Litigation Strategy Part 1
I. Introduction

Structuring litigation is like putting together a puzzle without a picture representation of the end product. Our role as lawyers is to sort through the pieces, organize them and group them into issue portions that interconnect to create the full picture of facts and law that create the claim. Often certain key components are initially missing and you must uncover those pieces through various pre-trial techniques. You may also discover other pieces are either not helpful or not relevant and must be discarded. Frequently, there will be more than one picture scenario forming, and you must examine all the potential scenarios and craft how they can be fit together in a comprehensive and truthful manner. Corner and edge pieces that initially help with the construction of the outline of your litigation strategy may have to be discarded or reconsidered as you collect more evidence, develop a deeper understanding of the client’s situation, and analyze the appropriate areas of law that are engaged.
Additionally, the results of the long-anticipated overhaul of the Supreme Court Rules, B.C. Reg. 221/90 were announced on July 7, 2009, and these changes will certainly alter the way we talk about litigation if not the way we think about and plan for litigation. Effective July 1, 2010, the Supreme Court Rules are repealed and the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the “New Rules”) will come into force. Some of the key similarities and differences will be highlighted in this paper for future reference.

II. Initial Client Interview

Preparation for litigation begins during the first meeting with the client. This is your first opportunity to hear the client’s story and begin to collect the pieces you will ultimately need to complete the puzzle as well as your first chance to ask the questions that will help you visualize the final result.

A. Client Goals

Two of the most important questions to ask the client at the first meeting are (1) “what is your ideal outcome” and (2) “do you have any other concerns.” The client may have a solid legal claim which can be pursued, but may also have other goals which make a non-litigious strategy more suitable. For example, if the corporate client has a contract dispute with a company with which they would like to continue to do business, prolonged litigation may be less suitable than negotiation or arbitration.

The client may also have important social or familial relationships which make litigation less attractive or have non-legal goals which are more important. Perhaps all the client really wants is an apology from the party he or she thinks has wronged them, which may be better achieved through non-litigious means.

There are legal, economic, business, moral, social and psychological consequences to choosing a route of dispute resolution, and only the client will know the true impact of these consequences. While the conduct of litigation is and should be in the lawyer’s hands, the client is the party with a real interest in the outcome and his or her goals should be kept in mind. These various approaches to the client’s dispute should be canvassed with the client in the initial interview.

B. Gather Facts

The second function of the initial interview with the client is to find out as much about the case as possible. The client should have the opportunity to talk about everything he or she thinks is relevant. You should listen objectively with an open mind and avoid jumping to legal analysis until you have as much information as possible. While the client may come to you with an issue they characterize one way, you may realize that it is actually something else entirely. It is only by listening with an open mind that you can create an action based on the facts instead of trying to fit the facts into a preconceived action.

Once you have gathered the facts from the client, organize them logically so that the picture begins to emerge. One way of doing this is to construct a chronology. This can help you to identify any gaps in the story and make connections that were not initially apparent. You can also discuss this chronology with the client and give them an opportunity to fill in gaps or correct information. This is also a good opportunity to outline the client’s disclosure obligations and begin collecting and examining documents.

There are a number of useful case analysis computer programs that allow the techno-savvy lawyer to enter case players, organizations, documents and issue threads into a system that can then provide data and visual representation spreadsheets of the entered data. These programs can provide a good structural place to hold and then reorganize your puzzle pieces as the facts unfold.
III. Develop Your Case Theory

After the initial client interview and some further investigation you should have enough of the story to develop your initial case theory. A useful case theory consists of one of two simple statements which contain the essence of the matter in a nutshell. The case theory must be logical and should convey the reason why your client should succeed. Consider your client’s case as if you were opposing counsel in order to test your case theory.

Your case theory will inevitably need to be revised as more facts and details are uncovered, particularly through discovery. Do not tie yourself to your theory at the expense of evidence which calls your theory into question. Rather than manipulating additional facts that come to light in order to force them into your case theory, your theory must be responsive to these facts. Every time your theory changes go back and re-examine your facts to see how they fit into this modified theory. Your case theory must be consistent with both the law and the facts.

The case theory should help you identify which facts are necessary in order to succeed.

A more detailed version of your case theory should address the elements of what you must prove to succeed and how you intend to prove each through witness testimony and exhibits.

