CIVIL LITIGATION
Practice Basics 2017

CHAIRS

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October 3, 2017
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CIVIL LITIGATION PRACTICE BASICS 2017

Chairs:  
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October 3, 2017  
9:00 a.m. to 12:30 p.m.  
Total CPD Hours = 2 h 30 m Substantive + 1 h Professionalism 📊

The Law Society of Upper Canada  
130 Queen Street West  
Toronto, ON  
SKU CLE17-01001

Agenda

9:00 a.m. – 9:05 a.m.  
Welcome and Opening Remarks  
Samaneh Hosseini, *Stikeman Elliott LLP*  
Andrew Kalamut, *McCarthy Tétrault LLP*

9:05 a.m. – 9:35 a.m.  
The Initial Client Meeting and Starting and Defending the Case (25 minutes 🕒)  
Atrisha Lewis, *McCarthy Tétrault LLP*
9:35 a.m. – 10:05 a.m.  Preparing for and Conducting Effective Examinations for Discovery (5 minutes)

Aaron Kreaden, Stikeman Elliott LLP

10:05 a.m. – 10:25 a.m.  Live Demonstration of an Examination for Discovery and Feedback Discussion

Samaneh Hosseini, Stikeman Elliott LLP

Andrew Kalamut, McCarthy Tétrault LLP

Aaron Kreaden, Stikeman Elliott LLP

10:25 a.m. – 10:40 a.m.  Coffee and Networking Break

10:40 a.m. – 11:05 a.m.  Bringing Common and Uncommon Motions (5 minutes)

Michael Fenrick, Palaire Roland Rosenberg Rothstein LLP

11:05 a.m. – 11:30 a.m.  Pre-trials and Settlements (15 minutes)

Hilary Book, Lax O’Sullivan Lisus Gottlieb LLP

11:30 a.m. – 11:55 a.m.  Expert Reports

Ellen Snow, Clyde & Co. LLP

11:55 a.m. – 12:20 p.m.  Preparing for Trial and Post-trial Issues (10 minutes)

Sachin Persaud, Boghosian + Allen LLP

12:20 p.m. – 12:30 p.m.  Question and Answer

12:30 p.m.  Program Ends
October 3, 2017

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Sachin Persaud, *Boghosian + Allen LLP*
Fact Scenario

Aaron Kreaden, Stikeman Elliott LLP

October 3, 2017
Fact Scenario:

Dan Taylor is the Premier of Ontario. He enjoys spending his evenings on his couch wrapped in his coziest bathrobe, sharing his thoughts on anything and everything in 140 characters or less on Twitter.

On an unseasonably warm September 24, 2017, former Ontario Premier, Bobby Oh, was grabbing his morning coffee before heading out to partake in various water sports on Lake Ontario. Though he hadn’t been checking his phone much since his time as Premier ended, he did occasionally scroll through Twitter to see what punny hashtags were trending.

Oh was doing just that this morning, when his eyes bulged and his coffee cup toppled out of his hand. Right at the top of his feed was a string of Tweets posted by @RealDanTaylor at 2:15am.

The Tweets read as follows:

Oh quickly called up his lawyer, Carly Counsel, and asked her to get going on defamation claim against Taylor, post haste.

After serving Taylor with a libel notice, Oh commenced an action in defamation alleging, among other things, that the Tweets subjected Oh to suspicion, hatred, ridicule, and contempt.

Taylor defended on the basis that the statements were true, and, in the alternative, fair comment.

Now, Carly Counsel and Bobby Oh are sitting across the table from Dan Taylor and his counsel, Layla Lawyer, getting ready to conduct an examination for discovery.
The Initial Client Meeting and Starting and Defending the Case

Atrisha Lewis, McCarthy Tétrault LLP

October 3, 2017
The Initial Client Meeting and Starting and Defending the Case

The Initial Client Meeting

A. General
B. Client identification
C. Conflicts
D. Solicitor-Client Privilege
E. Conducting the interview
F. Investigating the facts
G. Limitation periods
H. Determining which clients to take on
I. Retainers

Starting and Defending the Case

J. Looking ahead to trial when drafting pleadings
K. Rules and Statutes
L. Actions vs Applications
M. Common Pitfalls
The Initial Client Meeting

A. General

The initial client meeting will likely be your first formal in-person contact with a potential client. This is an opportunity for you as a lawyer to:

- ensure that you are abiding by the necessary Know Your Client rules imposed by the Rules of Professional Conduct;
- ensure there are no legal/business conflicts;
- obtain as many of the relevant facts as possible that are needed to move the matter forward through the litigation process; and
- confirm the scope of your retainer and how you are going to be compensated for your services.
B. Client Identification

The first information that you will need to obtain is the potential client’s information. By-Law 7.1 of the Rules of Professional Conduct sets out the Know Your Client requirements:

- the client’s legal status, i.e., an individual, corporation, estate, a bankrupt, etc.
- if the client is an individual:
  - full name, home address, telephone number, occupation, as well as that individual’s business address and telephone number (if applicable);
  - it’s a good idea to make a photocopy of any identification for your records;
- if the client is a corporation:
  - full business name, business address and telephone number, the nature of the business, as well as the name and contact information of the person instructing you
C. Conflict Check

A conflict exists where the potential duties owed to multiple clients, or the lawyer’s own interests, would be adverse or otherwise run into each other. Rule 3.4-1 of the Rules of Professional Conduct provide that:

A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.

Before you provide any services, you must first determine whether there exists a legal conflict between you (or your firm) and the client, i.e., whether you represent, or have represented, a client that is adverse in interest to the potential client.

If there is a conflict, it is possible that certain steps can be implemented so that you and your firm can still act for the potential client:

- waiver and consents;
- joint retainers; or
- setting of conflict screens at your firm.
D. Solicitor-Client Privilege

Assuming that you have cleared conflicts, the next step is discussing the relationship between counsel and client. This is a good opportunity to discuss the law surrounding solicitor-client privilege. This is a well-understood concept to lawyers, but may be foreign to a lay-person.

- Solicitor-client privilege is the client’s privilege.

- It is the client’s right to refuse to disclose, and to prevent others (including you) from disclosing confidential communications made with you for the purposes of obtaining legal advice.
  
  ▪ Anything the client discloses to you confidentially, does not need to be shared with any other parties.

  ▪ Your client should be made to understand that he/she should be sharing all the facts of the case with you, both good and bad;

- The key to that is “confidential” communications.

- Advise the client not to discuss the details of the case with others.

It is worthwhile discussing litigation privilege as well, which is the privilege that attaches to work-product that is produced (by counsel and others) for the purpose of litigation.
E. Conducting the Interview

As this is your first interaction with the client, it is important to take the time and use it as an opportunity to develop a relationship with the client:

- Introduce the client to any individuals who will be in contact with the client going forward, i.e., other lawyers, clerks, assistants, etc.

- Discuss the litigation process as a whole, which is going to be foreign to most clients:
  - What to expect in the coming months/years;
  - The stages of litigation (pleadings, discoveries, trial);
  - The slow speed in which litigation proceeds, i.e., manage the client’s expectations for when a resolution may occur.
F. Investigating the Facts

After obtaining the Know Your Client information and clearing conflicts, it is time to delve into the substantive issues.

What type of information are you looking for as counsel during this initial meeting?

The short answer: as much information as possible!

- What is the issue?
- Why does this person want or need a lawyer?
- The particulars of the case. Really try to drill down on the issues:
- Ask the client to provide you with documents now.
  - For example, if it is a contractual dispute, you should have the contract early so you can start your legal analysis of the issues.
  - If it is a personal injury claim, you will want the hospital records and doctors’ records early on as well.
- Is there a special relationship between your client and the other parties that you need to be aware of?
  - Does that give rise to certain special duties?
- In addition to questions about liability, you will want to discuss damages.
  - What is the end result that your client is seeking?
  - What is the relief/what will make your client whole again?
- Are there other parties that may be necessary and proper parties to the action?
  - If your client is the plaintiff, who should the defendants be, or who do the defendants need to be?
  - If your client is the defendant, is it appropriate to bring a crossclaim or counterclaim?
  - Should your client commence a third party claim if a proper party is not named as a defendant?
• There may also be other individuals, who may not be proper or necessary parties to the action, but may have relevant evidence.
  
  o Obtain those individuals’ contact information to act as potential witnesses.
  
  o If your client is a corporation, send out a litigation hold memorandum to make sure that documents and other records are maintained through the course of litigation.
    • Many companies have record retention policies that result in the destruction of records or data. Have an early conversation with your client. Identify the custodians of relevant records, and provide those custodians with a litigation hold letter to ensure that the documents are preserved.
  
• If your client is a defendant that is insured, you may want to place the client’s insurer on notice.
  
  o There are typically fairly strict reporting requirements for claims or potential claims.
  
  o If your client wants the benefit of insurance, make sure that the insurer is given the proper notice.

