	British Columbia	V1K 5L2	TEL # (604) 967-1111
		PROV.	POSTAL CODE	

### WHAT

#### HAPPENED?

Tell what led to the claim.

The Claimant claims against the Defendant in breach of contract. The particulars of the claim are as follows:

On January 5, 2013 Mr. Laurier hired Mr. Macdonald to paint his home. Mr. Laurier signed a detailed Contract outlining the work that was to be completed for \$6000.00. In addition, in August 2013 Mr. Laurier asked Mr. Macdonald to repair some damage that a moving company had created and to pressure wash the house. At that time Mr. Macdonald informed Mr. Laurier that this additional work would cost \$1400.00.

On or about January 5, 2013 Mr. Laurier issued Mr. Macdonald a \$2500 cheque as a deposit for the work to be completed on the home and garage at 321 Confederation Drive.

On January 12, 2013 Mr. Laurier informed Mr. Macdonald that the paint was cracking in certain areas. Mr. Macdonald corrected this problem and on March 10, 2013 he notified you that there was \$4900.00 due. This amount has not yet been paid.

If you need more space to describe what happened, attach another page, mark it "Page 2 of the Notice of Claim" and check this box. A copy of the attached page must accompany each copy of the Notice of Claim

### WHERE?

Tell where this happened.

CITY, TOWN, MUNICIPALITY	Richmond	British Columbia	WHEN?	12 January, 2013
		PROV.	Tell when this happened.	

### HOW

#### MUCH?

Tell what is being claimed from the defendant(s). If the claim is made up of several parts, separate them here and show the amount for each part. Add these amounts and fill in the total claimed.

a	Amount owing under original contract minus deposit		
b	Amount owing for second, oral contract for additional work	\$	3500.00
c	Daily interest from the date of filing of judgement - registry will calculate	\$	1400.00
d		\$	
e		\$	
		\$	
<b>TOTAL</b>			<b>\$4900.00</b>

#### TIME LIMIT FOR A DEFENDANT TO REPLY

The defendant must complete and file the attached reply within 14 days from being served with this notice, unless the defendant settles this claim directly with the claimant. If the defendant does not reply, a court order may be made against the defendant without any further notice to the defendant. Then the defendant will have to pay the amount claimed plus interest and further expenses.

The Court Address for filing documents is:  
6931 Granville Ave  
Richmond, BC  
V7C 4M9

+ FILING FEES	
+ SERVICE FEES	
<b>= TOTAL CLAIMED</b>	<b>\$</b>
<input checked="" type="checkbox"/> DEBT	
<input type="checkbox"/> OTHER THAN DEBT	

NOTICE OF CLAIM

court copy

court copy

**a) Claims in Debt**

Claims in debt are quantified. Usually, the parties can agree on the amount owing.

**SAMPLE:** The claimant's claim is for a debt in the amount owing to the claimant on account for (or, for the price of) goods sold and delivered (or services rendered) by the claimant to the defendant at their request. The goods sold (or services rendered) were: (description of goods or services) and were delivered (or rendered) on or about the 29th day of July 2007 at 3875 Point Grey Road in the City of Vancouver, BC. The claimant has demanded payment of this sum by the defendant but the defendant has refused or neglected to pay.

If the defendant has partially paid the original amount owing, this should be detailed in the Notice of Claim.

**b) Claims for Damages**

Damages are a claim for a loss where the parties do not agree on an amount owed. These claims often refer to breach of contract, misrepresentation, or negligence.

**SAMPLE:** The claimant's claim is against the defendant(s) (and each of them jointly and severally) for the sum of \$3,000 for damages to the claimant's house resulting from a roof installed on or about the 10th day of June, 2007, at (or near) 2120 West 2nd Avenue in the City of Vancouver, British Columbia, due to the roof being negligently installed by the defendant... causing damages of the above amount. The defendant's said negligence consisted of... (e.g. improper installation or materials).

**SAMPLE:** The claimant had a contract with the defendants to paint the claimant's house for \$3,000. The defendants never painted the house. The claimant had to pay XYZ Painters \$3,950 to paint the house. This happened in Coquitlam, British Columbia, in May of 2007.

In a claim for damages, the claimant may not know what the amount should be. In such cases, the claimant should claim a figure that he or she would accept in settlement, or if doubtful of the amount, \$25,000 should be claimed and the court will determine the appropriate amount of damages. Furthermore, Small Claims court can award aggravated and punitive damages. Aggravated damages are considered compensatory and may be awarded even if not plead specifically; see *Epstein v Cressey Development Corp.* [1992] 2 WWR 566 (BCCA). Punitive damages are not compensatory and must be plead specifically; see *Gillespie v Gill Et. Al.* [1999] B.C.P.C. No. 2021. For a discussion of aggravated damages see *Kooner v Kooner* [1989] B.C.S.C. No.62. For a discussion of aggravated and punitive damages, see *Siebert v J & M. Motors Ltd.* [1996] B.C.J. No.876.

**c) Other Remedies**

The Notice of Claim is designed for claims in debt and for damages, but other claims are available, such as specific performance of a contract, *quantum meruit* or return (recovery) of an item.

**SAMPLE:** The claim is against the defendant for the return of their lawn mower, which was borrowed by the defendant who refused to return it. This happened in Surrey, British Columbia, in July of 2007.

In cases such as this, ignore the dollar amount for the "How Much" section. Indicate instead what the claimant seeks, e.g. "The claimant asks for an order that her lawn mower be returned to her". The client should consider the possible condition of the goods when deciding whether or not to ask for damages instead.

## ***APPENDIX D: GLOSSARY***

### **AMENDMENT**

Modification of submitted materials. Amendments can consist of additions, deletions, and corrections.

### **ADJOURNMENT**

In court settings, postponement of an appearance date until a later, fixed, date.

### **BALANCE OF PROBABILITIES**

The civil standard of proof. To prove a civil case, it need only be established that the case is more probable than the other.

### **BEYOND A REASONABLE DOUBT**

The criminal standard of proof. Explained concisely in widely-cited case *R v W.(D.)*, [1991] 1 SCR 742, which is discussed in Chapter 1: Criminal Law.

### **CAUSE OF ACTION**

Legal cause for which an action may be brought. The legal theory giving basis to a lawsuit.

### **CIVIL LAW**

The system of law concerned with relations between individual parties, rather than criminal affairs.

### **COMMON LAW**

Law derived from custom and judicial decisions rather than statutes.

### **COMPLETE DEFENCE**

An argument, which, if proven, will effectively end the litigation in favour of the defendant.

### **CONTINGENCY**

In legal circles, is commonly used to refer to a *contingent fee*, which is a fee for legal services provided only if the legal action is settled favorably or out of court.

### **CONTRIBUTORY NEGLIGENCE**

Negligent behavior of the plaintiff that contributes to the harm resulting from the defendant's negligence.

### **COUNTERCLAIM/COUNTERCLAIMANT**

A claim by a defendant seeking relief from the plaintiff. Generally made as a response to the same facts that make up the issue the plaintiff originally claimed for.

### **CROWN**

Generally a reference to the government or state acting as a party in legal proceedings.

### **DEBTOR**

A person judged to owe money after the resolution of a civil case.

### **DEDUCTIBLE**

In an insurance policy, the amount that must be paid out-of-pocket before an insurance will pay any expenses. Generally, a clause used by insurance companies as a threshold for policy payments.

### **DEFAULT**



Often used in legal contexts as a verb meaning to fail to fulfill an obligation, generally referring to failure to pay a loan or make a court appearance.

### **DISBURSEMENT**

Expenses paid for goods and services that may be currently tax-deductible. Commonly used in the context of business expenses.

### **DISGORGEMENT**

Stolen money that must be repaid to victims of theft, fraud, or other financial crime.

### **DISMISS**

1. The discharge of an individual or corporation from employment.
2. Judgment in a civil or criminal proceeding denying the relief sought by the action.

### **EQUITY**

Can mean different things in different contexts. The most common definitions for equity include:

1. The broad concept of fairness
2. An alternative legal system that originated in the English courts as a response to the common-law system

### **ESTATE**

The degree, quantity, or nature of interest that a person has in real or personal property.

### **EX PARTE**

In the interests of one side only or an interested outside party.

### **EXECUTOR/EXECUTRIX**

A person specifically appointed by a will to carry out its wishes. Some of the administrative responsibilities typically added to executor's duties include:

- Gathering up and protecting the assets of the estate;
- Locating beneficiaries named in the will and/or potential heirs;
- Collecting and arranging for payments of debts to the estate;
- Approving or disapproving creditors' claims;
- Making sure estate taxes are calculated.