IV. Investigate the Law and the Available Remedies

Once you have a preliminary case theory and understanding of the facts, you must conduct legal research to determine how to proceed. An immediate concern is the existence of any limitation periods which may jeopardise your client’s claim. These should be investigated as soon as possible and may dictate commencing the action without delay. Next investigate whether your client has a claim in law and begin to identify potential causes of action. Once satisfied that your client has a claim and having completed legal research based on your current information, consider how to proceed based on the law and your client’s goals. Consider which jurisdiction is most appropriate for commencing your action and contemplate alternative methods of dispute resolution such as negotiation and mediation.

A. Court and Territorial Jurisdiction

The type of claim, amount of claim and territorial jurisdiction over the claim and parties are key factors which must be considered before commencing any action. These factors should also be considered when acting for a defendant.

I. Type of Claim

The type of claim may determine the most appropriate venue in which to commence the action. Certain actions may not be heard in the Provincial Court; for example, actions under statutes which specifically confer jurisdiction for certain matters on the Supreme Court such as the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). A claim for equitable relief must also be commenced in the Supreme Court as a court of equity. The Provincial Court only has jurisdiction over matters which have been specifically granted to it by statute.

The jurisdiction of courts over criminal matters is typically determined by the type of offence as set out in the Criminal Code, R.S.C. 1985, c. C-46. However there is a category of offences which permit the accused to elect how to proceed: in Provincial Court with judge alone, in Supreme Court with judge alone, or in Supreme Court with a judge and jury. There can be very important strategic motivations for choosing which to elect and the decision should not be made lightly.
2. **Amount of Claim**

The Provincial Court currently has jurisdiction under the *Small Claims Act*, R.S.B.C. 1996, c. 430 to hear claims for amounts up to $25,000, exclusive of interest and costs. These claims may still be brought in the Supreme Court because it has jurisdiction to hear all civil actions regardless of the amount of money involved. However, under Supreme Court Rule 57(10), if the amount recovered is within Provincial Court jurisdiction under the *Small Claims Act* then the plaintiff may not be entitled to costs. Rule 57(10) has been preserved in the Rule 14-1(10) of the New Rules:

A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the *Small Claims Act* is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.

The *Justice Modernization Statutes Amendment Act*, 2004 amended the *Small Claims Act* to allow the monetary jurisdiction of the court to be set by regulation to a maximum of $50,000.

When the Provincial Court’s jurisdiction is increased to claims up to the $50,000 permitted by the legislation, this avenue of dispute settlement will likely play an even larger role.

3. **Territorial Jurisdiction**

In order for the BC courts to have jurisdiction over a matter there must be a real and substantial connection between BC and either the facts on which the proceeding is based or the person of the defendant. A number of circumstances which constitute a real and substantial connection have been codified in s. 10 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28. If a real and substantial connection is not present then you may have to investigate other potential jurisdictions.

B. **Alternative Dispute Resolution**

Non-litigious methods of dispute resolution may be better suited for your client’s interests and should always be considered. In particular, in commercial contexts the parties often have ongoing commercial relationships, the continuation of which benefits both parties.

1. **Negotiation**

Successful negotiation affords parties the most control over the process and outcome of the action. Commercial relationships are built on negotiation and thus this can be an appropriate tool for resolving disputes. Negotiations between fundamentally equal parties built on an understanding of the legal and practical positions of each party can be highly successful and result in a satisfactory resolution for all parties. The primary advantages to a resolution reached through negotiation are that it will normally reflect the fact that the parties have an ongoing relationship, may consider facts and concessions not directly involved in the dispute and will be something with which all parties can live. Furthermore, negotiations can be faster and less expensive than litigation. Negotiations are most appropriate and likely to succeed where the parties are willing to communicate and there is either the beginnings of or existence of a relationship of trust and honesty.

2. **Mediation**

Mediation is similar to negotiation, but involves the participation of a neutral observer who may be able to offer objective insights into the key issues in the dispute and encourage the parties to explore alternative settlements. Compulsory mediation is a part of Small Claims procedure and can be compelled in the Supreme Court by serving a Notice to Mediate. This might be of limited use if the relationship between the parties is particularly hostile or either of the parties does not wish to
participate. Mediations should be approached with the same level of careful preparation as any other legal procedure, but should have a less adversarial tone.

