ADVOCACY 608
Anatomy of a Lawsuit

MICHAEL KIRK AND LIAM KELLY

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First interview with the client

- Fees

“It’s better to not take a file and not get paid then to take a file and not get paid”

- Very important to have a clear retainer and what it is you have been retained to do.

Commencing an Action

Can be commenced in 2 ways (well maybe three) under the *Alberta Rules of Court*.

- Rule 3.2(1)

-Originating Application

-Statement of Claim

Statement of Claim

- Technical Rules (Rule 13) set out requirements of pleadings (Rule 13.6 to 13.12).
- Court forms are set out at Schedule "A" to the *Alberta Rules of Court.*
- The Schedule "A" forms are online for use by lawyers and the public (most of the forms) in Word format.
- https://albertacourts.ca/kb/areas-of-law/civil/forms/word-forms

Statement of Claim

A statement of claim follows a well established style.

-Starts with the name of the Court, followed by the parties. This is called *“style of cause”.*

-The document is then named i.e. Statement of Claim. To continue, the body of the document. This is broken into two headings:

1. Statement of facts relied on
2. Relief sought

Statement of Claim - Continued

-Also needs to set out a cause of action (i.e. contract and breach, tort claim, etc.)

Good resources:

-Office precedents

-Bullen & Leake & Jacobs, *Precedents of Pleadings*

-Klar and Linden et al, *Remedies in Tort*

Statement of Claim – Remedy Sought

-End with the remedy or remedies sought, which summarizes what is being asked for from the Court.

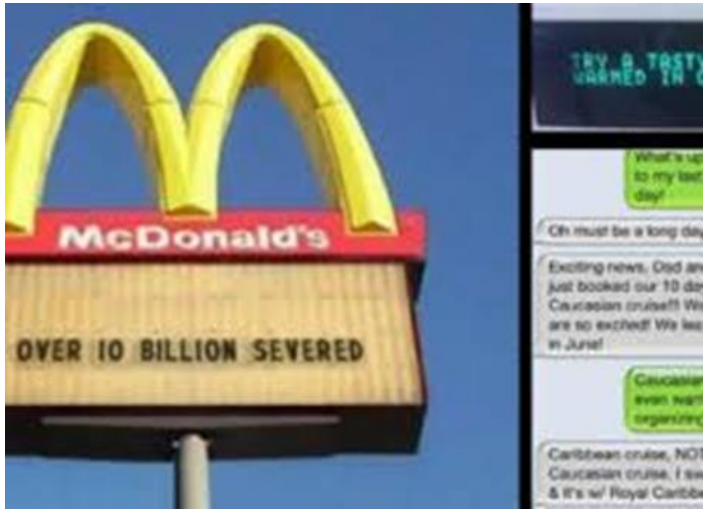
- This also includes interest and costs.

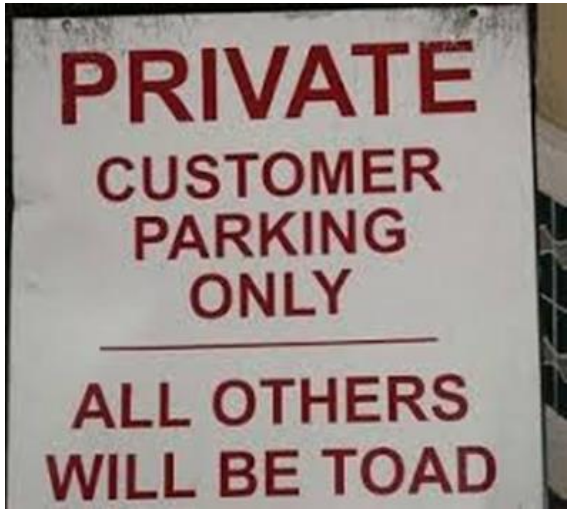
Warning!!!

Don’t be a slave to precedent… when it comes to documents!!

- Do not replicate errors or specifics to that pleading…it can happen to the best of us!

(i.e. client or party name)





Filing the Statement of Claim

- A fee is required when the S/C is filed.
- Most large law firms have runners, legal assistants and articling students to do this
- There is also an ALIA levy that is payable by law firms/lawyers for various documents filed.

Service of the Statement of Claim

Once a statement of claim has been filed, it must be served (delivered) to the defendant.