### **EXTRAPROVINCIAL CORPORATION**

A corporate body which is not incorporated in the province where action has been started.

### **GARNISHEE**

A third party ordered to surrender money or property lost by a defendant. The third party must possess the money or property but the defendant must own it.

### **HEARSAY**

A statement made out of court that is offered in court as evidence to prove the truth of the matter asserted. Hearsay evidence is generally inadmissible but there are many exceptions to the hearsay rule.

### **IN FORCE**

Commonly refers to when a law becomes legally applicable.

### **INDEMNIFY**

Contract with a third party to perform another's obligations if called upon to do so by the third party, whether the other has defaulted or not.

**INDIGENT**

Used in legal contexts to identify a person with no reasonable ability to pay; often used to identify those deserving of legal aid or waived filing fees.

**INJUNCTION (MANDATORY, PROHIBITORY, MAREVA, ANTON PILLER)**

A court order requiring an individual to either perform or not perform a particular act.

**JUDGMENT PROOF**

Commonly used to refer to defendants or potential defendants who are financially insolvent.

**JUDICIAL REVIEW**

A process where a court of law is asked to rule on the appropriateness of a decision of an administrative agency, tribunal, or legislative body.

**LEAVE**

Commonly used in the context of *leave of the court*. Generally refers to permission to perform an action or make a statement.

**LITIGANT**

Any party involved in a lawsuit.

**MALICIOUS PROSECUTION**

A cause of action relating to a civil suit or criminal proceeding that has been unsuccessfully committed without probable cause and for a purpose other than bringing the alleged wrongdoer to justice.

**MISNOMER**

An inaccurate use of a word or term.

**PARTNERSHIP**

An association of two or more persons engaged in a business enterprise in which the profits and losses are shared proportionally.

**PRIMA FACIE**

Based on first glance; presumed as true until proven otherwise.

**PROPRIETORSHIP**

An unincorporated business owned by a single person who is responsible for its liabilities and entitled to its profits.

**QUANTUM MERUIT**

Latin for “what one has earned.” The amount to be paid for services where no agreement exists.

**QUANTUM VALEBAT**

Latin for “what it was worth.” When goods are sold without a price specified, the law generally implies that the seller will pay the buyer what they were worth.

**REGULATION**

A law on some point of detail, supported by an enabling statute, and issued not by a legislative body but by an executive branch of government.

**RELIEF**

A legal remedy – the enforcement of a right, imposition of a penalty, or some other kind of court order – that will be granted by courts in response to a specific action.

### **ROYAL ASSENT**

In Canada, where the Lieutenant Governor signs a bill to bring it into law. New legislation can exist as a bill but not as binding law if it has not received Royal Assent.

### **SET-OFF**

A claim by a defendant in a lawsuit that the plaintiff owes the defendant money which should be subtracted from the amount of damages claimed.

### **SPECIFIC PERFORMANCE**

A legal remedy that compels a party to complete their specific duty in a contract rather than compensate the claimant with damages. Often used when a unique remedy is at issue.

### **STAND DOWN**

In court, when a matter is postponed for a short period of the time. Differs from adjournment in being less formal; to stand a matter down is usually to postpone it for a short, indefinite period, while adjournments are often for longer fixed periods.

### **STATUTE**

A written law passed by a legislative body.

### **STAY OF PROCEEDINGS**

Stoppage of an entire case or a specific proceeding within a case.

### **SUBROGATE**

To substitute one party for another in a legal proceeding. The facts of each case determine whether or not subrogation is applicable.

### **SUBSTITUTIONAL SERVICE**

Under court authorization, serving an alternate person when the original named party cannot be reached.

### **TORT**

A private, civil action stemming from an injury or other wrongful act that causes damage to person or property.

### **UBERRIMAE FIDEI**

Utmost good faith; commonly used as the standard for dealing in insurance contracts.

### **WITHOUT PREJUDICE**

A reservation made on a statement that it cannot be used against in future dealings or litigation.

## ***APPENDIX E: LEGISLATION AND RESOURCES***

### 1. LEGISLATION:

#### Corporations

*Business Corporations Act*, S.BC2002, c 57. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/02057\\_00](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/02057_00)

*Canada Business Corporations Act*, RSC 1985, c C-44. Website:  
<http://laws-lois.justice.gc.ca/eng/acts/c-44/>

#### Consumer Protection

*Business Practices and Consumer Protection Act*, S BC2004, c 2. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/04002\\_00](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/04002_00)

#### Judgments

*Court Order Enforcement Act*, RSBC 1996, c 78. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96078\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96078_01)

*Court Order Interest Act*, RSBC 1996, c 79. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96079\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96079_01)

*The Enforcement of Canadian Judgments and Decrees Act*, SBC 2003, c 29. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_03029\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_03029_01)

#### Court Rules

*Small Claims Act*, RSBC 1996, c 430. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96430\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96430_01)

*Supreme Court Act*, RSBC 1996, c 443. Website:  
[http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96443\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96443_01)

*Court of Appeal Act*, RSBC 1996, c 77. Website:  
[http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96077\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96077_01)

*Court Rules Act*, RSBC 1996, c 80. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96080\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96080_01)

*Small Claims Rules*, BC Reg 261/93. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/261\\_93\\_00b](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/261_93_00b)

*Supreme Court Rules*, BC Reg 221/90. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/168\\_2009\\_00](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/168_2009_00)

Court of Appeal Rules

#### Other Important Statutes

*Crown Proceeding Act*, RSBC 1996, c 89. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96089\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96089_01)

*Employment Standards Act*, RSBC 1996, c 113. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96113\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96113_01)

*Evidence Act*, RSBC 1996, c 124. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96124\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96124_01)

*Insurance (Vehicle) Act*, RSBC 1996, c 231. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96231\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96231_01)

(Old) *Limitation Act*, RSBC 1996m c 266. Website:  
[http://www.ag.gov.bc.ca/legislation/limitation-act/pdf/LimitationAct\\_REPEALED.pdf](http://www.ag.gov.bc.ca/legislation/limitation-act/pdf/LimitationAct_REPEALED.pdf)

(New) *Limitation Act*, SBC 2012, c 13. Website:  
[http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_12013\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_12013_01)

*Local Government Act*, RSBC 1996, c 323. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/96323\\_00](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96323_00)

*Motor Vehicle Act*, RSBC 1996, c 318. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/96318\\_00](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96318_00)

*Personal Property Security Act*, RSBC 1996, c 359. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96359\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96359_01)

*Residential Tenancy Act*, SBC 2002, c 78. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_02078\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_02078_01)

*Sale of Goods Act*, RSBC 1996, c 410. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96410\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96410_01)

*Strata Property Act*, SBC 1998, c 43. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/98043\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/98043_01)

*Law and Equity Act*, R.SBC 1996, c 253. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96253\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96253_01)

*Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28. Website:  
[www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_03028\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_03028_01)

## 2. BOOKS:

Bullen, Leake, Jacob, and Goldrein. *Bullen and Leake and Jacob's Precedents of Pleadings*, 15th ed. (London: Sweet and Maxwell, 2004).

Burdett, E. (Ed.). *Small Claims Act and Rules—Annotated*. (Vancouver, B.C.: The Continuing Legal Education Society of British Columbia, July 1997).

Celap, M. and Larmondin, P.J. *Small Claims Court for the Everyday Canadian*. (North Vancouver, B.C.: Self-Counsel Press, 2000).

Fraser, Horn and Griffen. *The Conduct of Civil Litigation in British Columbia*. 2<sup>nd</sup> ed. (Markham: Butterworths, 2007).

Keating, M. *Small Claims Court Guide for British Columbia*. (North Vancouver, B.C.: Self-Counsel Press, 1992).

Martinson, D.J. (Manual Coordinator). *Small Claims Court—1994*. (Vancouver, B.C.: The Continuing Society of British Columbia, April 1994).

Mauet, Casswell, and MacDonald. *Fundamentals of Trial Techniques 2d Canadian ed.* (Toronto: Little Brown, 1995).

McLachlin and Taylor, *British Columbia Court Forms.* (Markham, Ont.: LexisNexis Canada, 2005).

Moore Publishing. (Ed.) *Small Claims Practice Manual*, 3rd Ed. (Richmond, B.C.: Moore Publishing Ltd, 1999).

UBC Law Review Society. (Eds.) *Table of Statutory Limitations for the Province of British Columbia, Revised and Consolidated.* (Vancouver, B.C.: University of British Columbia Law Review Publication, 2006).