• Always reconsider potential conflicts once you get the full picture.
  
  o For example, is there a conflict with any additional parties being added to the litigation?

• Ask your client to prepare a narrative setting out their story/side of the case.
  
  o It is a helpful way for the client to sit down and work through the issues of the case and will help point to the evidence necessary to make out the claim/defence.
  
  o Receiving the narrative usually leads to additional questions, and starts bringing documents to light.
  
  o The narrative is subject to privilege, so the client does not have to worry about the other side getting a hold of it.

• At this early meeting, you will want to take the time to start thinking about experts that you will need to make your case.
  
  o If the issue is a sub-special or a highly specialized/technical field, and there may not be many experts in the field, you may want to retain one of these experts
early so you have the pick of the bunch, before the other parties have a chance to do so.

- Your client may have some ideas as to who would be a suitable expert in their case.

- It is never too early to start thinking about and developing your theory of the case.
  - The initial client interview is no exception.
G. Limitation Periods

Once you have the requisite facts and understanding of the issues of the case, consider what limitation periods apply in order to determine the timeline for either commencing a proceeding or responding to a proceeding.

- On the plaintiff side:
  - What limitation period governs the plaintiff’s cause of action?
  - Did your client retain you two years less a day? Move quickly!
  - Consider other potential time-restrictions, like length of warranties in contracts, or time limits established by agreements, or other things of those nature.

- On the defendant side, consider how long the client has to respond to the proceeding (i.e., ensure the client is not noted in default)
H. Determining Which Clients to Take On

An additional area of risk management that is necessary to consider is the issue of competency. This refers to whether you are the appropriate professional to act for that client. Do you have the right skill set to act for this potential client?

If a potential client seeks to retain your services, and you may not have the requisite skill set or expertise to properly serve this individual’s interest, consider referring the individual to another lawyer or law firm.
I. The Retainer

The Retainer or Engagement Letter with your client formalizes the solicitor-client relationship and establishes the scope of the services that you will be providing.

A Retainer or Engagement Letter should include the following:

- List the parties for whom you act;
- If you are acting for a corporation, you may want to list who you are obtaining instructions from within the corporation;
- List the lawyers or other professionals who will be acting for the client;
- Set out the scope of legal services that you will be providing;
- Outline the fee arrangement, i.e., your rates or the fee arrangement that you intend to have in place;
- How and when the retainer is terminated, i.e., at the conclusion or disposition of a matter, by written notice, etc.;
- Identify any conflicts and the manner in which the conflict is resolved, i.e., the client consents to continue to act where a conflict may exist; and

Any other information necessary to make the arrangement work for your client, i.e., if you have a joint retainer, maybe you would work out how the fees are arranged.
Starting and Defending the Case

J. Looking ahead to trial when drafting pleadings

Once you have the facts that are necessary to commence or defend a proceeding, it is important to treat the matter on the assumption that it will proceed to trial. Consider what issues must be raised, either claims or defences, at the pleading stage to ensure that the outcome sought by your client can be obtained, at trial.

Remember, the only thing that a trial judge reads before the start of trial are the pleadings. Tell a compelling story in a clear and concise manner!

- Consider conducting legal research to determine what causes of action are available to you as a plaintiff.

- The same goes for what defences are available to your client as a defendant.
  - Additionally, consider whether it is appropriate to counterclaim against the plaintiff, crossclaim against a co-defendant, or commence a Third Party Claim against a non-party.

- What underlying facts are necessary to be pleaded to support the cause of action or defence?
  - Remember that any facts as pleaded in the Statement of Defence are considered admissions for the purposes of trial, and are not easily withdrawn by amendment.

- If time is of the essence, and your client requires more time, considering serving either Notice of Action (Form 14C) or a Notice of Intent to Defend (Form 18B). This will extend the time to serve a Statement of Claim or Statement of Defence.

- Practical tips if you are the plaintiff or applicant:
  - Determine the legal title of the defendant or responding party by conducting corporate or legal name searches.
    - If it is not possible to determine the legal name of the individual, commence the proceeding using a placeholder name, such as John or Jane Doe.
  - Determine the addresses of the parties that you intend to serve personally.
  - Determine whether a jury trial is appropriate in the circumstances.
o Determine where the proceeding will be commenced.

o Use clear unambiguous language when drafting the pleading, along with plenty of headings and sub-headings. Be sure to include the following as the plaintiff:

- The precise nature and amount of relief sought based on the various heads of damages, along with claims for pre and/or post-judgment interest under the *Courts of Justice Act*.

- The names of the parties, their capacities, their business and residence, along with the facts and circumstances leading up to the dispute.

- The material facts that gave rise to the cause of action.

- The place of trial proposed by the plaintiff.

• Be sure to include the following as a defendant:

  o The allegations that the defendant admits, denies, and that the defendant has no knowledge of.

  o The material facts relied on for the basis of any defence.
K. Rules and Statutes

There are multiple Rules and Statutes that govern pleadings, addressing such things as what parties must be named in certain actions, the timing of limitation periods, the form of the pleading, the manner of service, and everything in-between.

It is imperative to carefully review the Rules of Civil Procedure and any other relevant legislation relating to your pleading to ensure that it is in conformity with the governing requirements.

- The first stop should always be the Rules of Civil Procedure. Specifically, consider the following Rules:
  - Rule 7 – Parties under disability (naming litigation guardians)
  - Rule 8 – Partnerships (commencing actions against partnerships)
  - Rule 9 – Estates and Trusts (commencing actions against an Estate or Trust)
  - Rule 13 – Place of commencement and hearing or trial
  - Rule 14 – Originating process (action or application)
  - Rule 16 – Service of documents
  - Rule 17 – Service of documents outside of Ontario
  - Rule 18 – Delivery of Statement of Defence
  - Rule 25 – Rule governing pleadings in an action
  - Rule 26 – Amendment of Pleadings
  - Rule 27 – Counterclaim
  - Rule 28 – Crossclaim
  - Rule 29 – Third-Party Claim
  - Rule 64 – Mortgage actions
  - Rule 74-75 – Estates Matters
  - Rule 76 – Simplified Procedure

- In addition to the Rules, consider whether any limitation periods apply. Review the Limitations Act, 2002, and any other relevant statutes.

- Depending on the claim commenced or defence raised, have a mind to that statute, and plead accordingly. The statute will likely set out the necessary elements of the cause of action, for example, the Negligence Act or the Ontario Business Corporations Act.
L. Actions vs. Applications

There are two ways to commence a proceeding in Ontario – either by Action or Application. Determining whether to proceed by Action versus Application requires consideration of the issues that gave rise to the proceeding as well as the relief sought by the initiating party.

- An Action is commenced by a plaintiff who is seeking relief in which there are facts in dispute. An Action is disposed of by trial, in which the parties lead evidence by oral testimony before the judge or jury.

- Rule 14.05 specifically governs when an Application is to be commenced as opposed to an Action. Evidence for Applications proceed by affidavit evidence, typically without court cross-examinations. The hearing of the Application will be before a judge on a written record, meaning that there is no live evidence given.
  
  - Applications are sometimes mandated by statute (Rule 14.05(2))
  
  - Applications are also appropriately brought where the party is seeking a declaration of rights by the Court under a contract, will, or agreement.
    
    - There is a list of circumstances in which an Application is appropriate as set out at Rule 14.05(3).
M. Common Pitfalls when Drafting Pleadings

- Failing to plead the necessary underlying facts to support a cause of action.
  
  - This can be fatal to a claim and result in a motion to strike the action.

- Failing to plead adequate specificity for certain causes of action.
  
  - The Rules mandate that certain causes of action relating to fraud, misrepresentation, breach of trust or malice or intent, require that the pleading shall contain full particulars (Rule 25.06(8)).

- Pleading evidence instead of facts.
  
  - A party is required to plead the material facts, and not the means by which those facts will be proven (X ran a red light, as opposed to Y saw X run a red light).

- Failing to ensure that the client carefully reviews the pleadings so there are no surprises going forward. Remember, as a defendant, anything pleaded is considered an admission!

- Failing to start an action under the proper monetary jurisdiction, such as commencing an action under the standard rules when the action ought to have been brought under the Simplified Procedure (less than $100,000) or in Small Claims Court (less than $25,000).
  