-As set out in the Rules of Court (*Rules of Court*, Part 11)

You Only have one year to serve the S/C. Otherwise, you will be back at the courthouse asking for an extension. (Rules 3.26 to 3.29)

Statement of Defence

The defence has a similar form, and it sets out denials and specific responses to the claim.

Other issues that may arise

- Need to amend the claim?
- Add parties?
- Issue Counterclaim?

Statement of Defence

Often, you may receive a letter from a defendant's lawyer requesting more time to file a defence.

-We are bound by the *Code of Professional Conduct*, and unless it is absolutely impossible for you to allow an extension, it is good practice to allow the defendant solicitor some extra time to prepare documents

- Always remember that opposing counsel has to review the case to prepare an appropriate response and may have other files or other activity pressing.
- Also remember the golden rule. On a different case, you'll be in the role of the defendant and you might request the extension.

The Lack of Defence

If a defence is not filed within the required time, you are entitled to do one of two things:

-You note the defendant in default of filing a statement of defence. (this is your only course of action when your claim is not a debt action i.e. motor vehicle accident or divorce)

-In the case of a liquidated demand, i.e. monies owed frim a customer to a creditor, you do not need to note in default because you can proceed immediately to default judgment.

Categorizing the Action

Actions are categorized as either “standard cases” or “complex cases”. A number of factors must be considered in deciding how to categorize the action. (Rules 4.3 to 4.7)

The main difference is that a standard case does not require a litigation plan, while a complex case does.

- There is a default in any event that the parties do not agree, the action will be considered a “standard action”.

Discovery

Following the exchange of the Statement of Claim and the Statement of defence, Reply and any Counterclaims and Third Party documents that may complicate the matter, the case enters a period of disclosure called discovery.

Discovery

Two components:

-Affidavit of Records (Document Discovery)

-Oral Questioning (Oral Discovery)

Questioning:

-Brief witness

-Corporate representative vs. individual

Affidavit of Records

In Alberta…

- The plaintiff must be served the Affidavit of Records within 3 months of being served with the Statement of Defence.
- The Defendant must serve their Affidavit of Records within 2 months of being served with the Plaintiff's Affidavit of Records.

-This rule is observed more in the breach than in this compliance

Content of Affidavit of Records

The records referenced and disclosed are those which are relevant and material to the issues in the action. (Rule 5.6)

- Record has a wide definition and contemplates more than written documents.
- It certainly contemplates e-mails and electronic records in the appropriate case.

Guidance

- You should always review all of the documents the client delivers carefully and conscientiously with the view to determine whether they may the lawsuit or at least not hurt it.
- Legal ethics require that even prejudicial relevant materials must be disclosed.
- You receive the documents from your client and make the decision on relevancy. If it is relevant, it is to be disclosed.

Questioning

- Formally called “Examinations for Discovery”.
- In other jurisdictions, (U.S.), it is called depositions.

Questioning is the “bread and butter” for litigation counsel. An entire lecture will be devoted to this topic. Generally, a questioning is where a party to the litigation is questioned under oath at some point after pleadings have closed.

Interlocutory Applications

These are chambers applications, examples are:

-To compel answers objected to at questioning

-To compel Answers to Undertakings

-Further and better Affidavit of Records

-To compel attendance at questioning

-Security for costs

Judicial Dispute Resolution/Mediation

The Judicial Dispute Resolution (JDR) was a popular form of alternative dispute resolution.

The purpose of a JDR is to reach a settlement on all issues, or to resolve as many issues as possible with the assistance of a Justice of the Court of Kings Bench.

- A more popular alternative is private mediation using a mediator. (This is often a lawyer or a retired judge)

Settling the Matter for Trial

In order to set the case down for the trial, in Alberta, the clerk of the court must be presented with form 37. (in Schedule "A" to the *Alberta Rules of Court*)

This form requires that Counsel certify a number of steps have been accomplished. They also certify that they have participated in some form of dispute resolution. (Rules 4.16 to 4.21)

-Occurs after filing form 37, but before trial commences.

USEFUL TIP!!!