Vogt, J. (Ed.). *Provincial Court Small Claims Handbook.* (Vancouver, B.C.: The Continuing Legal Education Society of British Columbia, January 1997).

Wineberg, H.S. *The Annotated British Columbia Limitation Act.* (Vancouver, B.C.: Carswell, 1995).

### 3. WEBSITES:

#### **Provincial Court Judgment Database**

Website: [www.provincialcourt.bc.ca/judgmentdatabase/index.html](http://www.provincialcourt.bc.ca/judgmentdatabase/index.html)

- \* Contains selected decisions from 1999 to the present.

#### **Provincial Courthouses Directory**

Website: <http://www.smallclaimsbc.ca/court-locations/other>

- \* Contains Small Claims Court locations

#### **British Columbia Court of Appeal and Supreme Court Judgment Database**

Website: [www.courts.gov.bc.ca/search\\_judgments.aspx](http://www.courts.gov.bc.ca/search_judgments.aspx)

#### **Small Claims Court**

Website: [http://www.ag.gov.bc.ca/courts/small\\_claims/info/what\\_is.htm](http://www.ag.gov.bc.ca/courts/small_claims/info/what_is.htm)

- \* Provides information on court procedure and the full text of the Small Claims Rules.

#### **Small Claims Fees**

Website:

[http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/261\\_93\\_05b](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/261_93_05b)

#### **Small Claims Forms**

Website: [http://www.ag.gov.bc.ca/courts/small\\_claims/info/forms.htm](http://www.ag.gov.bc.ca/courts/small_claims/info/forms.htm)

#### **Small Claims Pilot Project**

Website: [http://www.ag.gov.bc.ca/courts/small\\_claims/info/pilot.htm](http://www.ag.gov.bc.ca/courts/small_claims/info/pilot.htm)

#### **CanLII.org**

- \* Caselaw and legislation database.

#### 4. OTHER RESOURCES:

- **UBC Law Library**

Most of the books listed above are available in the Law Library. The *Small Claims Acts and Rules Annotated* and the *Provincial Court Small Claims Handbook*, published by the Continuing Legal Education Society (CLE), are recent publications written by Small Claims Court judges. They include the Act, Rules, and copies of all of the forms. Students can access an online edition of the *Provincial Court Small Claims Handbook* on the UBC Law Library website: [www.library.ubc.ca/law](http://www.library.ubc.ca/law).

- **Court Registry**

The Small Claims Court registry staff does not give legal advice, but they are experienced with the rules and procedures and are helpful. See **Appendix A: Small Claims Registries**.

- **DIAL-A-LAW**

DIAL-A-LAW ((604) 687-4680) is a library of pre-recorded messages on a variety of legal topics available by telephone 24 hours a day, seven days a week. Lawyers under the supervision of the Canadian Bar Association, BC Branch, prepare the tapes. Several tapes deal with Small Claims Court. The content of the tapes is also available online: [www.cba.org/BC/Public\\_Media/dal](http://www.cba.org/BC/Public_Media/dal)

- **BCSupreme Court Self-Help Information Centre**

274 – 800 Hornby Street  
Vancouver, BC V6Z 2C5  
Website: [www.supremecourtselfhelp.bc.ca](http://www.supremecourtselfhelp.bc.ca)

- **Company Search:**

To search for a **provincially** regulated company, the client may request a company or society search in person:

**Surrey Board of Trade**

101 – 14439 104<sup>th</sup> Ave  
Surrey, BC V3R 1M1

Telephone: (604) 581-7130  
Toll-free: 1-866-848-7130

**Small Business B.C.**

82 - 601 West Cordova St  
Vancouver, BC V6B 1G1

Telephone: (604) 775-5525  
Toll-free in B.C.: 1-800-667-2272

**Registrar of Companies**

940 Blanshard Street  
Victoria, BC V8W 2H3

Telephone: (250) 387-5101  
Telephone (Vancouver):  
(604) 660-2421  
Toll-free in B.C.: 1-800-663-7867

The client may also write to:

## **Registrar of Companies**

P.O. Box 9431  
Station Provincial  
Government  
Victoria, BC V8W 9V3

For more information about searching for provincial companies, refer to:

- <http://www.smallbusinessbc.ca/products-and-services/registration-services/corporate-search-service><http://www.bcregistryservices.gov.bc.ca/>
- [www.bconline.gov.bc.ca](http://www.bconline.gov.bc.ca) (the online search feature is not currently available to individuals however).

Partnerships and non-profit societies are also registered in the company directory and would show up in a search. In cases that involve franchises, it is important to do a company search to see how the other party is registered; it may be possible to sue the parent company and the individual who owns the franchise rights. The search costs \$10 and cheques should be made payable to the Minister of Finance.

### **If Unincorporated:**

#### **City of Vancouver Licence Office**

2<sup>nd</sup> Floor, East Wing, City Hall  
453 W 12<sup>th</sup> Ave, Vancouver, B.C.,  
Telephone: (604) 873-7568  
Website: [www.vancouver.ca/commsvcs/licandinsp/index.htm](http://www.vancouver.ca/commsvcs/licandinsp/index.htm)

To search for a **federally** regulated company, refer to:

#### **Industry Canada**

C.D. Howe Building  
235 Queen Street  
Ottawa, Ontario K1A 0H5  
Website: [www.ic.gc.ca](http://www.ic.gc.ca)

A collection of useful company directories can be found on the Industry Canada website under the "Programs and Services" heading. Federal corporations can be searched free of charge online.

**NOTE:** If the defendant is a business, it may be worth checking if that defendant has declared bankruptcy. To do so contact Industry Canada's Head Office of the Superintendent of Bankruptcy at (613) 941-2863 for free.

- **Translation and Support Services**

To find support services and resources, including agencies and people that can provide translation services, please visit:

#### **MOSAIC**

Vancouver, BC  
Tel: (604) 254-9626  
Fax: (604) 254-3932  
[www.mosaicbc.com](http://www.mosaicbc.com)

#### **Society of Translators and Interpreters of B.C.**



Tel: (604) 684-2940  
Fax: (604) 684-2947  
[www.stibc.org](http://www.stibc.org)

**MultiLingoLegal.ca**

**DIVERSEcity**

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Fax: (604) 597-4299  
<http://www.dcrs.ca/?section=home&page=home>

**WelcomeBC**

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<http://www.welcomebc.ca/home.aspx>

**OPTIONS**

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**S.U.C.C.E.S.S.**

Tel: (604) 684-1628  
Fax: (604) 408-7326  
<http://www.successbc.ca/>

**Westcoast Association of Visual Language  
Interpreters**

<http://www.wavli.com/>

**Citizenship and Immigration Canada**

Tel: 1-888-242-2100  
<http://www.cic.gc.ca/english/index-can.asp>

**Affiliation of Multicultural Societies and  
Service Agencies of B.C.**

Tel: (604) 718-2780 or  
1-888-355-5560  
Fax: (604) 298-0747  
<http://www.amssa.org/>

**Safe Harbour**

<http://www.amssa.org/programs/diversity/safe-harbour/>

**Immigrant Services Society of B.C.**

Tel: (604) 684-2561

## **LIMITATION PERIODS**

A claim is governed by the (old) *Limitation Act*, RSBC 1996, c 266 [*Old Limitation Act*] if discovery occurred before June 1, 2013 (30(3)). The definition of discovery is given in the (new) *Limitation Act* and may be found in the corresponding section of this Appendix. Under the (old) *Limitation Act*, the limitation period depends on the type of claim and who the other party is. A claim may consist of several causes of action and each cause of action may have a separate/different limitation period.

The (new) *Limitation Act*, SBC 2012, c 13 [*Limitation Act*] came into effect on June 1, 2013. A claim is governed by this Act if the claim was discovered after this date, unless the facts underlying the claim arose before the effective date and the limitation period under the old *Limitation Act*, RSBC 1996, c 266 [*Old Limitation Act*] has expired<sup>289</sup>.

The Notice of Claim must be **filed** before the limitation period expires. If a notice of claim has not been **served** within 12 months after it was filed, it expires, but the claimant may apply to have it renewed (*Small Claims Rules*, Rule 16 (3)).