  - There are significant cost consequences to a plaintiff that improperly commences an action in the incorrect monetary jurisdiction. Do not claim $1M in damages when the loss is only $10,000.
Civil Litigation Practice Basics 2017

Discovery Basics

Aaron Kreaden, Stikeman Elliott LLP

October 3, 2017
Discovery Basics

Getting Started

1. Objectives of Discovery
   - Ensure full disclosure of all material facts and evidence relevant to the action at an early stage, allowing the parties to know the case they have to meet;
   - Opportunity to assess the strengths and weaknesses of your own case and that of the other side;
   - Narrow the issues in dispute and facilitate settlement talks;
   - Obtain admissions that will help dispense with proof of your case or undermine the opposing party’s case or credibility if the suit does proceed to trial;

2. Preparing for Discovery
   - Thoroughly review pleadings to identify the issues in the action and what must be proved at trial by way of defence or claim;
   - Consider the constituent elements of the claim or defence which must be proved, the evidence anticipated to prove each and be aware of the relevant law;
   - Explain the examination for discovery process to your client - where it will take place and how it will be conducted;
   - Review all essential and relevant documents with your client prior to discovery;

3. Discovery Plan
   - In order to be able to seek the court's assistance in achieving full disclosure, the parties must agree to a discovery plan (R 29.1.05);
   - A discovery plan must be agreed to before the earlier of (i) 60 days after the close of pleadings (subject to agreement by the parties to extend the time) and (ii) attempting to obtain evidence;
   - The discovery plan sets out the scope of documentary discovery, the timeline for service of each party's affidavit of documents and the names of persons to be produced for oral examination (R 29.1.03(3));
     o If the other party is a corporation, this requires you to choose you want to examine on behalf of the corporation;
     o Consistent with the purposes of conducting the discovery, you’ll want the person with the greatest knowledge, provided that they can bind the corporation through an admission;
     o This is often best determined through cooperation with the other side, but don't be afraid to test opposing counsel's suggestion by asking how long the person has been in a position, what their involvement in the subject matter of the dispute was and who else might have been involved;
     o Three possible motions regarding the identity of the witness to be examined (R. 31.03(1)):
       1. You can bring a motion to examine a person more than once, but leave will only be granted in exceptional circumstances;
       2. You can bring a motion to examine a second officer/director/employee, but the court will have to be satisfied that satisfactory answers can’t be
obtained from only one person without undue expense and inconvenience and it would likely expedite the conduct of the action; and
3. On the other side, the examinee can bring a motion to substitute a different witness (Rule 31.03(2)).

Documentary Discovery

1. Preparing an Affidavit of Documents
   - All documents relevant to an issue in dispute must be listed in one of the schedules of the affidavit of documents (R 30.03(2)):
     1. Schedule A - Documents in the party's possession, power or control which the party does not object to producing;
     2. Schedule B - Documents over which the party claims privilege and the grounds for the claim for each document;
     3. Schedule C - Documents that are no longer in the party's possession, power or control;
   - The obligation to disclose all relevant documents is a continuing one - if the client comes into possession of a document that is relevant it must be disclosed in a supplementary affidavit;

2. Ensuring the Sufficiency of the Opposing Party’s Affidavit of Documents
   - Satisfy yourself that the opposing party’s affidavit of documents includes:
     - All correspondence between the parties;
     - Any agreements relevant to the dispute;
     - Internal notes and memoranda;
     - Documents relating to each cause of action;
     - Financial statements (if relevant to the dispute); and
     - A complete Schedule B.
   - If documents are missing or the basis of claims of privilege is unclear, raise it with opposing counsel and if the response is not satisfactory, consider bringing a motion for a further and better affidavit of documents.

3. Consequences of Incomplete Affidavit of Documents
   - If the document is favourable, the party cannot rely on it;
   - If the document is not favourable, the court can grant such relief as is just including revoke the party's right to examine for discovery, dismiss the action or strike out a defence (R 30.08).

Examination for Discovery

1. Use of Information Obtained on Discovery
   1. Deemed Undertaking Rule
      - Parties and their lawyers are deemed to undertake not to use evidence or information obtained through the discovery process for any purpose other than the proceeding in which the evidence is obtained (R 30.01);
• There are a few narrow exceptions, including for use in related proceedings and to impeach the testimony of a witness.

2. Reading in

• Evidence obtained through examination for discovery does not automatically become part of the evidence at trial;
• A party must read into the record at trial any parts of the transcript that it wishes to rely on, allowing the party to pick and choose those parts of the transcript that are advantageous to the party or damaging to the opponent (R 31.11);

3. Use Only by Examining Party (R 31.11)

• Information obtained through cross-examination at trial and examination on affidavits for motions or applications can be used by either party. Consequently, it can harm the examining party.
• In contrast, information obtained on examination for discovery can only be used by the examining party;
• There is no downside to exploring issues on examination for discovery.

2. Scope of Examination for Discovery

• A party has the right to examine a representative of each opposing party once without leave of the court (R 31.03);
• Each party must limit its examinations of all other parties to a maximum of seven hours unless leave is obtained or the parties consent to a longer time limit (R 31.05.1).

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1 Note that R 31.11 of the Rules of Civil Procedure, RRO 1990, Reg. 194, says that a party can read in the evidence of "the adverse party" or a person examined "on behalf... of the adverse party"; See also Ontario v Rothmans Inc., 2011 ONSC 2504 at para 113.

2 See Ontario v Rothmans Inc., 2011 ONSC 2504 for a helpful comparison of the scope of examination for discovery, cross-examination on a motion or application and cross-examination at trial.
## Substantive Scope of Examination

<table>
<thead>
<tr>
<th>Examination for Discovery</th>
<th>Cross-examination on Motion or Application</th>
<th>Cross-Examination at Trial</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Right to Examine</strong></td>
<td>An adverse party is entitled to examine a representative of each party opposite in interest. The &quot;equality of arms&quot; principle applies, entitling each party to equal discovery.</td>
<td>An adverse party has the right to cross-examine a deponent who has sworn an affidavit (R 39.02). Governing principles are more adversarial than on discovery.</td>
</tr>
<tr>
<td><strong>Use of Information</strong></td>
<td>Examining party only - no risk to your case because you control use of the discovery transcript at trial (R 31.11).</td>
<td>Either party - answers given may be harmful to the cross-examining party's case.</td>
</tr>
</tbody>
</table>
| **Scope of Questioning** | Determined by the Rules of Civil Procedure.  
- The witness is required to respond based on knowledge, information and belief, so may be questioned for hearsay evidence  
- Questions must be relevant to issues defined in pleadings (R 36.06(1))  
- Questions may pertain to the party's position on legal issues  
- Questions may pertain to the contents of documents over which privileged is claimed, especially litigation privilege  
- Proportionate in terms of time and expense to the issues in dispute (R 29.2.03) | Determined by the Rules of Civil Procedure and case law.  
- Deponent is only required to inform herself if she deposes on information and belief; otherwise answers are confined to personal knowledge.  
- Limited to the issues on the motion or application, the matters raised in the affidavit and the credibility of the deponent  
- Unlike during discovery when questions must be "relevant", questions need only have a semblance of relevancy | Determined by the rules of evidence.  
- Personal knowledge only, hearsay evidence inadmissible  
- Privileged communications inadmissible |
| **Undertakings**         | May be requested and compelled because the witness is obligated to inform him or herself of the matter at issue. | May be requested, but is less clear whether they can be compelled. If the deponent deposes on the basis of information and belief or the information is readily available or not unduly onerous to obtain, the court may compel an answer. However, compulsion in this context is in tension with the adversarial system. | May be given, but cannot be compelled. |
3. Preparing Your Client to be Examined

- Explain the examination for discovery process - where it will take place and how it will be conducted;
- Review all essential and relevant documents with your client prior to discovery - this is best achieved by preparing a brief of the pleadings and key documents for your client;
- Emphasize that the purpose of discovery is to help the opposing party’s case, so nothing that is said on discovery can help at trial;
- Explain the use of discovery transcripts only by the examining side and the restrictions placed on use by the deemed undertaking rule;
- Imagine what you would ask if you were opposing counsel and consider what questions you may need to object to;
- Instruct the client on how to answer questions:
  - be concise, do not ramble;
  - listen to the questions carefully and ensure you understand them before answering;
  - answer questions directly;
  - do not guess - emphasize that a witness on examination for discovery deposes to his or her information, knowledge and belief - assumptions, opinions and conjectures should play no role in the witness' testimony
  - do not argue the case;
  - do not rush;
- Explain to the client your role in the examination:
  - You cannot tell the witness what answers to give or run interference on difficult lines of questioning;
  - You cannot discuss evidence with the witness during breaks in the examination;
  - You can refuse questions that:
    - Are not relevant;
    - Require a legal conclusion;
    - Require an expert opinion;
    - Touch on privileged matters;
    - Are speculative or hypothetical;
    - Are ambiguous or incomprehensible;
    - Are contrary to the requirement of proportionality;
    - Constitute cross-examination on issues of credibility;
  - You can interject to ensure that the witness and counsel understand the question;
  - You can answer questions unless the examining lawyer objects (Rule 31.08). They will be binding on the client unless the client repudiates, contradicts or qualifies your answer during the examination;
  - As a practical matter, counsel may sometimes wish to correct an answer, but if there’s an objection by the examiner, that is not allowed.
Once the examination has been completed, the witness may be re-examined by his or her own lawyer and any party adverse in interest to the examining party. The examination must not take the form of a cross-examination (R 34.11);
  o Consider re-examining the client if they made a bad admission or you know that they said something wrong;
• After the examination, send the client a copy of the transcript to review for any errors. There is a positive obligation to advise if there are any errors or responses that are incomplete;

4. Preparing to Examine the Opposing Party

• Learn the strengths and weaknesses of your case - you will not be hurt by an answer given during an examination, therefore probe into all areas relevant to the issues in dispute and secure a full understanding of the opposing party's case;
• To formulate and ask questions effectively on examination for discovery, visualize how the transcript of the examination will read at trial – use short and crisp questions, focusing only on one point;
• Consider whether to address issues chronologically or by topic;
• Review and organize the relevant documents to walk through with the witness; try to get admissions as to authenticity whenever possible.