- When setting a matter for trial, err on the side of caution in reserving the number of trial days.
- More is better than less…

The Trial Sequence – Rule 8.10

Division 4

Procedure at Trial

Order of presentation

8.10(1) Unless the Court directs otherwise, the order of presentation at a trial is

as follows:

(a) the plaintiff may make one opening statement and, subject to clause (b), must then adduce evidence;

(b) the defendant may make one opening statement either immediately after the plaintiff's opening statement and before the plaintiff adduces evidence or at the conclusion of the plaintiff's evidence;

(c) when the plaintiff's evidence is concluded, the defendant may make an opening statement if the defendant has not already done so immediately after the plaintiff's opening statement, and the defendant must then adduce evidence, if any;

(d) when the defendant's evidence is concluded, the plaintiff may adduce evidence, if any, to rebut the defendant's evidence;

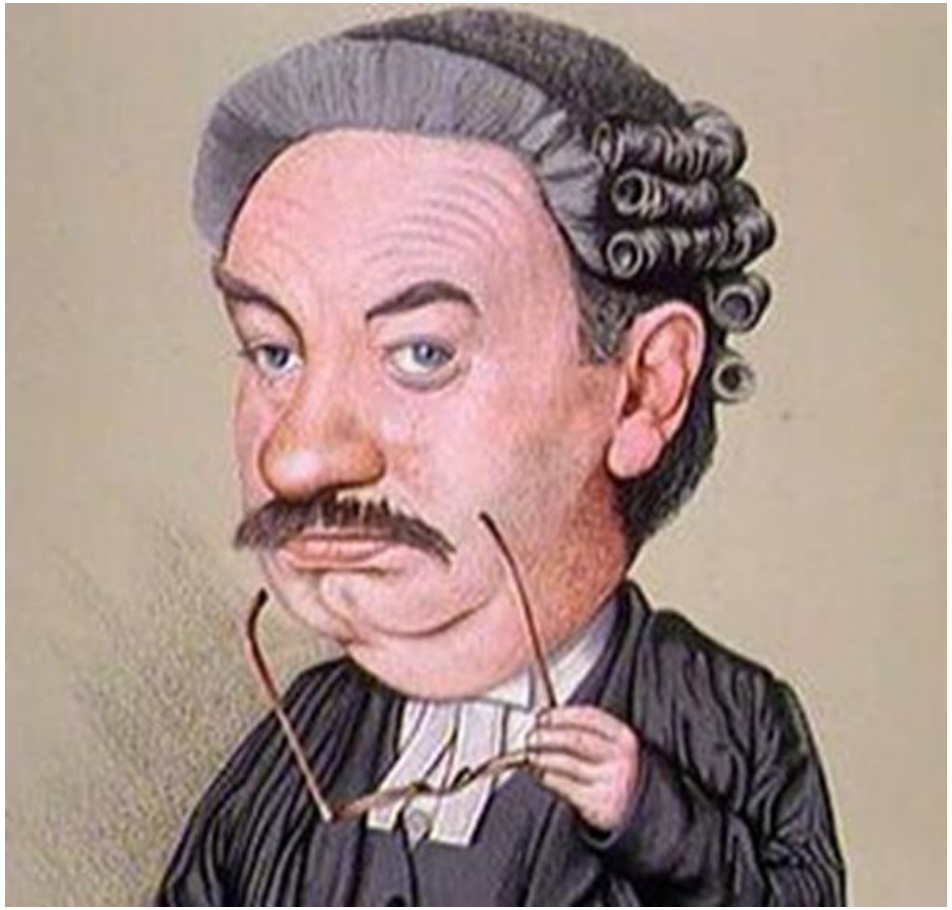
(e) when the defendant's evidence and the plaintiff's rebuttal evidence, if any, are concluded, the plaintiff may make a closing statement, followed by the defendant's closing statement, after which the plaintiff may reply;

(f) if the defendant adduces no evidence after the conclusion of the plaintiff's evidence, the plaintiff may make a closing statement, followed by the defendant's closing statement, after which the plaintiff may reply.

(2) If the burden of proof for all matters in issue in the action is on the defendant, the judge may direct a different order of presentation.

(3) If there are 2 or more plaintiffs or 2 or more defendants separately represented, the judge must determine the order of presentation.

Trial – The Big Day



Trial – The Big Day

Relatively speaking, few cases make it to trial. Therefore, even the most jaded advocate is excited every time a trial starts.

- You often scramble to find your Barrister's robe, tabs and shirts!!