### **1. Old Limitation Act:**

Generally, time limitations begin to run from the date of the breach (when all of the elements of the cause of action came into existence). This Act does NOT apply to actions listed under s 3(4), including actions for sexual assault or misconduct. Time limits for the more common causes of action are:

- Default limitation period: 6 years (s 3(5));
- Breach of contract: 6 years (insurance: one year); generally notice period required (note: see bullet point immediately below);
- Damages for the injury of person or property (including economic loss arising from the injury), **whether based on contract, tort, or statutory duty**: 2 years (*Limitation Act*, s 3(2)(a));
- Debt: six years (from the date of the last acknowledgment of the debt, with some exceptions);
- Enforcement of local judgement for money or return of property: 10 years (s 3(3)(f));
- Ultimate limitation period: 30 years after all elements of a given cause of action are complete (after all damages have occurred). Applies to all claims falling under the (old) *Limitation Act* except for exceptions under s 8(1);
- Special ultimate limitation period for hospitals, hospital employees and doctors: 6 years (s 8(1)).

In most cases, the action lapses when the time limit expires. In some circumstances, s 6 of the *Limitation Act* allows for the running of the basic limitation period, but NOT the ultimate limitation date, to be postponed. Notably, this is the case for actions for personal injury, damage to property, professional negligence, and any action based on fraud or deceit. In these circumstances the running of time does not begin until such time as the identity of the defendant is known to the plaintiff, and a reasonable person, making normal and appropriate inquiries would have discovered a cause of action to exist<sup>290</sup>. The limitation period is renewed (up to the 30 year ultimate limitation period) if the cause of action is confirmed (s 5) by the defendant's acknowledgement or part payment of the amount claimed before the original limitation period expires.

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<sup>289</sup> *Limitation Act*, SBC 2012, c 13: s 30(3-4) [*Limitation Act*].

<sup>290</sup> See *Shah v Governor and Co of Adventurers of England Trading into Hudson's Bay Co (cob Hudson's Bay Co)* [2008] BCJ No 479, 2008 BCCA 114.

**NOTE:** Where an action has already been commenced, the court has the discretion to allow a third party to be added even if the limitation period for a claim against that third party has expired. See *Teal Cedar Products (1977) Ltd. v Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A.) and *Wadsworth v Macleod* (2004), B.C.S.C., 1824 for a discussion. The court will consider factors such as: the extent of the delay, the reason for the delay, any explanation put forward to account for the delay, the degree of prejudice caused by the delay, and the extent of the connection, if any, between the claims and the proposed new cause of action.

## **2. New Limitation Act:**

Under the new *Limitation Act*, the basic limitation period for most causes of action is 2 years from the date of **discovery** of the claim. Discovery is defined as the day on which the claimant knew or reasonably ought to have known all of the following:

- e) That injury, loss or damage had occurred;
- f) That the injury, loss or damage was caused by or contributed to by an act or omission;
- g) That the act or omission was that of the person against whom the claim is or may be made;
- h) That, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage<sup>291</sup>.

Other limitations include:

- Enforcement of civil judgements (s 7): 10 years from date of judgement;
- Debts owed to government (s 38): 6 years;
- Maximum limitation period: 15 years after the original act or omission giving rise to the claim occurs. Applies to all claims falling under the (new) *Limitation Act*.

Under the (new) *Limitation Act*, the running of both the basic and ultimate limitation periods may be delayed for minors (s 18), persons while under disability (ss 19, 25), and for fraud or wilful concealment of facts on the part of the defendant (ss 12, 21(3)). Both the basic 2 year limitation period and the 15 year ultimate limitation period are renewed if the defendant gives written and signed acknowledgement of liability (s 24). A counterclaim may be brought even though the limitation period has expired if the counterclaim relates to the claim to which it responds and that claim is within its applicable limitation periods (S 22). The Act generally does not apply to sexual assault claims, child or spousal support claims, or fines under the *Offence Act* (s 3). The Act also does not apply to limitation periods established under other legislation.

## **3. Other Legislation:**

Certain Acts will overrule the *Limitation Act*. The *Vancouver Charter*, S.BC1953, c 55; the *Police Act*, R.S.BC1996, c 367; and the *RCMP Act*, RS 1985, c. R-10, all have their own limitation periods and notice provisions, and must therefore be consulted before bringing an action against a party covered by one of these statutes. For limitation dates pertaining to employment, human rights complaints or residential/tenancy disputes, see the corresponding chapters of this manual.

The *Local Government Act*, RSBC 1996, c 323, sets a limitation date for claims against a municipality in BC (s 285) of 6 months after the cause of action arose. Notice of damages must be delivered to the municipality within 2 months from the date on which the damage was sustained unless the damage resulted in death, the claimant has a reasonable excuse, or the municipality is not unfairly prejudiced by the lack of notice (s 286(1-3)).

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<sup>291</sup> *Limitation Act*, s 8.

	<b><i>Old Limitation Act:</i></b>	<b><i>New Limitation Act:</i></b>
<b>Application:</b>	Applies if discovery occurred before June 1, 2013	Applies if discovery occurred after June 1, 2013
<b>Basic Limitation Period:</b>	6 years after events occurred*	2 years after discovery**
<b>Damages to Personal Injury or Property:</b>	2 years after events occurred	2 years after discovery
<b>Debts owed to government:</b>	6 years after events occurred	6 years, including ICBC claims for vehicle indebtedness, student loans and medical fees
<b>Counterclaims:</b>	Not barred by expiry of limitation period if counterclaim connected to the claim to which it responds and the limitation period for that claim has not expired.	Not barred by expiry of limitation period if counterclaim connected to the claim to which it responds and the limitation period for that claim has not expired.
<b>Ultimate Limitation Period:</b>	30 years after all damages occurred 6 years for negligence/malpractice actions against medical practitioners & hospitals	15 years after original events occurred
<b>Enforcement of Judgements:</b>	10 years after judgement	10 years after judgement

\* See *Limitation Act*, RSBC 1996 c 266 for exceptions

\*\* See *Limitation Act*, SBC 2012 c 13 for exceptions

## ***APPENDIX G: CAUSES OF ACTION***

### **Causes of Action**

The cause of action is the claimant's reason for bringing a suit against the defendant. While there must always be a cause of action, in Small Claims it is generally sufficient to cite the facts; Small Claims judges will take a liberal view of pleadings and allow litigants to assert claims in non-legalistic language. However, the judge must still be able to find a cause of action in the facts the claimant alleges. Potential claimants should therefore review the following, non-exhaustive list of causes of action to determine if they have a valid claim. Claimants may claim for more than one cause of action on a notice of claim and are advised to do so if they believe more than one cause of action applies or are not sure which one is valid; it is easier to name superfluous causes of action on the notice of claim than to get the claim amended after filing it. The following causes of action may be brought in Small Claims unless the amount claimed is over \$25 000 or it states otherwise in the list. They are organized into 3 categories: 1) common; 2) rare; 3) see a lawyer

### Defences

For each cause of action there are usually a number of possible defences. Both Claimants and Defendants should be aware of the defences. Below are defences to some of the more common causes of action

#### 1) Common causes of action

- **Breach of Contract** – Contract law governs voluntary relationships between parties. It is a complicated and nuanced area of the law. To bring a claim for breach of contract, a party must demonstrate that the other party failed to perform a contractual obligation. Depending on the type of term that is breached, the other party may be able to “terminate” the contract. Termination. Terms that go to the heart of a contract are usually called “conditions”. Breach of a condition by one party entitles the other party to terminate the contract and end their obligations. Less important terms are called “warranties”. Breach of a warranty does not give the other party a right to terminate. However, the party not in breach can still sue the other party for breach of contract.
- **Defences:**
- **1) No consideration: In order for a promise or any other contractual obligation to be enforceable by courts, there must be consideration. Consideration is what is given in exchange for a promise that makes the promise binding. If there is no consideration for a promise, the promise will not be enforced by the courts, even if the parties have an otherwise valid contract.**
- **2) Void contract: A contract can be void and therefore unenforceable for several reasons, including lack of mental capacity, uncertainty of terms, illegality.**
- **3) Unconscionability: A contract is said to be unconscionable and therefore unenforceable where the circumstances surrounding the creation of the contract gave rise to a grave inequality in bargaining power between parties. This is a complicated area of contract law, and legal advice should be sought.**
- **4) Misrepresentation: If the other party made a statement to you before the contract came into existence that you relied on in entering the contract and that turned out to be false, you may be able to have the contract set aside.**
- **5) Frustration: frustration occurs when an unforeseen event renders contractual obligations impossible or radically changes the primary purpose of the contract. Frustration is also another complicated area in contract law. Legal advice should be sought.**
- **Breach of Employment Contract (implied terms)** – The courts cannot enforce statutory rights such as those found in the *Employment Standards Act*, as special adjudicative bodies have been created to rule on these types of claims and have exclusive jurisdiction over them. However, many parallel rights exist at common law and may be enforced by the courts. At common law, employment contracts contain numerous implied terms that are actionable through Small Claims, such as the requirement to give reasonable notice or payment in lieu upon termination of an employee. The fact that no written employment contract was signed does not disqualify an employee or former employee from claiming for breach of these terms. See LSLAP Manual Chapter 06 – Employment Law for more details.
- **Defences:**