5. Key Questions

• Cross-examination on the affidavit of documents is proper and key. Explore the completeness of the affidavit of documents (Rule 31.06(1)(c) – Ask:
  o Who did you speak to in order to identify the relevant documents?
  o Did you identify them yourself or did someone conduct the process for you?
  o From what sources were the documents catalogued?
• You can ask for the party’s position on legal issues but expect counsel to respond. Ask:
  o What are you relying on in support of that allegation?
  o What evidence do you have that that took place?
• Persons of Interest:
  o Parties are entitled to ask for and obtain the names and addresses of persons who might reasonably be expected to have knowledge of the matters at issue (R 31.06(2)).
  o It is also permissible to ask questions about the expected evidence of potential witnesses for the opposing side as disclosed by its affidavit of documents, though the documents themselves remain privileged.3
• Expert Opinions:
  o Parties are entitled to ask about the "findings, opinions and conclusions" of any expert witnesses that the opposing party intends to rely on at trial (R 31.06(3));
  o This right extends to the foundational information upon which an opinion in an expert report is or will be based, but not necessarily to specific documents themselves.4

3 Sacrey v Berdan (1986), 10 CPC (2d) 15 (WL) (Ont Dist Ct) at para 11.
4 See Andreason v Thunder Bay (City, 2014 ONSC 314); Conceicao Farms Inc. v Zeneca Corp., 2006 CarswellOnt 5672.
• Insurance Policies:
  o Parties are entitled to obtain disclosure of the existence, contents and limit of any insurance policies that might be available to satisfy all or part of a judgement (R 31.06(3)).

6. Conducting the Examination
• Be friendly or, at the very least, professional and courteous, but also firm;
• Put the witness at ease; start with the easy, non-contentious issues;
  o Name; where they live; what they do;
  o Establish the witnesses’ place in the scheme;
  o Try and distinguish between their own personal knowledge and the knowledge of others;
• Try and distinguish between witness’ own personal knowledge and the knowledge of others;
• The goal is to create a helpful transcript;
  o Go slow and steady, pauses don’t show up on the transcript;
  o Identify each document you refer to;
  o Speak for the benefit of the record. Rather than saying “can you describe what those numbers refer to?”, paint a picture by saying “There are a series of columns. Please look at the column that is furthest to the left that begins with a 5…”;
  o Remember that tone does not come through in the transcript. Get your questions on the record along with refusals to answer them;
• Ask simple questions so you know what’s being answered;
• You may adjourn to seek directions (Rule 34.14) when:
  o There are excessive interruptions / objections that are denying you your right to an examination;
  o The right to examine is being abused by excess of improper questions;
  o The examination is being conducted in bad faith or in an unreasonable manner; or
  o Many of the answers are evasive or unresponsive.

7. Refusals, Undertakings & Questions Taken Under Advisement
• Undertaking – A party can undertake to provide the answer to a question on a later date but if no answer is provided within 60 days it is treated as a refusal (R 31.07(1)(c));
• Under Advisement – A party can take a question under advisement but if no answer is provided within 60 days it is treated as a refusal (R 31.07(1)(b));
• Refusals – If a party refuses to answer a question, even on the basis of privilege, it is a refusal (R31.07(1)(a));
• Each question should be met with an answer, a refusal or an undertaking – make sure to get one by specifically asking for undertakings;
• Consequences of a Refusal:
  1. The information withheld is inadmissible at trial (R 31.07(2));
  2. On a refusals motion, the court can order the party to re-attend for examination at its own expense, dismiss the proceeding, strike out a defence, or strike out all or party of the party’s evidence (R 34.15).
Bringing Common and Uncommon Motions

Michael Fenrick, Palaire Roland Rosenberg Rothstein LLP

October 3, 2017
“Bringing Common and Uncommon Motions”
Civil Litigation Practice Essentials
October 5, 2016

Presentation by Michael Fenrick, Paliare Roland Rosenberg Rothstein LLP
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Checklist prepared by Tina Lie, Paliare Roland Rosenberg Rothstein LLP
tina.lie@paliareroland.com and updated by Michael Fenrick

Motions Checklist

Whether/when to bring a motion

☐ Necessary
☐ Will materially advance your client’s case
☐ Reasonable prospect of success
☐ Benefits outweigh the costs

Starting your motion

☐ Jurisdiction – Master vs. Judge (see Rule 37.02)
  ☐ Motion “shall” be made to the court if within jurisdiction of Master (see Rule 37.04)

☐ Schedule motion
  ☐ Motion Scheduling Court for certain motions before a judge (long, urgent, summary judgment)

See Practice Direction for Civil Applications, Motions and other Matters in the Toronto Region

☐ 9:30 Appointment for matters on the Commercial List

See Commercial List, Toronto Practice Direction

☐ Set a timetable
☐ For discovery-related motions, discovery plan in place? (see Rule 29.1.05)
## Preparing your materials

- Notice of Motion (see Rule 37.06)
  - Relief sought
  - Grounds for motion
  - Statutory provisions and applicable rules
  - Documentary evidence
- Evidence to support grounds for motion
  - Affidavits
    - Whose?
    - On information and belief? (see Rule 39.01(4))
    - “Full and fair disclosure of all material facts” on ex parte motion (see Rule 39.01(6))
- Cross-examinations
  - Necessary?
  - Timing – delivered all affidavits, including reply affidavits? (see Rule 39.02(2))
  - Transcripts filed? (see Rule 37.10(5))
- Examination of witness (see Rule 39.03)
- Discovery transcript (see Rule 39.04)
  - Adverse party’s discovery transcript may be used
  - Own discovery transcript may not be used without consent (but can be attached to affidavit)
- Factum required? (see rule under which relief is sought)
  - Length – need leave?  
    
    See *Practice Direction for Civil Applications, Motions and other Matters in the Toronto Region*

- Other materials
  - Refusals and undertakings chart (see rule 37.10(10))
  - Pleadings?
At the motion

□ Motion confirmation form before motion (see Rule 37.10.1)
□ Draft order
□ Bill of costs or costs outline (see Rule 57.01(5) and (6))
Examples of Types of Motions

Substantive motions

- **Summary judgment – Rule 20**
  - “No genuine issue requiring a trial” (see Rule 20.04(2))
  - Evolution of summary judgment “from highly restricted tools used to weed out clearly unmeritorious claims or defences to ... a legitimate alternative means for adjudicating and resolving legal disputes”
  - Appropriate where the process (including the new fact finding powers in Rule 20):
    1. allows the judge to make the necessary findings of fact;
    2. allows the judge to apply the law to the facts; and
    3. is a proportionate, more expeditious and less expensive means to achieve a just result.

- **Determination of question of law / strike out a pleading – Rule 21**
  - Strike out a pleading
    - No reasonable cause of action or defence (see Rule 21.01(1)(b))
    - Prejudice or delay; scandalous, frivolous or vexatious; abuse of process (see Rule 25.11)
  - No evidence admissible (see Rule 21.01(2))
    - Available where question does not turn on facts
  - Motion must be made “promptly” (see Rule 21.02)

- **Special case – Rule 22**
  - Parties concur on question of law (see Rule 22.01(1))

Early motions – for plaintiff

- **Norwich order**
  - To obtain pre-action discovery against third party – primary purposes:
    - Obtain identity of a potential defendant
- Evaluate whether cause of action exists
- Trace assets
- Preserve evidence or property

- Five-part test (see Isofoton S.A., 85 OR (3d) 780 (ON SC))
  1. Valid, bona fide or reasonable claim
  2. Involvement of third party in alleged wrongdoing
  3. Third party is the only practical source of information
  4. Indemnification of third party for costs associated with disclosure
  5. Interests of justice

- **Motion to strike out pleading – Rule 21**
  - See above

- **Interlocutory injunction – Rule 40**
  - Three-part test (see RJR Macdonald, [1994] 1 SCR 311)
    1. Serious issue to be tried
    2. Irreparable harm
    3. Balance of convenience
  - Undertaking as to damages (see Rule 40.03)
  - **Mareva injunction**
    - *Ex parte* motion to preserve evidence or assets
    - Need grounds for believing that defendant has evidence or assets in Ontario and risk that they will be removed
    - Maximum duration of 10 days, subject to extension (see Rule 40.02)
    - Need “full and fair disclosure of all material facts” (see Rule 39.01(6))