3. Arbitration

Arbitration can be utilized as a result of an arbitration clause in the contract or agreement under which the dispute has arisen or it can be agreed to by the parties after a dispute has arisen. Arbitration has considerable advantages and disadvantages that should be explored before choosing this route; in particular, pre-hearing procedures may be shortened, abridged or unavailable and there is a limited right of appeal. Whether or not arbitration is appropriate will depend on the circumstances of the parties and the dispute.

V. Frame and File the Pleadings

This is your opportunity to put your case theory and the client’s concerns into the legal language necessary to advance your position. Pleadings form the borders of the litigation puzzle: they define the issues on which the court must adjudicate in order to resolve the dispute between the parties, give fair notice to the other side of the case that has to be met, and will determine what is relevant at the discovery stage. Pleadings should strike a delicate balance between being broad enough to permit you to explore the other side’s case during discovery, but not so broad as to permit the other side to use the discovery process as a “fishing trip.” Pleadings can also be your first opportunity to present your case to the trial judge and therefore must appropriately advocate your client’s interests. They should be based on your theory of the case and the legal research conducted based on your current information.

A. Purposes

Mr. Justice Parrett stated in Keene v. British Columbia (Ministry of Children and Family Development), 2003 BCSC 1544, in relation to the purpose of pleadings that:

[27] First and foremost the purpose is to define the issues and give the opposing parties fair notice of the case they have to meet. However, equally important in today’s court process is the fact that pleadings must be relied upon to provide the boundaries and the context for effective pre-trial case management, the extent of disclosure required, as well as the parameters or necessity of expert opinions.

[28] Once the trial has started the pleadings should form an effective guide to allow the trial judge to control the process and effectively deal with relevance and other admissibility issues.

He went on to remark that in his view “the absence of proper and careful pleadings is a major source of difficulties in civil litigation today leading to unnecessary chambers applications, extended case management procedures, extended trials and unnecessary difficulty in dealing with admissibility issues” (¶29).

Pleadings define the issues in the action, so will also define what is relevant during discovery and at trial. Mr. Justice K.J. Smith (as he then was) stated in Homalco Indian Band v. British Columbia, [1998] B.C.J. No. 2703, ¶5, that:

[T]he ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action.
He elaborated on how to achieve this purpose, commenting that a “statement of claim must plead the causes of action in the traditional way so that the defendant may know the case he has to meet to the end that clear issues of fact and law are presented for the court” (Homalco, ¶9). This is an important element of basic fairness and the court is willing to strike out pleadings under Rule 19(24) if pleadings are “constructed in a manner calculated to confuse the defendants and to make it extremely difficult, if not impossible, to answer” (Homalco, ¶11, see also McNutt v. A.G. Canada et al., 2004 BCSC 1113 ¶41 and Jerry Rose Jr. v. The University of British Columbia, 2008 BCSC 1661 ¶14).

B. Technical Requirements

The Supreme Court Rules require that pleadings be concise, contain a statement of the material facts relied on and not contain the evidence by which the facts alleged are to be proved. Under Rule 19(1):

A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.

The requirements of precision remain under the New Rules and indeed are set out even more clearly in Rules 3-1 and 3-7:

3-1(2) A notice of civil claim must do the following:

(a) set out a concise statement of the material facts giving rise to the claim;
(b) set out the relief sought by the plaintiff against each named defendant;
(c) set out a concise summary of the legal basis for the relief sought;
(d) set out the proposed place of trial;
(e) if the plaintiff sues of a defendant is sued in a representative capacity, show in what capacity the plaintiff sues or the defendant is sued;
(f) provide the data collection information required in the appendix to the form;
(g) otherwise comply with Rule 3-7.

Rule 3-7 (1) states that: “A pleading must not contain the evidence by which the facts alleged in it are to be proved.”

The facts that must be included in the pleadings are the “facts necessary for the purpose of formulating a cause of action or defence,” Pyke v. Price Waterhouse Ltd. (1996), 40 C.P.C. (3d) 7 ¶11 (B.C.S.C.). If a material fact is omitted, a cause of action may not be effective and the result may be that the entire action or a particular claim is struck.

In Delaney & Friends Cartoon Productions Ltd. v. Radical Entertainment Inc. et al., 2005 BCSC 371, the Court struck out a claim for punitive damages on the basis that the statement of claim did not plead the material facts on which a claim for punitive damages could be sought at trial. The plaintiffs’ action generally was stayed pending its filing of an amended statement of claim which better provided the material facts on which their action was based.