- 1) Just cause: If an employer terminates an employee for just cause the employer is not required to give the terminated employee reasonable notice or pay in lieu. The onus to prove just cause is on the employer, and the standard is generally hard to meet. See LSLAP Manual Chapter 06—Employment Law for more details.
- **Debt** – Debt claims arise where the defendant owes the complainant a specific sum of money, often for a loan or for unpaid goods or services. There may be some overlap between debt and breach of contract.
- Defences: As there likely will be some overlap between debt and breach of contract, see the defences above under breach of contract.
- 

## 2) Rare Causes of Action

- **Breach of Confidence** - Breach of confidence occurs when the defendant makes an unauthorized use of information that has a quality of confidence about it and was entrusted to him/her by the claimant in circumstances giving rise to an obligation of confidence.
- **Nuisance** – Nuisance may be private or public. Private nuisance is defined as interference with a landowner or occupier’s enjoyment of his/her land that is both substantial and unreasonable. It can include obnoxious sounds or smells or escaping substances, but does not usually arise from the defendant’s normal use of their own property. An interference with the enjoyment of land is “substantial” if it is not trivial; that is, it amounts to something more than a slight annoyance or trifling interference. Whether the interference is “unreasonable” depends on the circumstances. Factors that courts will consider (but are not bound to) in assessing reasonableness include the seriousness of the interference, the neighbourhood and surrounding area, and sensitivity of the plaintiff.
- Public nuisance may be thought of as a nuisance that occurs on public property or one that affects a sufficient number of individuals that litigating to prevent it becomes the responsibility of the community at large.
- **Trespass to Chattels** – Where the defendant interferes with the claimant’s goods without converting them to the defendant’s personal use.
- **Trespass to Land** – Trespass to land is actionable even where it occurred by the defendant’s mistake. The claimant does not need to show a loss, although their award may be reduced commensurately if the trespass does not cost them anything.
- **Conversion** – Conversion is defined as wrongful interference with the goods of another in a manner inconsistent with the owner’s right of possession. This includes theft; it also includes instances where the defendant genuinely believes the goods belong to him/her, even if (s)he purchased them innocently from a third party that stole them. It also applies when the defendant has sold the goods or otherwise disposed of them. The remedy is usually damages for the value of the goods and possibly for losses incurred by the detention of the goods. The value of the goods is assessed from the time of the conversion.
- **Unjust Enrichment** – Where the defendant was enriched by committing a wrong against the claimant, the claimant suffered a corresponding loss, and there was no juristic reason for the enrichment.
- **3) Causes of action to see a lawyer about**
- **Assault** – Contrary to its criminal law equivalent, civil assault is defined as intentionally causing the claimant to have reasonable grounds to fear immediate physical harm. Mere words or verbal threats are not sufficient; there must be some sort of act or display that suggests the defendant intends to carry through with his or her threat; banging on a door or raising a fist may suffice.

- **Battery** – Battery is defined as any intentional and unwanted touching, including hitting, spitting on the claimant or cutting his/her hair.
- Defences:
  - 1) Lack of Intent: Battery is an intentional tort which means that the plaintiff must prove the defendant acted with intent in committing battery. The defendant need not intend to cause the plaintiff harm. Rather intent refers to the desire to engage in whatever act amounts to battery. If the defendant can show that he/she did not act with intent, the claim for battery will unlikely be successful. For example, if the physical contact was involuntary or an accident
  - 2) Self-defence: The defendant can defeat a battery claim if he/she can show that the battery was an act of self-defence. There are three basic elements to self-defence which the defendant must prove:
    - 1) You honestly and reasonably believed that you were being or about to be subject to battery
    - 2) There was no reasonable alternative to the use of force
    - 3) The use of force was proportional to the actual or perceived threat
  - 
  -
- **Breach of Privacy** – Privacy rights are governed by the *Privacy Act*, RSBC 1996, c 373. Two common law causes of action are codified under this act:
  - Intrusion upon seclusion: includes spying upon, observing or recording a person where they have a reasonable expectation of privacy.
  - Appropriation of likeness: where a person's personal image, including portraits, caricatures, photos or video footage, are used for commercial gain without their consent.
 Breach of privacy is outside the jurisdiction of Small Claims.
- **Defamation** – Defamation, libel and slander are outside the jurisdiction of Small Claims.
- **Detinue** – Detinue occurs when the defendant possesses goods belonging to the claimant and refuses to return them. There is some overlap between detinue and conversion, but conversion still applies where the defendant no longer has goods, while detinue generally does not. The remedy for detinue may be the return of the goods or damages for the value of the goods and possibly for losses incurred by the detention of the goods. The value of the goods is assessed at the time of the trial.
- **False Imprisonment/False Arrest** – Where a person is illegally detained against their will. Peace officers have broad authority to arrest. Private citizens, including security guards, have limited authority to arrest in relation to a criminal offence or in defence of property. Usually, a party who is detained and is not convicted of the offence for which (s)he is detained has grounds for a claim in false imprisonment/arrest unless the defendant is a peace officer or was assisting a peace officer in making the arrest.
- **Negligence** – Negligence is a complicated but frequently litigated area of law. Put very simply, it is based on the careless conduct of the defendant resulting in a loss to the claimant. Claims in negligence may be for personal injury or for economic loss. Claimants are advised to consult a lawyer before bringing a claim in negligence. Negligence consists of the following components:
  1. **Duty of Care** – the claimant must prove that the defendant owed them a duty of care arising from some relationship between them. Many duties of care have been recognized, including but by no means limited to the following:
    - a. Duty towards the intoxicated

- b. Peace officer's duty to prevent crime and protect others
  - c. Negligent Infliction of Psychiatric Harm/Nervous Shock
  - d. Manufacturer's and Supplier's Duty to Warn
  - e. Negligent Performance of a Service
  - f. Negligent Supply of Shoddy Goods or Structures
  - g. Negligence of Public Authority
2. **Standard of Care** – Once a duty of care is established, the level of care that the defendant owed to the claimant must be determined. This is usually based on the standard of care that a reasonable person would exercise, such as avoiding acts or omissions that one could reasonably foresee might cause the claimant a loss or injury. The level of care expected of professionals in the exercise of their duties is usually higher.
  3. **Causation** – The claimant must show that the defendant's carelessness actually caused the claimant loss or injury. The basic test is whether the claimant's loss would not have occurred without the defendant's action and no second, intervening act occurred that contributed to the loss.
  4. **Remoteness** – Remoteness is a consideration of whether the loss caused by the defendant's actions was too remote to be foreseeable as a result of the defendant's negligence. If so, the court may not award damages for the loss even though it was a direct result of the defendant's carelessness.
  5. **Harm** – Unlike some causes of action, negligence requires the claimant to prove that the defendant's carelessness caused them harm, whether it is personal injury, pure economic loss or otherwise.
- **Misrepresentation** – Misrepresentation applies where a claimant was induced to enter a contract on the basis of facts cited by the defendant that turned out to be untrue. Misrepresentation can be claimed in contract law or in torts generally, or in both concurrently. In contract law, the remedy is a declaration that the contract is void (rescission). In torts, the remedy may be damages for the claimant's consequential losses. If the claim is brought in contracts, a distinction must be made between representations, which are statements that induce one to enter a contract, and the terms of the contract, the violation of which gives rise to a claim in breach of contract but not in negligence. There are three specific categories of misrepresentation:
    - **Fraudulent misrepresentation** – where the defendant made the statement knowing it was untrue. This is the hardest category of misrepresentation to prove, as the claimant must prove the defendant's state of mind prior to the formation of the contract.
    - **Negligent misrepresentation** – where the defendant made the untrue statement carelessly, without regard to whether it was true. This category of misrepresentation is more easily proved than fraudulent misrepresentation. See the section on Negligence below for the basic principles.

**Innocent misrepresentation** – where the defendant made the untrue statement in the genuine belief that it was true. This form of misrepresentation is the easiest to prove, but it may only be claimed in contract law, so the remedy for a successful claim is always voidness of the contract (rescission).