- **Anton Piller order – Rule 45**
  - *Ex parte* “civil search warrant”
  - Four-part test (Celanese, 2006 SCC 36)
    1. Strong *prima facie* case
    2. Very serious damage
3. Convincing evidence that defendant has incriminating documents or things
4. Real possibility that defendant may destroy material before discovery process
   o Need “full and fair disclosure of all material facts” (see Rule 39.01(6))

- **Other interim relief**
  o Appointment of receiver (Rule 41)
  o Certificate of pending litigation (Rule 42)
  o Interim recovery of personal property (Rule 44)

**Early motions – for defendant**

- **Jurisdiction / forum non conveniens – Rule 17.06**
  o Available to out-of-province defendant
  o “Real and substantial connection” test for jurisdiction (see Van Breda, 2012 SCC 17)
  o Various factors for *forum non conveniens*
  o Motion must be made before defending

- **Motion to strike out pleading – Rule 21**
  o See above

- **Motion for particulars – Rule 25.10**
  o Particulars sought are not within the knowledge of the party seeking them
  o Particulars are necessary to enable party to plead

- **Security for costs – Rule 56**
  o Available to defendant in certain circumstances (see Rule 56.01(1)) – some examples:
    - Out-of-province plaintiff
    - Plaintiff is corporation and there is good reason to believe it has insufficient assets in Ontario to pay costs
Action is frivolous and vexatious and there is good reason to believe plaintiff has insufficient assets in Ontario to pay costs

Procedural motions

- **Amendment of pleadings – Rule 26**
  - Court “shall” grant amendment unless there is prejudice that cannot be compensated for by costs or an adjournment (see Rule 26.01)
  - Limitation period?

- **Discovery-related motions – Rule 30-31**
  - Discovery plan in place? (see Rule 29.1.05)
  - Refusals and undertakings chart (see rule 37.10(10))
ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

INSOLVENT CO.                              Plaintiff

- and -

INNOCENT CANADA LIMITED                  Defendant

NOTICE OF MOTION

The Defendant, Innocent Canada Limited, will make a motion to the court on <date>, 2014 at 10:00 a.m., or as soon after that time as the motion can be heard, at 393 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An order compelling Insolvent Co. to pay into court $200,000.00 as security for costs of this action;

2. In the alternative, an order compelling Insolvent Co. to pay into court such amount or amounts and in the form determined by the court as security for costs of this action; and

3. Costs of this motion fixed and payable forthwith, inclusive of disbursements and H.S.T.

THE GROUNDS FOR THE MOTION ARE:

1. The Plaintiff is a corporation incorporated under the laws of Ontario;
2. The Plaintiff no longer carries on business in Ontario;

3. The Plaintiff has insufficient assets in Ontario to pay any adverse cost award made against it in this action;

4. The Defendant’s estimated party and party costs to defend this action are approximately $200,000.00;

5. Rules 56.01(1)(d) and 56.04 of the *Rules of Civil Procedure*; and

6. Such further and other grounds as counsel may advise and the court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Affidavit of Denis Innocent sworn September 2, 2014;

2. Affidavit of Gordon Knight sworn September 2, 2014;

3. Such further and other material as counsel advise and this Honourable Court permits.

September 2, 2014

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INSOLVENT CO. -and- INNOCENT CANADA LIMITED
Plaintiff Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

NOTICE OF MOTION

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Lawyers for the Defendant
ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

INSOLVENT CO. Plaintiff
- and -

INNOCENT CANADA LIMITED Defendant

AFFIDAVIT OF DENIS INNOCENT

I, DENIS INNOCENT, of the City of Toronto, in the Province of Ontario, President and CEO of Innocent Canada Limited, MAKE OATH AND AFFIRM:

1. I am the President and CEO of the Defendant, and as such I have knowledge of the matters to which I hereinafter depose, except where such knowledge is stated to be based on information and belief, in which case I have set out the source of my information, and I believe such information to be true.

The Action

2. This action centers on a dispute over the scope of and the termination of a consulting services agreement (the “Agreement”) that the parties entered into on October 1, 2005. Innocent Canada Limited ("Innocentco") terminated the Agreement for cause on April 28, 2011.

A copy of the Agreement is attached to this affidavit as Exhibit “A”.
3. During the term of the Agreement, on October 29, 2010, the Plaintiff issued a Notice of Action against Innocentco. The Statement of Claim was subsequently filed on November 26, 2010. Innocentco was unaware that the claim had been issued until April 2011.

4. In the Statement of Claim, the Plaintiff (sometimes referred to herein as “Insolventco”) claims damages in the amount of $5,000,000, as well as an accounting and disgorgement of all revenue and profits generated by Innocentco from November 1, 2008 to the date of trial relating to the sale of products by Innocentco to the purchasers listed on Schedule A to the Agreement.

5. There are 250 purchasers listed on Schedule A. These purchasers bought dozens of different types of products from Innocentco, the vast majority of which were not relevant to or included under the terms of the Agreement.

6. The Defendant was served with the Statement of Claim on April 27, 2011. It retained White Knight LLP shortly thereafter.

7. I am advised by Gordon Knight (“Knight”), a lawyer with White Knight LLP, that shortly following its retainer, Sangit Wacker (“Wacker”) of Fancy Pants LLP (“Fancy Pants”), lawyers for the Plaintiff, telephoned him and explained that the Plaintiff was facing dismissal of its action for delay because no statement of defence had been filed within 6 months of the issuance of the claim. Therefore, a defence needed to be filed immediately to avoid administrative dismissal.

8. The parties agreed the Defendant would file a broadly worded defence
promptly to save the Plaintiff’s claim from an administrative dismissal, and that it
would thereafter deliver a more comprehensive amended statement of defence in
due course.

9. In accordance with the parties’ agreement, the Defendant delivered its
Statement of Defence on May 1, 2011.

10. The Plaintiff served its affidavit of documents almost a year later, on April
15, 2012. The affidavit listed only a few hundred documents, despite the fact that
the claim challenges the entire contractual history of the Plaintiff and Defendant
spanning five and half years, and involving hundreds of underlying transactions.

   A copy of the Plaintiff’s affidavit of documents is attached to this affidavit as
   Exhibit “B”.

11. In June 2013, the parties received a Status Notice from this court dated
June 13, 2013 advising of a possible dismissal of the action for delay (again).

   A copy of the Status Notice is attached to this affidavit as Exhibit “C”.

12. The Defendant delivered its Amended Statement of Defence on July 30,
2013.

13. After a lengthy collection and review process which was very disruptive and
time consuming, the Defendant served its affidavit of documents and copies of its
productions on July 30, 2013. The Defendant has identified approximately 10,000
relevant documents given the very broad scope of the allegations raised in the
Statement of Claim.

   A copy of the Defendant’s affidavit of documents is attached to this affidavit
In August 2013, the parties agreed to a timetable for the action which the Plaintiff was to file with the court to avoid the second potential administrative dismissal of its action. The timetable required the parties to complete examinations for discovery by January 31, 2014, and that the Plaintiff set the action down for trial by October 15, 2014.

A copy of the parties’ agreed timetable is attached to this affidavit as Exhibit “E”.

After filing the timetable with the court in August 2013, the Plaintiff took no other steps up to January 2014 to advance its action.

I am informed by Knight that Wacker contacted him in late January 2014 to discuss scheduling the examinations for discovery. Knight requested that Wacker send him a proposal in writing, which was never forthcoming.

I am informed by Knight that he spoke with Wacker on February 28, 2014. The conversation is set out in Knight’s affidavit sworn in support of this motion, sworn September 2, 2014, which I have read. I understand that the gist of the conversation was the Knight had learned that the principal of the Plaintiff, Ded Beet (“Beet”), had commenced an action against Fancy Pants with respect to a different retainer. Wacker was not aware that the action had been brought.

On March 13, 2014, White Knight received a notice of change of lawyers indicating that Black Hatt LLP (Black Hatt) were now the lawyers for the Plaintiff.

A copy of the Notice of Change of Lawyers is attached to this affidavit as
Exhibit “F”.

19. White Knight has received no further communication from Black Hatt, even though under the timetable the Plaintiff is required to set this action down for trial by October 15, 2014.

The Plaintiff is no longer in business and appears to have no assets in Ontario

20. The Plaintiff is a corporation incorporated under the laws of Ontario. It has not filed an annual return since 2012. The Plaintiff’s registered office is a post office box located inside a shopping mall.

A copy of the corporate profile report for the Plaintiff is attached to this affidavit as Exhibit “G”.

21. According to a July 2014 Superior Court of Justice family law judgment (the Trial Decision) involving Beet, Beet is the sole shareholder of the Plaintiff, and the Plaintiff has not been actively carrying on business since April 2011.

A copy of the Trial Decision is attached to this affidavit as Exhibit “H”.

22. Beet maintains a profile on Linkedin. His current position is listed as the president at “Ded Beet Consulting”. His profile lists his role as president of the Plaintiff as having ended in April 2011. In his profile, Beet states that he is “looking for business opportunities”.