There are a number of specific rules relating to material facts and pleadings therefore the Supreme Court Rules, and starting July 2010, the New Rules, should be reviewed regularly when drafting your pleadings.

The New Rules change the forms used for commencing an action and responding to an action. An action must be started with a notice of civil claim or, in certain circumstances, a petition or requisition (2-1 (1)). A notice of civil claim must be in Form 1, which combines elements of the writ and statement of claim forms from the current Supreme Court Rules and provides additional guidance and organization for commencing the action. The new Form 1 is divided into three parts with the contents to be as follows:
Part 1: Statement of Facts – Using numbered paragraphs, set out a concise statement of the material facts giving rise to the plaintiff’s(s’) claim. If any party sues or is sued in a representative capacity, identify the party and describe the representative capacity.

Part 2: Relief Sought – Using numbered paragraphs, set out the relief sought and indicate against which defendant(s) that relief is sought. Relief may be sought in the alternative.

Part 3: Legal Basis – Using numbered paragraphs, set out a concise statement of the legal bases on which the plaintiff(s) intend(s) to rely in support of the relief sought and specify any rule or other enactment relied on. The legal bases for relief sought may be set out in the alternative.

A response to civil claim replaces both the appearance and the statement of defence in the New Rules. A response to civil claim must be in Form 2, which similarly to Form 1 provides a clearer structure and guidance than the current Form 14. Form 2 is organized under specific headings which correspond to the notice of civil claim as follows:

Part 1 – Response to Notice of Civil Claim
Division 1 – Defendant’s(s’) Response to Facts
Division 2 – Defendant’s(s’) Version of Facts
Division 3 – Additional Facts

Part 2 – Response to Relief Sought

Part 3 – Legal Basis

It is particularly important to avoid unknowingly making admissions which prejudice your client. Any admissions made in pleadings are binding on the party making them and the parties can be cross-examined on pleadings. Further, these admissions are binding and cannot be withdrawn without consent of the other party or leave of the court. A significant change in the New Rules from the Supreme Court Rules is the omission of Rule 19(19) which states: “An allegation of fact in a pleading, if not denied or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant or mentally incompetent person.”

Rule 3-3(8) of the New Rules seems to replace this, stating that: “An allegation of fact in a notice of civil claim, if not admitted, denied, or stated to be outside the knowledge of the defendant, is deemed to be outside the knowledge of the defendant.” As such the consequences of failing to mention something in a response to civil claim may be less severe than in the past.

C. Risks Associated with Poor Pleadings

The material facts as set out must disclose a reasonable cause of action or defence, or your pleadings will be vulnerable to a motion to strike. This can be done in two ways under the Supreme Court Rules, either through a Rule 19(24) application or using a Rule 18 application for summary judgment.

I. Rule 19(24)

Well crafted pleadings are necessary in order to properly advance your client’s interests and avoid having the pleadings struck out. In Dempsey et al. v. Envision Credit Union et al., 2006 BCSC 750 ¶17, Madam Justice Garson summarized the various reasons pleadings will be struck out under Rule 19(24) as follows:

(a) the pleadings are unintelligible, confusing and difficult to understand (Citizens for Foreign aid Reform, supra);
(b) the pleadings do not establish a cause of action and do not advance a claim known in law (Citizens for Foreign aid Reform, supra);

(c) the pleadings are without substance in that they are groundless, fanciful and trifle with the Court’s time (Borsato v. Basra);

(d) the pleadings are not bona fides, are oppressive and are designed to cause the Defendants anxiety, trouble and expense (Borsato v. Basra);

(e) the action is brought for an improper purpose, particularly the harassment and oppression of the Defendants (Ebrahim v. Ebrahim, 2002 BCSC 466).


Rule 19(24) has been imported word for word into Rule 9-5(1) of the New Rules:

At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be,
(b) it is unnecessary, scandalous, frivolous or vexatious,
(c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
(d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Rule 9-5(3) empowers the registrar to refer any document it considers might be subject to an order under Rule 9-5(1); thus, this procedure may play a more prominent role in the future.

2. Summary Judgment

If there are no bona fide triable issues disclosed by the pleadings, the pleadings will be vulnerable to an application for summary judgment under Rule 18 of the Supreme Court Rules. Where “insufficient material facts have been pleaded to support every element of a cause of action, then beyond a doubt that cause of action is bound to fail” and a defendant’s application for summary judgment will succeed: Skybridge Investments Ltd. v. Metro Motors Ltd., 2006 BCCA 500 ¶11.

