

Advocacy 608

Introduction to

Chambers

MICHAEL KIRK AND LIAM KELLY

Introduction to Chambers

- ❖ Chambers fundamentals.
- ❖ Initiating a chambers application (Notice of Application) – could be “without notice” or by consent.
- ❖ Affidavits in support of applications.
- ❖ Appearing.
- ❖ Tips for chambers advocacy.

Chambers Fundamentals

- ❖ Chambers is a forum for arguing applications.
- ❖ These can be interlocutory, dispositive or originating.
- ❖ Applications can be used strategically.
- ❖ Possible alternatives to an application – proceed with a consent order or even settlement.

Interlocutory Applications

Why?

- ❖ Protect/preserve subject matter of litigation.
- ❖ Establish status quo pending trial.
- ❖ Preserve evidence.
- ❖ Settle a procedural matter.
- ❖ End all or some of a litigation.

Examples – usually injunctive relief, such as a mareva injunction, *Anton Piller* Order.

Interlocutory Applications - Continued

Examples:

- ❖ Orders regarding service (substitutional service or service *ex juris*)
- ❖ Setting aside default judgment
- ❖ Security for costs
- ❖ Compelling production of records (affidavit of records, undertakings)
- ❖ Compelling attendance at questioning
- ❖ Setting matter down for trial

Applications for Judgment

Two types:

- Summary Judgment
- Default Judgment

- ❖ Exceptional remedies.
- ❖ Test for Summary Judgment has changed since *Hryniuk* (SCC decision).
- ❖ Court is supposed to look at disposing more matters on a summary basis...if it can.

Other Types of Applications

Replevin

Civil enforcement remedies (*Civil Enforcement Act*)

Remedies on Judicial Review (Rules 3.15-3.24 of the *Rules of Court*)

Types of Chambers

Provincial Court Chambers

Court of King's Bench

- ❖ Application Judges chambers
 - ❖ If the rule says “Court” vs. “Judge”.
 - ❖ Generally, go to Applications Judge vs. Justice.
 - ❖ Justices hate when you waste their time with Applications Judges matters.

Justice chambers

- ❖ When it says “Justice”. Period.

Court of Appeal chambers

- ❖ Similar to Justice Chambers

Types of Chambers

No gowning required.

Stand/bow to applications judge/judge/justice as he/she enters and exits.

Special chambers:

- ❖ Applications in Court of King's Bench that will take longer than 20 minutes total.
- ❖ Parties allowed to submit briefs.
- ❖ Longer delay to schedule.

Types of Chambers

Application Judges have jurisdiction by virtue of *Court of King's Bench Act* (jurisdiction outlined therein).

Generally, procedural matters are heard by an Applications Judge and substantive matters are heard by a Justice in chambers.

If a rule refers to the Court, then the matter can go to an Applications Judge.

If a rule refers to a Judge, then the matter must go to a Justice.

Initiating an Application

Most chambers applications are commenced by a Notice of Application.

Without notice

- No notice to other side.
- Applicant not facing other side .
- Court must be satisfied no notice is necessary.
- Interplay with ethical obligations (lawyer as advocate must (a) give notice if aware of opposing counsel and (b) present all facts and law.

Initiating an Application

Notice of Application

- Must generally serve on all affected parties Elements:
 - ❖ Relief sought
 - ❖ Irregularities/objections
 - ❖ Grounds of application
 - ❖ Materials/evidence being relied upon (incl. rules/ legislation)

Initiating an Application

Notice of Application (cont'd)

- ❖ Timing of service of notice of application (5 days under rules generally).
- ❖ Consenting to date for application.

Regular vs. Special Chambers

- ❖ All applications that can be heard in 20 minutes for both sides can be heard in morning chambers.
- ❖ Those that are longer are adjourned to Special Chambers.
- ❖ Afternoon chambers
 - Date is pre-booked.
 - Are written briefs.
 - Long wait list for these at present.

Initiating an Application

Originating application

- ❖ Distinct from general Notice of Application (different rules apply regarding timing of service);
- ❖ It starts the lawsuit; and
- ❖ Usually seeking relief pursuant to legislation such as judicial review or oppression remedies under the *ABCA*.

Affidavits

- ❖ Applicants will file evidence for applications in the form of affidavits.
- ❖ Usually sworn by client/witness.
- ❖ Lawyer should avoid swearing affidavits.
- ❖ Unless procedural, attaching something non-controversial, should not have an assistant or paralegal swear a substantive affidavit.