**Excluded Causes of Action:**

Certain causes of action are outside the jurisdiction of Small Claims, including:

- Claims for malicious prosecution.
- Claims involving residential tenancy agreements.
- Claims for statutory rights in employment law (e.g. overtime and statutory holiday pay).
- Claims in divorce, trusts, wills or bankruptcy.
- Claims for breach of privacy, intrusion upon seclusion, or appropriation of likeness.
- Human rights complaints (discrimination)
- Most disputes between strata lot owners and strata corporations, except for recovery of maintenance fees against a strata lot owner (*Strata Plan LMS2064 v Biamonte*, [1999] BCJ No 1267).

Not all claims that are barred from Small Claims must be brought in Supreme Court. Administrative tribunals such as the Employment Standards Branch, Residential Tenancy Branch, and BC Human Rights Tribunal have exclusive jurisdiction over many types of claims. Claimants should consider the nature of their claim and review the corresponding chapter of the LSLAP Manual to determine the proper forum for their complaint.





# APPENDIX H: SAMPLE REPLY TO CLAIM:

REGISTRY FILE NUMBER
REGISTRY LOCATION Richmond

## REPLY

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

- To a Claim  
 To a Counterclaim

**TO:**  
Copy the name, address and telephone number of the claimant from the Notice of Claim.

NAME John A Macdonald CLAIMANT(S)  
 ADDRESS 123 Parliament Way  
 CITY, TOWN, MUNICIPALITY Richmond PROV. British Columbia POSTAL CODE V6K1H6 TEL. # (604) 555-5785

**FROM:**  
Fill in the name, address and telephone number of the defendant filing this reply.

NAME Wilfred Laurier DEFENDANT  
 ADDRESS 321 Confederation Drive  
 CITY, TOWN, MUNICIPALITY Richmond PROV. British Columbia POSTAL CODE V1K 5L2 TEL. # (604) 967-1111

**DISPUTE:**  
Using the "HOW MUCH" section of the Notice of Claim as a guide, tell why you disagree with each part (a - e). If you agree with parts of the claim say so.

- a** \$3500 - Disagree - Paint cracked due to wrong undercoat being used on metal garage doors, but Mr. Macdonald refused to apply proper undercoat, simply repainting garage doors instead.
- b** \$1400 - Disagree - Additional work was discussed but Mr. Laurier never agreed to pay for this work to go ahead. Also, house was not fully pressure washed.
- c**
- d**
- e**

**AGREEMENT WITH THE CLAIM:**  
If you agree to pay all or part of what is claimed, make a proposal.

I J (NAME) agree to pay \$ \_\_\_\_\_  
 I could make the following payments:  
(GIVE DATES AND AMOUNTS)

**COUNTERCLAIM** (YOU SHOULD ONLY FILL OUT THIS PART OF THE FORM IF YOU WISH TO MAKE A CLAIM AGAINST THE CLAIMANT)  
 (THIS PART IS NOT TO BE USED WHEN REPLYING TO A COUNTERCLAIM)

**WHAT HAPPENED?**  
Briefly tell what has led to your counterclaim.

Since events in January, cracks have appeared in paint on other parts of the home's exterior. Mr. Laurier will have to have the entire home repainted and prefers to hire a different professional. Mr. Laurier claims under breach of contract for the return of his deposit.

**HOW MUCH?**  
Tell what you are claiming. If your counterclaim has more than one part, separate each part and fill in each individual amount, then add the individual amounts to make the total.

<b>a</b>	Return of deposit	\$	2500.00
<b>b</b>		\$	
<b>c</b>		\$	
<b>TOTAL</b>		\$	\$2500.00
<b>+ FILING FEES</b>		\$	
<b>= TOTAL CLAIMED</b>		\$	

court copy

court copy

FORM 2  
SCL 002 01/2008  
(OPC 7530854502)

## ***APPENDIX I – AMENDING A NOTICE OF CLAIM***

Anything in a notice of claim, reply or other document that has been filed by a party may be changed by that party (a) without any permission, before a settlement conference, mediation, trial conference or trial, whichever comes *first*; or (b) with the permission of a judge. If permission of a judge is required, the applicant must complete an application form (Form 16), follow the instructions on the form, and file it at the registry with the amended document (Rule 8).

If a Notice of Claim or Reply is being amended, changes must be underlined, initialed and dated on the revised document and, if there is an order authorizing the change, the document must contain a reference to it (Rule 8(2)). The document must then be filed at the registry and served again on each party to the claim before any further steps are made in the claim. The other party may then change their reply through the same process if they choose, or they may rely on their original reply.

A party wishing to withdraw their claim or other filed document may do so at any time by filing a copy of a notice of withdrawal at the registry and serving the notice on the parties that were served with the document that is being withdrawn (Rule 8(4)).

## ***APPENDIX J: CIVIL RESOLUTION TRIBUNAL PROCEDURES***

The Civil Resolution Tribunal is designed to facilitate dispute resolution in a way that is accessible, speedy, economical and flexible. It relies heavily on electronic communication tools. It will focus on resolution by agreement of the parties first, and by the Tribunal's binding decisions if no agreement is reached. Resolving a dispute through the Tribunal has up to three stages, described in detail below. The full proposed model can be viewed at: <http://www.ag.gov.bc.ca/legislation/civil-resolution-tribunal-act/pdfs/CRT-Business-Model.pdf>

### ***XVII. First Phase – Self Help***

If required under the rules, a claimant must attempt to resolve the dispute using the tribunal's online dispute resolution services. The claimant may first use the website's resources to gather information and diagnose their claim. The parties may then engage in an online negotiation that is monitored but not mediated or adjudicated. This tool will guide the parties through a structured negotiation phase.

If a claimant's attempt at online dispute resolution has been unsuccessful, the claimant must formally request resolution of the claim through the tribunal and pay all required fees. A claimant cannot request tribunal resolution if there is a court proceeding or other legally binding process to resolve the claim that has reached a stage specified in the rules.

If the other party does not agree to tribunal resolution or does not reply to the request for tribunal resolution, the tribunal will not resolve the claim unless the defendant is required to participate under either a statute or a court order.

Despite the consent of both parties, the tribunal retains authority to refuse to resolve a claim or dispute and may exercise this authority at any point before making a final decision resolving the dispute. The general authority for refusing to resolve a claim or dispute is set out in s. 11 of the CRTA.

### ***XVIII. Second Phase – Case Management***

*The purpose of the case management phase is to facilitate an agreement between the parties and to prepare for the tribunal hearing should it be required. The Preparation for Tribunal Hearing phase may be conducted at the same time as the Facilitated Dispute Resolution phase.*

#### **• *Facilitated Dispute Resolution (FDR)***

A case manager will determine which FDR processes are appropriate for a particular dispute and has the authority to require the parties to participate. FDR may be conducted in person, in writing, by telephone, via videoconferencing, via email, via other electronic communication tools, or a combination of these methods. These negotiations will be mediated by the case manager.

#### **• *Preparation for Tribunal Hearing***

If the FDR process does not result in a settlement, the case manager will assist the parties in preparing for adjudication by ensuring the parties understand each other's positions and by directing the exchange of evidence. Most of this exchange and communication will occur online.

### ***XIX. Third Phase - Adjudication***

Adjudicators will decide most cases by reviewing the evidence and arguments submitted through the tribunal's online tools. The adjudicator may order a telephone, video or face-to-face hearing if warranted by the circumstance. The tribunal's decisions will be binding and may be enforceable as court orders once they are filed with either the BC Provincial Court or BC Supreme Court. The tribunal may make an award of expenses but not for legal costs.

## ***APPENDIX K: SMALL CLAIMS COURT FEES***

### Fee Waiver:

There are no settlement, trial conference or trial scheduling fees, unless an adjournment is requested. If a trial date is reset less than 30 days before the date of the proceeding, the party adjourning the trial must pay \$100 to the court. This fee does not apply if the matter must be reset due to the unavailability of a judge, or if the party requesting the change was not notified of the trial date at least 45 days in advance (Rule 17(5.2)). There are no fees for “interlocutory” applications. There are fees for some collection orders. Filing fees, interest, disbursements and, in most cases, reasonable expenses may be recovered from the unsuccessful party (Rule 20(2)). Legal (i.e. a lawyer’s) fees are not recoverable. If a party cannot afford the court’s fees, they may apply to the registrar to be exempt from paying the fees (Rule 20(1)) by completing a Form 16 (Rule 16(3)).