A copy of Beet’s Linkedin profile, printed on August 28, 2014 is attached to this affidavit as Exhibit “I”.

23. The Plaintiff had maintained an internet web page at www.nodough.com from 2008 until at least April 2011. A screen capture of the current home page of
www.nodough.com shows that it is now “under construction”. To the best of my knowledge, the Plaintiff has no presence on the internet to suggest that it has engaged in any business since the termination of the Agreement in April 2011.

Copies of the current screen capture for the Plaintiff’s website taken on August 30, 2014, and the archived screen capture from April 2011 are attached to this affidavit as Exhibit “J”.


A copy of the www.canada411.ca and www.411.ca search results are attached to this affidavit as Exhibit “K”.

25. The Plaintiff does not appear to own any real property in Ontario. A paralegal at White Knight, Virginia Clerk (“Clerk”), conducted a search of the Plaintiff through Teranet and the results were negative.

A copy of the search results dated August 30, 2014 are attached to this affidavit as Exhibit “L”.

**Beet’s Matrimonial Proceedings**

26. Beet’s divorce and division of family assets are the subject of the Trial Decision, referenced above. I am advised by Clerk that she conducted a search of the Court of Appeal records, and no appeal was filed from the Trial Decision.

27. In the Trial Decision, the trial judge cites evidence led by Beet with respect to his business assets. Specifically, the judge found:

(a) Beet had continuously worked in, controlled and operated Insolventco from 1994 to April 2011.
(b) Insolventco is owned by Beet.

(c) Beet had complete control over Insolventco.

(d) Beet gave evidence at the trial that Insolventco required $500,000 to “stay afloat” and that receiving such funds was “vital to the viability of the company” because Insolventco had “lost its only consulting contract in 2011.” I take that finding to be a reference to the termination of the Agreement in April 2011.

(e) Beet gave no evidence of any efforts he was making to secure another consulting contract for Insolventco or to pursue other new business for the Plaintiff or himself.

(f) The Court fixed the value of Insolventco at $1,000,000 as of the valuation date of June 2012, based upon its retained earnings at that time.

(g) Beet claimed that after Insolventco lost its major contract he “was in financial difficulties.”

(h) After the Plaintiff’s “main contract was cancelled”, Beet “did not make an effort to regain his previous level of earnings and, as such, was under-employed.”

(i) Beet was ordered to pay to his ex-wife:

   (i) $100,000 in spousal support arrears from 2012 to the date of judgment;
   
   (ii) $200,000 in retroactive child support;
   
   (iii) $5,000 per month per child in child support going forward; and
(iv) $50,000 in retroactive education costs; and,

(v) $700,000 for an equalization payment.

28. In a separate decision, the Court awarded a total of $500,000 in costs against Beet in respect of the matrimonial proceeding (the “Costs Award”).

A copy of the Costs Award is attached to this Affidavit as Exhibit “M”.

**Beet and the Plaintiff do not appear to have sufficient assets to satisfy all of their obligations and there is an Unpaid Judgment against the Plaintiff**

29. Based on the information in the Trial Decision and admissions in the Statement of Claim it is apparent that the only available source of funds Beet had to pay the amounts in the Trial Decision and Costs Award would be from the retained earnings in Insolventco.

30. Clerk conducted writ searches against both Beet and Insolventco. The search came back with no results against Beet, which in my mind, confirms my belief that Beet paid his matrimonial obligations from the retained earnings of Insolventco.

A copy of the writ search results dated August 30, 2014 are attached to this affidavit as Exhibit “N”.

31. This belief is bolstered by the fact that the writ search for Insolventco identified that it has an unpaid judgment in the amount of $50,000 owing to a leasing company dating from June 2, 2014. If there were still funds in Insolventco, I believe that the creditor would have arranged for the sheriff to seize these funds from Insolventco.

32. To my knowledge, there is no evidence that the Plaintiff is still a going
concern, that it generates any revenue, that it owns any property, or that it has any other assets.

33. In the Statement of Claim at paragraph 12 & 14, the Plaintiff admits that it has ceased carrying on business, and has wound up all of its business activities. This is consistent with the Trial Decision.

34. Based on all of the forgoing, it appears the Plaintiff has insufficient assets in Ontario to satisfy any adverse cost award that may be made in this litigation.

The Defendant's Costs will be Substantial

35. The action is a complicated commercial dispute. To date, the Defendant has been required to defend the action and review thousands of documents in order to produce its affidavit of documents.

36. The collection and review of relevant documents required to produce an affidavit of documents was particularly time consuming and expensive. The initial universe of potentially relevant documents totalled approximately 200,000. While this number was reduced using key word searches, approximately 50,000 documents were reviewed for relevance and privilege. The final Affidavit of Documents listed approximately 10,000 documents in Schedule A.

    A chart detailing the legal fees the Defendant has incurred to date is attached to this Affidavit as Exhibit “O”.

37. The parties have yet to agree upon a discovery plan and schedule oral discoveries. I am informed by Knight that oral discoveries would likely require
three or more days per party given the number of documents involved and the general complexity of the issues in dispute.

38. The discoveries will require a significant amount of preparation in light of the complexity of the liability and damages issues in play between the parties. Specifically, disproving the Plaintiff’s claim will require a review of the business activities of both the Plaintiff and the Defendant over the three year term of the Agreement. Given the nature of the Agreement, these issues will need to be explored in respect of all the purchasers’ accounts and several hundred product types for each sale to these purchasers.

39. I anticipate that the trial of this matter would take at least 15 days. The resolution of this case will require evidence of:

   (a) the discussion of the parties during the negotiation of the Agreement (in advance of its execution);

   (b) factual matrix/commercial context evidence regarding the workings of the Defendant which inform the intentions of the parties in negotiating the Agreement;

   (c) negotiation and attempts at resolution throughout the term of the Agreement; and

   (d) forensic analysis of the accounts and products included within the terms of the Agreement, and the commissions paid to the Plaintiff. The Agreement excludes many products Innocentco sells to the purchasers. The Plaintiff is claiming disgorgement and unjust enrichment. There will be a significant dispute on the contract
interpretation of what accounts and products were included or excluded from the scope of the Agreement. There will also be a significant dispute as to the damages that flow from any finding on the scope of the Agreement. The parties will have to call evidence on a granular level (per client, per account, per sale) regarding damages.

40. Knight has prepared a draft costs outline estimating the legal fees the Defendant will likely incur from now until the completion of trial on a party and party basis. The costs outline is an exhibit to the affidavit of Gordon Knight sworn September 2, 2014, which I have reviewed. These partial indemnity costs are significant – totalling approximately $200,000 up to the date of trial, and more thereafter. I understand that the actual costs that the Defendant will incur in continuing to defend this action will greatly exceed these party and party costs.

A copy of the Costs Outline containing an estimate of these costs is attached to this Affidavit as Exhibit “P”.

Affirmed before me at the City of
City of Toronto, in the Province of Ontario, this 2nd day of September, 2014 )

_______________________________ )
DENIS INNOCENT
Commissioner for Taking Affidavits
INSOLVENT CO. -and- INNOCENT CANADA LIMITED
Plaintiff Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

AFFIDAVIT OF DENIS INNOCENT

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Lawyers for the Defendant
BETWEEN:

INSOLVENT CO.                      Plaintiff
- and -

INNOCENT CANADA LIMITED          Defendant

ORDER

THIS MOTION, made by the Defendant for an order for security for costs was heard this day, at 393 University Avenue, Toronto, Ontario.

ON READING the affidavit of Denis Innocent, Gordon Knight, and Ded Beat, and on hearing the submissions of the lawyers for the parties,

1. THIS COURT ORDERS that the Plaintiff, Insolvent Co., pay into court $200,000.00 as security for costs of this action within 30 days of the date of this order.

2. THIS COURT ORDERS that the costs of this motion are fixed in the amount of $X, payable by the Plaintiff to the Defendant within 30 days of the date of this order.
THIS ORDER BEARS INTEREST at the rate of 3% per year commencing on October 15, 2014.