Affidavits - Continued

Contents

- ❖ Titled in the cause and written in the first person.
- ❖ Divided into consecutively numbered paragraphs.
- ❖ May contain statements as to belief of deponent (in interlocutory applications).
- ❖ Must contain actual knowledge and not hearsay in applications for final disposition (summary judgment).

Affidavits - Continued

Tips for preparing affidavits:

- ❖ Know what you need in the affidavit (read case law, rules and statutes) to meet or resist the test in law.
- ❖ Simple and clear language setting out facts logically.
- ❖ Make sure deponent reviews affidavit, understands contents and believes contents to be true (client should not sign just because lawyer said so).
- ❖ Review procedure for administering oaths before swearing affidavit with client .

Affidavits - Continued

Service

- ❖ Generally required to file and serve affidavit at the same time as notice of application.
- ❖ Exceptional cases where it is possible to file later, or to file following application on a lawyer's undertaking.

Affidavits - Continued

Cross-examination

- ❖ The Cross Examination on Affidavit in Alberta is of Right.
 - There is no requirement to file/serve a response affidavit until after the cross examination on the main affidavit (if at all).
- ❖ Right to examine affiant.
 - ❖ Procedurally → More rare.
 - ❖ Substantively → Tactically deployed.
 - E.g. if the affidavit sucks, then it might make sense to bring this up in court submissions rather than giving them a chance to bolster their evidence in the transcript (cross X transcript can be used).
- ❖ Cannot be used as a delay tactic.
- ❖ Scope is the issue in the application before the Court and credibility (*R. v. Pazkowski*).
- ❖ Complete transcript from cross-examination must be filed as evidence (in advance, way in advance if possible).

Appearing in Chambers

- ❖ If unable to resolve before scheduled hearing date, an appearance will be required.
- ❖ King's Bench morning chambers begin at 10:00am every day in Edmonton and Calgary (variable dates/times in other cities).
- ❖ Without notice at 9:30 am.
- ❖ Matters organized on a list.
- ❖ Check in with clerk when you arrive.

Appearing in Chambers

Order of applications

- (1) Adjournments
- (2) Without notice
- (3) Consent matters
- (4) Regular list (there is an actual list)

Adjournments

- ❖ By consent or where notice of application was not served.
- ❖ Can be set to specific date or *sine die* (can be done online in major centers before 3:00 pm the day before).

Appearing in Chambers

Regular List

- ❖ If the application is longer than 10-15 minutes, moves to back of list.
- ❖ If other side not on time, stand down.
- ❖ Suggest adjournment if a party is unrepresented so as to obtain counsel.
- ❖ Senior members of the bar should be deferred to (professional courtesy).

Appearing in Chambers

Duty Applications Judge and Duty Justice assigned to hear emergency matters.

Evidence

- ❖ Pleadings (not really evidence)
- ❖ Affidavits (including exhibits)
- ❖ Cross-examination transcript
- ❖ Transcript from questioning

Appearing in Chambers

Order of proceedings:

- ❖ Applicant
- ❖ Respondent
- ❖ Rebuttal (short and sweet)
- ❖ Decision (off bench or reserve)
- ❖ Costs (in cause, in any event of cause, payable forthwith or at conclusion)

Appearing in Chambers

Appeals

- ❖ Appeal of Applications Judge's decision goes to Justice.
 - ❖ Effectively hearing *de novo*.
- ❖ Appeal from Justice goes to Court of Appeal.
 - ❖ True appeal with deference to Justice.
- ❖ **NOTE**: Appeal does **not** stay proceedings or enforcement.

Chamber Tips

- ❖ Know/follow the *Rules of Court*.
- ❖ Have all materials prepared.
- ❖ Present argument in organized, concise manner.
- ❖ Always be on time.
- ❖ Make sure you appear.
- ❖ Announce your name/firm to the court unless the court refers to you by name.

Chamber Tips - Continued

- ❖ Identify clearly who you act for.
- ❖ Introduce your colleague on the other side.
- ❖ Be mindful of duties as officer of the court.
- ❖ Be frank, candid and honest.
- ❖ **Never** mislead the court.
- ❖ Do not give evidence.
- ❖ Be courteous/respect.
- ❖ You are an Officer of the Court.

Chamber Tips - Continued

- ❖ Speak clearly.
- ❖ Be matter of fact, avoid drama.
- ❖ Remove bad speech habits (ie. “like” or “um”).
- ❖ Eye contact.

Preparation Tips

Need to have knowledge of the following:

- ❖ Nature of action
- ❖ Pleadings
- ❖ Relief claimed
- ❖ History of action
- ❖ Knowledge of filed materials
- ❖ Knowledge of Rules
- ❖ Service



Kirk / Kelly Advocacy Winter 2023