### Common Fees:

For filing a notice of claim	
(a) for claims up to and including \$3 000	100
(b) for claims over \$3 000	156
For filing a reply, unless the defendant has agreed to pay all of the claim	
(a) for claims up to and including \$3 000	26
(b) for claims over \$3 000	50
For filing a counterclaim or a revised reply containing a new counterclaim	
(a) for counterclaims up to and including \$3 000	100
(b) for counterclaims over \$3 000	156
For filing a third party notice	25
For resetting a trial or hearing with less than 30 days' notice before the date of the proceeding as set on the trial list, unless the matter must be reset due to the unavailability of a judge	100
For personal service by the sheriff	
(a) for receiving, filing, personally serving one person, and returning the document together with a certificate or affidavit of service or attempted service	100
(b) for each additional person served at the same address	20
(c) for each additional person served not at the same address	30

### Other Fees:

For a full list of fees see the Small Claims Rules Schedule A:  
[http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/261\\_93\\_05b](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/261_93_05b)

## ***APPENDIX L: SETTLEMENT CONFERENCE PREPARATION CHECKLIST***

### Settlement Conference Preparation Checklist

1. Be prepared to define the issues
2. List who will attend settlement conference
3. Authority to settle: obtain instructions and ensure a representative with authority to settle is in attendance
4. List who will speak to what issues
5. Witnesses: how many and names/evidence
6. Expert witnesses: bring report or summary of opinion expected
7. Expected schedule for delivery of expert reports
8. Documents to be sought and schedule for delivery
9. List documents to bring
10. Consider admissions or seek agreed facts, or alternative methods of proof
11. Time estimate for trial, available dates for counsel and witnesses
12. Other orders: in advance of trial, consider if a separate hearing will be required for one or more of the following:
  - a) summary judgment or dismissal
  - b) production of other documents or evidence
  - c) addition of parties or amendment of pleadings
  - d) change of venue
  - e) consolidation of claims, joining trials
  - f) inspection or preservation of property
  - g) independent medical examination
13. Ask the judge to review the prospect of the penalties in Rules 10.1, 20(5) and 20(6)

**SOURCE:** *Small Claims Court - 1994*, Continuing Legal Education Society Manual.

**NOTE:** For **trial conferences** under the pilot project in Vancouver (Robson Square), at least 14 days in advance of the conference, each party is required to complete a Trial Statement (Form 33) and file it, along with **all relevant documents**, at the registry (Rule 7.5(9)). Each party must serve the other parties to the claim with a copy of the trial statement and attachments at least 7 days before the trial conference (Rule 7.5(10)).

## ***APPENDIX M: PAYMENT HEARING CHECKLIST***

Both the debtor and the creditor can request a payment hearing, or a judge may order one. A creditor may request a payment hearing to ask the debtor about their ability to pay or to disclose the debtor's assets so they may be seized or garnished. Either the creditor or the debtor may request a payment hearing to propose a payment schedule or changes to a payment schedule.

### **Creditor Checklist:**

#### **1. Before the Payment Hearing:**

- If you are the party requesting a payment hearing, you must complete and file a summons in Form 12 at the registry: <http://www.smallclaimsbcc.ca/court-forms>. If the debtor is a corporation, you may name an officer, director, or employee to appear and give evidence on behalf of the debtor (Small Claims Rule 12(5)).
- After you file the summons, you must serve it on the debtor at least 7 days before the date of the payment hearing (Rule 12(7)).
- If the person who serves the summons on the debtor will not be at the hearing to provide oral evidence, you should have them prepare an affidavit of service, available at the website above, and file it at the registry in case the debtor does not show up to the hearing; otherwise you will not be able to get a warrant for their arrest.

#### **2. At the Payment Hearing:**

- Bring a list of questions you wish to ask the debtor about their assets. Lists of the types of questions that may be asked can be found at: <http://www.lawsociety.bc.ca/docs/practice/checklists/E-5.pdf> (designed for Supreme Court but may be adapted for Small Claims), OR: [http://www.thelawcentre.ca/self\\_help/small\\_claims\\_factsheets/fact\\_16](http://www.thelawcentre.ca/self_help/small_claims_factsheets/fact_16)
- Be prepared to propose a payment schedule and defend it or argue why one should not be ordered.

#### **3. After the Payment Hearing:**

- If the debtor misses a payment, the balance of the judgement becomes due immediately and you may proceed to collections. See Chapter 10 of the LSLAP manual – Creditor's Remedies and Debtors' Assistance – for information on collections procedures.

### **Debtor Checklist:**

#### **1. Before the Payment Hearing:**

- If you are the party requesting a payment hearing, you must complete and file a notice in Form 13 at the registry: <http://www.smallclaimsbcc.ca/court-forms>.

- After you file the notice, you must serve it on the creditor at least 7 days before the date of the payment hearing (Rule 12(11)).
- If the person who serves the summons on the creditor will not be at the hearing to provide oral evidence, you should prepare a certificate of service (Form 4), available at the website above, and file it at the registry in case the creditor does not show up to the hearing.

## 2. At the Payment Hearing:

- Be prepared to answer questions about your finances such as contained in the lists in Creditor Checklist – Section 2 above.
- Bring financial records and evidence of income and assets, including:
  - Bank records
  - Credit-card statements
  - Tax returns and supporting documents
  - Property, sales of property and mortgages
  - Receipts for insurance, medical bills, utilities
  - RRSP, TSFA and other investment statements
  - Debts you owe and debts that are owed to you (including future debts)
  - Assets you have disposed of since the claim arose
  - Employment and pay-stubs
  - Evidence of means that you have or may have in the future of paying the judgement
- Prepare a Statement of Income and Expenses, available at: <http://www.ag.gov.bc.ca/courts/forms/scl/scl024.pdf>
- Be prepared to suggest a payment schedule or changes to the payment schedule that you can manage
- Be prepared to argue why your financial circumstances justify the schedule or changes you are proposing



- If you are on welfare or other income assistance, be sure to bring this to the judge's attention

**3. After Judgement:**

- If you are having difficulty managing your debts, see Chapter 10 of the LSLAP manual – Creditor's Remedies and Debtors' Assistance.

## ***APPENDIX N: SMALL CLAIMS APPEAL***<sup>292</sup>

Step 1: Obtain a copy of the written Order made by the Small Claims Court Judge which is being appealed.

If you do not already have a copy of the Order that you want to appeal, you should go to the Court Registry in the Court House where the Order was made. Ask the Clerk for a copy. There may be a small photocopying fee which you will have to pay.

Step 2: Obtain and fill in a Notice of Appeal form

Step 3: File the Notice of Appeal at the Supreme Court Registry closest to the place where the Small Claims Court Order was made.

Step 4: Pay the \$200 Filing Fee and \$200 Security for Costs. Also, deposit with the Court Registry the amount of money the Small Claims Court Judge ordered to be paid to the Respondent. Alternatively, bring an application to a Judge to reduce the amounts payable.

If you cannot afford the filing fee, you may want to apply to a Supreme Court Judge to reduce the amount to be paid.

To succeed in reducing the filing fee, you must be able to prove that you are indigent (see Supreme Court Civil Rule 20-5). The BC Court of Appeal has considered the meaning of that word in a case called *Johnston v. Johnston*. The Court said "indigent" means "a person who has some means but such scanty means that he is needy and poor."

The Court refused to approve any particular standard for determining whether a person is "indigent", and each case will be looked at individually. However, if you receive social assistance or persons with disabilities benefits and you prove this to the court, you will be declared indigent.

If you cannot afford to pay the security for costs (or the amount required to be paid to the Respondent by the Small Claims Court Order) you may want to apply to a Supreme Court Judge to reduce the amounts to be paid.

It is not clear what test the Court will apply to succeed in an application to reduce these amounts. However, it is clear that evidence of an inability to pay the amount required will be vital.

Step 5: File the Notice of Appeal in Small Claims Court on the same day it was filed in Supreme Court

When you file the Notice of Appeal, be sure to attach the Supreme Court Practice Direction, Standard Directions for Appeals from Provincial Court pursuant to the Small Claims Act.

Section 7 of the Small Claims Act says that the Notice of Appeal must be filed in the Small Claims Court Registry on the same day that it is filed in the Supreme Court Registry. However, in a case decided in 1993 called *First City Trust v. Bridges Café Ltd.*, the court recognized that in certain places in British Columbia the distance between the location of the Supreme Court Registry and the Small Claims Registry was so great as to make it very difficult to comply with Section 7. In that case, the filing took place on the next day. The Court held that the right of appeal would not be lost, even if the filing did not occur on the same day, as long as the Respondent was not prejudiced. Therefore, every reasonable effort should be made to file the Notice of Appeal in the Small Claims Court Registry on the same day or at the latest the day after the Notice of Appeal was filed in Supreme Court Registry.