Master Shorthaman
Civil Litigation Practice Basics 2017

Checklists for Pre-Trials & Settlements

Hilary Book, Lax O’Sullivan Lisus Gottlieb LLP

October 3, 2017
Checklists for Pre-Trials & Settlements

Hilary Book, Lax O’Sullivan Lisus Gottlieb LLP

Pre-Trials

1. Diarize the date of the pre-trial and make sure the client will attend
   - Client must attend in person (r. 50.05(1))
   - If someone else’s approval is required for settlement, that person must be available by telephone throughout (r. 50.05(2))
2. Expert reports – due 90/60 (responding)/30 (reply) days before the pre-trial (r. 53.03)
3. Pre-trial conference memorandum – due 5 business days before the pre-trial (r. 50.04)
4. Before the pre-trial, you need to think about the following (at a minimum):
   - Witnesses
     o Who?
     o How long will their testimony take?
     o Are they available for trial? Should they be summonsed?
     o Do any witnesses require accommodations? Interpreters?
   - Documents
     o What are the key documents? (bring them to the pre-trial – r. 50.11)
     o Are there authenticity/admissibility issues?
   - Settlement
     o What offers have already been exchanged, if any?
     o Settlement position and strategy for the pre-trial – must be discussed with the client in advance
   - What still needs to be done in advance of trial?
     o Amend the pleadings?
     o Answer undertakings?
     o Requests to admit?
     o Evidence Act notices?
   - What could be done to make the trial more efficient?
     o Agreed statement of facts?
     o Agreed chronology/cast of characters?
     o Joint document book?
   - What orders do you want to ask the pre-trial judge for? (see r. 50.07 and 20.05)
Settlement

1. Think about settlement at every stage of the proceeding
   - See r. 3.2-4 of the Rules of Professional Conduct
   - Rule 49 – incentivizes early offers

2. When advising the client on settlement, discussion points include:
   - Strengths and weaknesses of the case, including evidentiary frailties
   - Litigation costs
   - Time commitment required from the client to litigate
   - Litigation risk/uncertainty

3. When drafting an offer, consider:
   - Is the offer all-inclusive, or are interest and/or costs additional?
   - How long is the offer open for acceptance?
   - Are there any special/potentially controversial provisions you want in the release? For example:
     - Exclusions from the scope of the release
     - Confidentiality provision
     - Non-disparagement clause
   - Is settlement approval required?
   - Are you competent to advise the client on the tax implications? If not, have you told them to get tax advice?
Preparing for Trial

Sachin Persaud, Boghosian + Allen LLP

October 3, 2017
Civil Litigation Practice Basics 2017

Preparing for Trial

Sachin Persaud & Amelia Phillips
Boghosian + Allen LLP
Litigation Counsel

October 3, 2017
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**APPENDIX I**

Typically, such an appendix would be placed at the end of the paper. However, this is the most helpful tool we can provide to those preparing for trial. The Trial Preparation Memorandum, below, provides a framework for preparation for trial that includes steps that counsel should turn their minds to as the matter proceeds towards trial. The deadlines are general and should be adjusted for the particularities of each case.

---

**[INSERT THE STYLE OF CAUSE]**

**TRIAL PREPARATION MEMORANDUM**

Trial Commencement Date:
Length of Trial:

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<td>Experts Initial Reports (must be served 90 days prior to pre-trial conference) r. 53.03(1)</td>
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<tr>
<td>Experts Responding Reports (must be served 60 days prior to pre-trial conference) r. 53.03(2)</td>
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<td>Notice of Medical Records s. 52 of <em>Evidence Act</em> (10 days prior)</td>
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<td>Contact Expert Witnesses for availability</td>
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<td>Order Transcripts and index transcripts</td>
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<tr>
<td>Send letter to opposing counsel re: disclosure obligation</td>
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### 30 Days:

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### 10 Days:

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<tr>
<td>Offer to Settle (at least 7 days prior) r. 49.03</td>
<td></td>
</tr>
<tr>
<td>Prepare Briefs (Discovery Brief; Trial Brief including witness examination; Exhibit Brief; Book of Authorities; Joint Document Brief)</td>
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</table>
Preparing for Trial
Sachin Persaud & Amelia Phillips
Boghosian + Allen LLP

Everything you do on a file should in some manner prepare you for trial. In other words, the trial is the culmination of all your hard work. What follows is a guide to preparing for civil trial. The paper will follow the Trial Preparation Memorandum deadlines attached as Appendix I prior to this paper at page 3.

Solidify Your Theory of the Case

First things first. In preparing for trial, you have to understand the action and know the strengths and weaknesses of your case and the strengths and weaknesses of your opponent’s case. First, determine the narrative you wish to establish. For example, in a simple contract case where your client wishes to enforce the contract, the theory of the case could be: 1) the contract is binding and 2) if the contract is not enforced, the opposing party will be unjustly enriched. Next, determine how you will go about proving this narrative using the evidence you intend to elicit. To this end, we recommend following these 5 steps:

Step 1: Make a list of each fact you have to prove.

Step 2: Make a list of all the evidence you have to prove each one of those facts.

You should have alternative ways to prove all facts and, in particular, pertinent facts. You cannot always predict what will happen at trial and leading up to trial. If your star witness cracks under pressure or, worse, dies, you will need another way to prove your fact.
Step 3: Make a list of possible ways your opponent could attack each item of evidence.

Knowing your weaknesses will allow you to cover your bases and brainstorm solutions ahead of trial. Do not allow your opponent to surprise you.

Step 4: Make a list of each fact your opponent has to prove.

Step 5: Make a list of all the evidence your opponent has to prove each one of those facts.

At trial, new information may become known. Be sure that you update the above steps daily while at trial to ensure you are advancing your theory of the case. Indeed, your theory may have to change. If so, do not panic – simply follow the steps above to ensure you continue to present the strongest case possible.

Offer to Settle

Rule 49 is designed to encourage and facilitate settlements by providing that if the result at trial shows that it would have been better for the recipient of the offer to have accepted it, then the party that made the offer will secure a better order as to costs than would otherwise have been the case. Because of these costs consequences, a party has an incentive to compromise by making a reasonable offer and the recipient must take the offer seriously. A visual depiction of the cost consequences of failure to accept offers to settle is included in the Rules of Civil Procedure as follows: ¹

An Offer to Settle can be made at anytime and, indeed, you may wish to consider settlement early on in the file. However, where the offer is made less than seven days prior to the commencement of trial, the cost consequences referred to in Rule 49.10 do not apply.

**Expert Reports**

Before you can call an expert witness at trial, a copy of an expert report should be served on every other party. Rule 53.03(2.1) sets out what is to be included in the expert’s report including the expert’s qualifications, the instructions provided to the expert before they prepared their report, and the substance of their opinion.
Unless you obtain leave from the court, initial expert reports must be served at least 90 days prior to the pre-trial conference (r. 53.03(1)), NOT the trial. If you miss the deadline for service, Rule 53.08 provides that the report is still admissible if the court is satisfied that its admission would not prejudice your opponent or cause undue delay in the conduct of the trial. The court may impose terms to address any prejudice. For example, in Hunter v. Ellenberger [1987] O.J. No. 1182, the expert evidence was received with time allowed to opposing counsel to call responding evidence and with a costs penalty.

If you are on the receiving end of an initial expert report, you are entitled to respond to it with your own expert report. Such a report must be served at least 60 days prior to the pre-trial conference (r. 53.03(2)).

Initial and responding reports properly served can be supplemented later provided the supplementary report is served at least 30 days before the trial (r. 53.03(3)(b)). However, the supplementary report should be used to respond to issues raised in reports from other parties; it is not prudent to rely on the rule to raise new issues, as such reports are classified as “supplementary”.

Where the expert is a medical practitioner, s. 52(2) of the Evidence Act must be complied with. The section requires that the report be served with at least 10 days notice. All medical reports prepared for the action, including those served in accordance with the Rules, require leave of the court to be admitted into evidence. The trier of fact is the ultimate gatekeeper of expert evidence.
**Prepare Evidence Act Notices**

**Notice of Business Records s. 35 of Evidence Act**

The *Evidence Act* permits you to adduce business records at trial without calling the maker of the record. Even if you do not call the maker of the record, you still need to call someone. This someone is a person who can prove that the records record an act that was made in the usual and ordinary course of business and it was in the usual and ordinary course of business to make such a record.

You do not technically need this provision at all if you are going to call the maker of the business record as a witness. However, it is prudent to give notice even in this case.

Under s. 35(3) of the *Evidence Act*, parties must serve their Notice of Intention to adduce business records at least 7 days prior to the commencement of trial. If you miss the deadline for notice, try resorting to the common law to get the evidence in. In *Ares v. Venner*, [1970] S.C.R. 608, the Supreme Court of Canada held that hospital records, as a subset of business records, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein. If a party wishes to challenge the accuracy of the records, they can do so by calling the record keeper as a witness.

**Notice of Medical Records s. 52 of Evidence Act**

In cases requiring medical evidence, under s. 52(2) of the *Evidence Act*, parties must serve their Notice of Intention to adduce medical records at least 10 days prior to the commencement of
trial. All medical reports prepared for the action require leave of the court to be admitted into evidence.

Compile Witness List

When compiling your witness list, return to your theory of the case and the 5 steps for establishing evidence discussed above. What are the facts you need to prove and who can help you prove them? How are you going to get the facts that you require into evidence?

Be sure to advise your witnesses of the trial date as soon as possible in order to secure their availability, and follow up with them prior to trial.

Report to Client on Liability and Damages

The reporting letter to your client prior to trial should include a section on liability and a section on damages. Each section should summarize the evidence as it relates to that section and give a preliminary assessment. Your assessment on liability should let your client know what their chances of success are in the action; and your assessment on damages should inform them of what the action is worth.