Rule 9-6 of the New Rules provides a similar avenue for summary judgment:

9-6(5) – Power of court

(5) On hearing an application under subrule (2) or (4), the court,

(a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
(b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
(c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
(d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

VI. Commence the Action

Once you have decided the path that best meets the client’s needs, it is time to commence the action in the appropriate venue. Use of various procedural options such as Rule 18A, Rule 66 and Rule 68 can
streamline litigation making the cost more bearable for the client. These options can make litigation significantly faster and less expensive if used appropriately. There are similar options available in the New Rules.

A. Summary Trial

Under Rule 18A of the Supreme Court Rules a party may apply for judgment after a summary trial in circumstances when the court is able to find the facts necessary to decide the issues of fact or law solely on the basis of affidavit evidence. There are several advantages to this procedure, particularly the speed with which it can be accomplished because there is no live witness testimony. The process is most suitable when there are few factual disputes or credibility issues. Rule 18A(11)(a) of the Supreme Court Rules states that the court may grant judgment on the application unless:

(i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

(ii) the court is of the opinion that it would be unjust to decide the issues on the application.

This rule is replicated word for word in Rule 9-7 (15)(a) of the New Rules so will likely play a similar role in the future. Rule 18A has been interpreted in Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202 (C.A.). There, Chief Justice McEachern (as he then was) set out a list of factors to consider when determining whether it would be unjust to decide the issues on summary trial:

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question. (at 19)

If any of these factors are present in your action consider carefully whether to bring an application for judgment on summary trial, because it may be unsuccessful and a waste of time and resources.

B. Fast Track and Expedited Procedures

Rule 66 of the Supreme Court Rules sets out the "fast track" procedure and currently applies to actions by judge alone in which the trial is estimated to take no more than two days. There is no monetary limit on the amount of the claim but simply a time limit. Generally, Rule 66 is appropriate where the legal and factual issues are fairly straightforward and the evidence can be presented in two days. The process only applies if one or both of the parties invokes it. One of the key benefits is the ability to secure a quick trial date as Rule 66(20) requires that the trial must be set within four months of application. There are also restrictions on the length of examinations for discovery and no party is obliged to respond to interrogatories unless the court otherwise orders; both of these measures are intended to speed up the discovery process.

Rule 68 of the Supreme Court Rules sets out the expedited action procedure which is available for most claims of $100,000 or less, exclusive of interest and costs. Similar to Rule 66, there are a number of procedural limitations which restrict examinations for discovery, obligations to produce documents and the use of expert evidence.

In the New Rules, Rules 66 and 68 have been combined to produce Rule 15-1 – Fast Track Litigation. Under Rule 15-1(1) the procedure applies to an action if:

(a) the only claims in the action are for one or more of money, real property, a builder’s lien and personal property and the total of the following amounts is $100,000 or less, exclusive of interest and costs:
I.1.10

(i) the amount of any money claimed in the action by the plaintiff for pecuniary loss;

(ii) the amount of any money to be claimed in the action by the plaintiff for non-pecuniary loss;

(iii) the fair market value, as at the date the action is commenced, of
   (A) all real property and all interests in real property, and
   (B) all personal property and all interests in personal property claimed in the action by the plaintiff,

(b) the trial of the action can be completed within 3 days,

(c) the parties to the action consent, or

(d) the court, on its own motion or on the application of any party, so orders.

Rule 15-1 has restrictions on examinations for discovery and requires a case planning conference or trial management conference before parties can file contested applications. There are also fixed costs provisions similar to those in Rule 66 and a similar requirement that the trial date be set for within four months of the application for a trial date. Finally, limitations on document production such as those in Rule 68 apply to all actions under the New Rules and thus apply to fast track actions under Rule 15-1. Given the expanded availability of this procedural option it is likely that its use will expand in the future.

VII. Conclusion

The process of planning litigation can be intimidating at times, much like opening a box to discover a jigsaw puzzle with what seems to be a mish-mash of pieces from many different puzzles. Methodical planning and the appropriate use of the available procedural tools will assist you in sorting through the pieces and assembling the puzzle. The New Rules promise to provide the opportunity for more efficient and expedient litigation which will mean that lawyers who can accurately and quickly piece together the puzzle in a comprehensive manner will ultimately have more opportunity to advocate for their clients' rights.