Step 6: Within 7 days of filing the Notice of Appeal, serve the Notice of Appeal on each person who was a party to the lawsuit in Small Claims Court who will be affected by the Appeal. If you need more time to serve the Notice of Appeal, you must bring an application to a Supreme Court Judge. See Step 4 above.

The Appellant can serve the Notice of Appeal, or can have a process server or a friend give the documents to the Respondent. If you decide on using a process server, look in the yellow pages under "Process Servers." To save money you should telephone several process servers to get quotes about how much it will cost to have the documents served because prices vary. You should also confirm that the process server will provide you with a sworn Affidavit of Service. An Affidavit of Service is a document that proves to the Court that the documents were served on the Respondent.

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<sup>292</sup> This information was taken with permission from the Small Claims Factsheet 17 produced by the Law Centre at the University of Victoria Faculty of Law.

The person who is going to serve the document should be given two copies of the document. They should compare the two copies to ensure that they are the same. This is because one copy will be given to the Respondent to be served and the second copy will be attached to an Affidavit of Service. In the Affidavit of Service the person serving the document will be swearing that they gave a copy of the document to the Respondent. Unless they first compare the documents, they will not know that the copy of the documents attached to the Affidavit of Service are the same as those given to the Respondent.

If the person delivering the documents does not already know the Respondent, they should confirm that the documents are being given to the right person. This can be done simply by asking the name of the person being given the documents.

After leaving a copy of each document with the Respondent to be served, the person serving the document must make a note of the time, date, and place (street address, city, and province) where the documents were served. This information will be needed to prepare an Affidavit of Service.

Step 7: Apply to the Registrar for a date for hearing the Appeal. That date cannot be less than 21 days after applying for the date. Before the Registrar will set a hearing date, the Appellant must prove the money to be deposited in Step 4 has been deposited (or an Order has been obtained which reduces the amount required to be deposited).

Step 8: Serve the Notice of Hearing of Appeal on the Respondent. Also, serve any Order obtained under Step 4. Be sure to act quickly. There is a deadline which must be met (unless a Judge grants an Order extending the time). See Step 10 for instructions on how to serve the documents.

Step 9: The Appellant must order transcripts of the oral evidence given at the Small Claims Court trial and the Judge's reasons for judgment. The Appellant must pay for a copy of the transcript for the Court and one for each party to the appeal. Act quickly.

Transcripts are prepared by Court Reporters. You will have to make arrangements with the Court Reporters who work in your area of the Province to prepare the transcripts that you will need. To find out who may do the work in your area you may wish to speak to the Court Registry staff. Alternatively, you may wish to telephone Court Reporters listed in the yellow pages under "Reporters-Court & Convention."

Step 10: Within 14 days of filing the Notice of Appeal, the Appellant must prove to the Registrar that the transcript has been ordered and that the Notice of Appeal, Notice of Hearing of Appeal, and the Order reducing the amount of money to be paid under Step 4 (if any) have been served on the Respondent.

To prove that the Notice of Appeal, Notice of Hearing of Appeal and Order (if any) have been served, you will need to file an Affidavit of Service. A process server usually will prepare and have sworn an Affidavit of Service as part of the work they do for you. If you or a friend serve the documents, you will have to prepare your own Affidavit of Service.

Step 11: Prepare a Statement of Argument

Before you can prepare your Statement of Argument you must first pick up the transcript from the Court Reporter. Next, you must carefully read your copy of the transcript. You should make a note of the pages in the evidence or the Judge's reasons for judgment that contain the error in fact or law that you say should result in your appeal being successful. You should also look at copies of any exhibits which were given to the Judge during the Small Claims trial (like contracts, photos, reports, affidavits) to see if the exhibits contain evidence which would help your appeal.

When completing a Statement of Argument, the first step is to decide whether parts of the Small Claims Order are acceptable, or whether you do not agree with the entire Order. Then, on the Statement of Argument, list what you do not agree with.

Then, on the Statement of Argument you should list the evidence and the page and line numbers in the transcript, which will show the Supreme Court Judge where the Small Claims Court Judge made an error. This will become more clear to you if you view the sample and complete your Statement of Argument in the same way. The sample is based on the case described earlier in this Factsheet in which the Judge failed to apply the Limitation Act.

Finally, in the portion of the Statement of Argument dealing with the nature of the Order you are seeking, you should state what you want the Judge to do. For example, if you brought a lawsuit in Small Claims Court and you lost, you may want the Supreme Court Judge to make an Order for what you sued for. So, if you were owed money and you sued for \$8000 and you lost, you would ask in your Statement of Argument for an Order that the Respondent pay you \$8000. On the other hand, if you were the Defendant in the same lawsuit and you lost at the trial, you might want an Order dismissing the claim.

It would be very useful to get some legal advice when filling in the Statement of Argument.

Step 12: Within 45 days of filing the Notice of Appeal, the Appellant must:

1. File at the Supreme Court Registry the original copy of the transcript;
2. File a Statement of Argument; and
3. Serve a copy of the transcript and Statement of Argument on the Respondent.

After you have prepared the Statement of Argument make a photocopy for yourself and each Respondent. Take the original and each copy, plus a copy of the transcript to the Supreme Court Registry. The Registry will date stamp the Statement of Argument. You can then serve the Statement of Argument and transcript on the Respondent.

Step 13: At this point the Respondent will have to prepare a Statement of Argument. The Respondent must file the Statement of Argument and deliver a copy to the Appellant not less than 14 days before the hearing of the appeal. A Respondent's Statement of Argument is a document which sets out:

1. What paragraphs the Respondent disagrees with in the Appellant's argument;
2. Why the Respondent disagrees with the Appellant's argument; and,
3. What Order the Respondent would like to see the Supreme Court Judge make.

The Respondent should start to prepare the Respondent's Statement of Argument by first carefully reading the Appellant's Statement of Argument. Note where you think errors were made. The Respondent should then read the transcript and review all the exhibits and list the page and line on the transcript that supports the Respondent's case. Then fill in the form in a manner similar to that in which the Appellant's Statement of Argument was completed.

It would be very useful to get some legal advice when filling in the Statement of Argument.

Step 14: Prepare for the hearing

The hearing will not be a new trial. A Judge could order a new trial at the end of the hearing. But the trial would occur at a later date. So the hearing will have a different format than what you experienced at the trial. For example, no witnesses will be called to give evidence. Instead, what usually happens is that the Appellant first tells the Judge what the trial was about. The Appellant then tells the Judge what decision(s) made by the Small Claims Court Judge that the Appellant disagrees with and why. The Appellant may go through the Appellant's argument set out in the Statement of Argument. The Judge might read the portions of the transcript and the exhibits which the Appellant refers to in the Statement of Argument. The Judge may also ask the Appellant questions. The Appellant might conclude by noting the Order that the Appellant would like the Judge to make.

It would then be the Respondent's turn. The Respondent might take the Judge through the Respondent's argument as set out in the Respondent's Statement of Argument. The Respondent would answer questions the Judge had. The Respondent would conclude by telling the Judge what Order the Respondent would like the Judge to make.

To prepare for this type of hearing you should carefully review your Statement of Argument and any exhibits that you are going to refer to. You might also make notes of what you want to say.

Small Claims appeals do not happen often. However, if you can watch one before your case occurs it will help to give you a good idea of what is likely to happen. To find out if an appeal will happen before your case goes ahead, call the Supreme Court Registry and ask to speak to the Trial Coordinator.

Step 15: Appear in Court

Make sure you bring your copy of the Statement of Argument, transcript, and exhibits to Court with you on the day of your hearing. Arrive earlier than the time appointed for the hearing to begin.

Find the trial list, which will usually be posted somewhere in the Court building. This list tells which cases are to be tried on that date and in which particular Courtroom they will take place. If your case is not on the list, then you should immediately check with the Court Clerk or Registry. Otherwise, go to the proper Courtroom and be seated in the gallery.

When your case is called move forward to the Counsel table. Stand while speaking to the Judge. Introduce yourself to the Court. In Supreme Court a Judge is called "My Lord or My Lady" or "Your Lordship or Your Ladyship."

The Judge probably will have read both Statements of Argument and will have some familiarity with the case. The Appellant will then present their case first, followed by the Respondent.