For example, if you are representing a personal injury plaintiff, let them know what the liability exposure of the defendant is and, regarding damages, how much the defendant will likely be asked to pay. Reporting helps manage your client’s expectations ahead of trial.
**Order Discovery Transcripts and Index Transcripts**

In the months leading up to trial, you will have an intimate knowledge of your case. This is a good time to review the original discovery transcripts again (as opposed to a summary of them). Review the transcripts with the 5 steps above in mind. You may discover evidence that you did not pinpoint when you were less familiar with your case.

It is prudent to index the transcripts for the facts you wish to prove and those you anticipate your opponent will attempt to prove. Indexing will keep the evidence you need at your fingertips at trial.

**Send Letter to Opposing Counsel re: Disclosure Obligation**

You should be sure you have full answers to all of the undertakings and refusals given at discovery.

You should also be sure to answer all of your own client’s undertakings – even if your opponent does not press you for the answers. This is because undertakings usually represent information that could be useful at trial (and helpful or harmful to your case). If you do not answer undertakings (or worse, do not turn your mind to the answers), you risk being surprised by your opponent before trial. It is possible they have secured answers that you have not. You also risk your opponent making an issue at trial of your failure to answer undertakings and having an adverse inference found on the evidence that was not produced but should have been.
Serve Request to Admit

Under Rule 51.02, you can serve a request to admit on another party requesting that they admit the truth of a fact or the authenticity of a document at any time. The rule is useful to limit the issues at trial by obtaining admissions as to facts and documents that would otherwise have to be proved at the trial. If your opponent, or other party, denies or refuses your Request to Admit and the fact or document is subsequently proved at trial, there may be cost consequences for them. That is, the court may take the denial or refusal into account in exercising its discretion as to costs (rr. 51.04, 57.01(1)(g), and 58.06(1)(g)).

In addition to limiting the issues to be proved at trial, utilizing the Request to Admit rule has several other advantages. They include:

- you can avoid calling a witness on a small matter who might otherwise damage your case;
- if you know the other side will not admit a fact but the proof of the fact will be expensive, serve a Request to Admit in any event and you may be able to recover the expense of proving the fact;
- you can get in business records without calling anyone;
- you can avoid calling a witness who may be expensive to get to trial (e.g., payment for the time of a professional or getting a witness from another jurisdiction);
- thinking back to the 5 steps above, you may be able to get your opponent to admit a piece of evidence that will assist you in proving one of your facts. If they have not done the same 5-step analysis as you have, they may not appreciate the importance of admitting to any one piece of evidence. On the other hand, your opponent may be very
well prepared and the Request to Admit may alert them to an evidentiary problem you are having or alert them to a theory of the case you intend to advance that they did not consider before.

For all of the above reasons, when you receive a Request to Admit, ensure you review it carefully to determine that it is advancing your theory of the case and/or increasing efficiencies at trial.

If you receive a Request to Admit business records, review each document closely to determine whether it is truly a business record within the meaning of section 35 of the Evidence Act and whether you will gain anything by compelling your opponent to call the maker of the record at trial. If you suspect that there are deficiencies in the record keeping practices of the business, then it may be important to compel your opponent to call their witness. Once the witness is in the box, you can view their testimony and you can cross-examine them. The records only go in as prima facie proof of their contents and you can still call the maker of the record or some other person to disprove the contents.

Requests to Admit can be served at anytime prior to the commencement of trial (r. 51.02(1)). However, a party who has been served with a Request to Admit must respond (if they wish to) within 20 days of being served with a Request to Admit (r. 51.03(1)) or they will be deemed to have made the requested admission (r. 51.03(2)). As an aside, do not overuse or abuse Requests to Admit. In Slate Falls Nation v. Canada (Attorney General), [2005] O.J. No. 5228,
Master J. Egan struck out 25 requests to admit, served by one party before the close of pleadings, as an abuse of process.

With respect to getting admissions on the authenticity of a document, an admission prevents your opponent from suggesting that the document was fabricated or is not genuine. However, obtaining this admission does NOT allow you to simply tender the document at trial. You still must have a witness prove the document or use some other means to get it into evidence.

**Summon Adverse Party Witnesses**

You may need to call a party adverse in interest to testify. Since they are adverse in interest, they may not want to testify. Under Rule 53.07, you may compel such a witness to attend at trial by serving them with a summons to witness at least 10 days prior to the commencement of trial. Failure of the witness to attend once properly served may result in the issuance of a bench warrant for their arrest.

**Meet Witnesses**

Prepare your own witnesses on what they can expect of the environment and the procedure at trial as they may be intimidated and unfamiliar with court procedure. They will be a more effective witness if they are properly acclimated to the court environment. You may want to visit the courthouse with an important witness.
Consider providing your witnesses with some general guidelines or tips on how to conduct themselves at trial. A sample Witness Preparation Memorandum is included in Appendix II, at the end of this paper.

Your witnesses should understand their testimony and relevant documents and know their testimony well enough to be able to testify even under the extreme pressure of cross-examination. Although it is good to not sound rehearsed, it is more important to get your witness’s best knowledge into evidence in a confident manner.

**Prepare Briefs**

An important part of being prepared for trial is being organized and knowing where evidence and other supporting material can be located when you need to refer to it quickly. Consider using a digital searchable summary to assist you in locating needed documents.

It is usually beneficial to come to an agreement with opposing counsel on what documents will be relied upon and can be included in a joint document brief. A joint document brief will likely result in counsel being more organized at trial, which will please the trial judge. When agreeing upon a joint document brief, ensure that your opponent understands what the agreement to the inclusion of documents means. Are the documents agreed upon as to the truth of their contents or their authenticity or simply for organizational purposes? This must be clear to all parties and to the trial judge.
You may want to have a few briefs organizing various parts of your case (e.g., a Discovery Brief, Exhibit Brief, Book of Authorities) and compile them into a Trial Brief. Your Trial Brief will help you stay organized during the trial itself and should include witness examination.

**Demonstrative Evidence at Trial**

Demonstrative evidence can include photographs, charts/graphs, videos, demonstrations, models, samples, etc. Consider including this evidence in your Request to Admit to get agreement before trial on what can and cannot be used.

In using demonstrative evidence, the general test for use is whether such evidence increases understanding rather than serves as a distraction. The evidence should be relevant and its probative value should outweigh its possible prejudicial effect.

Consider getting experts to prepare and present your demonstrative evidence, particularly where you are unfamiliar with the content of the demonstrative aid.

**Conclusion**

The foregoing is a short introduction to trial preparation. Consider the following resources for a more in-depth discussion of trial and post-trial issues:


APPENDIX II

Sample Witness Preparation Memorandum

- Dress neatly and conservatively. Suits can be worn, but are not necessary. A collared shirt and tie with dress pants are appropriate for this particular trial.

- You will sit in a raised witness box at the front of the courtroom near the Judge. In attendance will be the Judge, counsel, court reporter, clerk, sheriff’s officer and spectators that could include the Plaintiff, family and other witnesses. You will be asked to take an oath or affirmation prior to testimony being provided.

- I will ask questions first by way of direct examination. We will prepare for these questions through the use of the admissible documentation and photographs we will review together. Opposing counsel will then cross-examine you. I may then ask rebuttal questions, after which opposing counsel may ask further cross-examination questions.

- Always tell the complete truth according to your best recollection of the facts and the events involved.

- Listen carefully to every question and allow counsel or the Judge to complete the question before answering. Answer only the question that is asked. Speak clearly and loudly.

- Take your time answering questions. This allows time for you to consider the question and for counsel to object to the question being asked, if necessary.

- If you do not understand a question, say so, and counsel will rephrase it. If you can’t remember an answer to a question, say “I can’t remember” or “I can’t recall”. (You will be allowed to review notes and records to jog your memory). If you don’t know the answer to a question, say “I don’t know”. **Do not guess.** You can provide approximations of dates, times and distances but make it clear that you are providing an estimate. Do not exaggerate or understate the facts.

- If you cannot answer a question with a “yes” or “no”, say so and explain your answer. However give positive, clear, and direct answers to every question whenever possible. Answer the question with the words you normally use and feel comfortable with. Don’t use someone else’s vocabulary.

- Be serious and polite at all times. Counsel on cross-examination may attempt to confuse you, have you argue with him, or have you lose your temper. Do not argue with counsel or the judge. Never lose your temper.

- Beware of questions that assume facts that are not true or that you have no knowledge of. Don’t be afraid to correct counsel if they paraphrase you or state a fact attributed to you that is not true or that you did not say.
• You will be allowed to testify only to what you personally saw, heard, and did. You generally cannot testify to what others know or to conclusions, opinions, and speculations.

• If an objection is made by either side to any question or answer, stop and wait for the judge to rule. If he overrules the objection, answer the question. If he sustains the objection, simply wait for the next question. Never try to squeeze an answer in when an objection has been made.

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