Agreed Facts and Documents

At the commencement of the trial, and as part of the opening statement of the Plaintiff, the Plaintiff will indicate and file with the court any records and any facts that have been agreed upon.

The terms have now been agreed upon by counsel.

The Opening Statement

The Plaintiff has an opportunity to make an opening statement.

- A good advocate will always make an opening statement, although, some will be tempered by the patience of the Judge.
- An opening statement can create the theory of the case and give the Judge a heads up on what to look for.
- Identify witnesses and give a summary of what you expect their evidence to be.

Opening Statements – Key Points

Keep the statement simple.

- Cover 4 points:

  -The theory of the Plaintiff

  -The key facts you will prove (reference to witnesses and their evidence)

  -What you are asking for (Relief Sought in Claim),

  -What the Judge should be particularly cautious about

Calling Your First Witness

You will then call your first witness.

- There will likely be an order to exclude witnesses (except the parties and experts during expert testimony).
- For each witness you call, the defendants counsel will be able to cross-examine that witness.
- You may have re-examination… be careful!
- You proceed this way until all of your case has been concluded.
- You may have read-ins from Questioning. Be careful, they form part of your case.

Application for Non-Suit

The most chilling words for a Plaintiff's lawyer to hear are that the defendant whishes to apply for a non-suit.

- This means the Defendant is trying to end the case without even putting on a defence.
- This may be based on the Defendant arguing that the Plaintiff has not called sufficient evidence to establish liability on the cause of action alleged, or it may be a more technical argument.
- The complex law relating to a non-suit application is beyond this introductory course. In the normal course of events, the defence will call it's case after you have concluded.

The Defendant's Case

- The Defence may make an opening statement.
- Thereafter, the Defendant calls his/her witnesses. As the Plaintiff, you get to cross-examine each of those witnesses.
- The Defendant is given a brief rebuttal examination.

This process continues until all witnesses have been called by the Defendant.

Very rare that there will be Defendant's read-ins. They become part of your case.

Rebuttal Evidence

- Where the Defendant has been elected to call evidence, the Plaintiff may call rebuttal witnesses.
- The rules on rebuttal witnesses are very strict and outside the scope of this course.
- They are intended to prevent case splitting and sandbagging. (Usually something that arose in the defendants case)

Closing Argument

In civil cases, the party that has the burden goes first.

- Thereafter, Plaintiff will argue first.
- The Defendant will argue next.
- The Plaintiff will be given a very brief response.

Written Argument

- Depending on the complexity of the case, the Judge may also request written argument and will certainly receive from you as part of your argument. This will list any summaries of law you wish to file.

The Judgment

- If they feel they have a good handle on the case, many Judges will take some time to polish up their notes and deliver an oral judgment.
- The judges are all too well aware that the clients are anxious and wish to know the outcome as quickly as possible.

❖Some cases are too complex for an oral judgment to be given.

❖In those cases, the Judge will reserve his or her decision and it will be released at some point later.

- Could be that day, the next day, or the next month.

The Formal Judgment

The reasons for judgment are not the judgment itself. Although, the judgment speaks from pronouncement.

- Once the reasons have been released, the parties (usually the winning side) quickly prepare a form of judgment. This takes the form of a judgment (see Part 9, *Alberta Rules of Court*)
- A Court Order or judgment recites briefly that trial has occurred and summarizes the rulings, usually with a pronouncement of a monetary award in favor of one of the parties, or that the case is dismissed.
- Usually references costs.

Costs

The successful party usually receives costs.

- The schedule of costs is set out in Schedule "C" of the *Alberta Rules of Court*.
- There is a recent move away from reliance on the Schedule C, to an indemnity of 40 to 50% of actual costs.
- On rare occasions, a party may be granted solicitor and client costs (legal fees).

The Appeal

- If the parties are unhappy with the judgment and are contemplating an appeal – usually because the winner didn't get enough money or the loser lost – one or both may file an appeal.
- The other side could file a cross-appeal.
- Time to appeal runs from the date of decision to one month from the date of decision. (Rule 14.8 Alberta Rules of Court)
- Different enactments might have different appeal provisions… be very cautious!!
- Alberta Rules of Court – Part 14 Appeals deal with the requirement for an appeal, and there are strict deadlines.

MILLER THOMSON

Kirk / Kelly Advocacy 2023

WITTEN LLP