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Litigation Without Trial

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LITIGATION WITHOUT TRIAL

I. Introduction

Important facets of litigation occur in chambers, including applications for final orders in petitions on corporate and arbitration matters and judicial review, as well as summary trials. The process of reaching court in such situations — the instances discussed in this paper are oriented, in particular, to the B.C. Supreme Court — differs from that used to get to a regular trial, as does the mode of presentation.

Set out below are some practice tips on litigating cases without a regular trial. Some of these tips delve deep into logistics — as most of you already know, the practice of law is only in part about the legal propositions pertaining to the case at hand, but also in large part about identifying and presenting the facts to which those legal propositions apply, and figuring out how to get the case into court at all.

II. Knowing What Form of Process to Use

Many of us are accustomed to commencing court proceedings by notice of civil claim, and proceeding with document discovery, examinations for discovery, and other steps leading toward an ordinary trial with live witnesses in attendance.

Even in proceedings commenced by notice of civil claim there can be variations on this theme. Sometimes it is possible to obtain summary resolution, including by means of summary trial, with most or all of the evidence adduced by affidavit though sometimes with discovery of

documents and/or examinations for discovery nonetheless held in advance. In other cases there may be a combination of processes — with cooperative counsel and an amenable judge, it may be possible to have a "hybrid trial" where some or all of the direct evidence is adduced by way of affidavit but some witnesses appear live for cross-examination and there are the openings and closings that one would expect of an ordinary trial.

However, not to be overlooked as a means of getting to court even for a final order in certain commercial cases is using a petition as the point of entry, with a process that generally does not involve discovery and that leads to a hearing in chambers — generally without live witnesses — as the norm. This can occur in a variety of contexts, including on certain points of contractual interpretation, for certain relief under corporate statutes, and when challenging the decisions of certain tribunals in both the administrative and arbitral contexts.

When considering how to commence a proceeding, do not forget to review the ever-helpful Rule 2-1(1) and (2) of the Supreme Court Civil Rules, which provide:

> **Commencing proceedings by notice of civil claim**
>
> (1) Unless an enactment or these Supreme Court Civil Rules otherwise provide, every proceeding must be started by the filing of a notice of civil claim under Part 3.
>
> **Commencing proceedings by petition or requisition**
>
> (2)To start a proceeding in the following circumstances, a person must file a petition or, if Rule 17-1 applies, a requisition:
>
> (a) the person starting the proceeding is the only person who is interested in the relief claimed, or there is no person against whom relief is sought;
>
> (b) **the proceeding is brought in respect of an application that is authorized by an enactment to be made to the court**;
>
> (c) **the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document**;
>
> (d) the relief, advice or direction sought relates to a question arising in the execution of a trust, or the performance of an act by a person in the person's capacity as trustee, or the determination of the persons entitled as creditors or otherwise to the trust property;
>
> (e) the relief, advice or direction sought relates to the maintenance, guardianship or property of infants or other persons under disability;
>
> (f) the relief sought is for payment of funds into or out of court;
>
> (g) the relief sought relates to land and is for
>
> (i) a declaration of a beneficial interest in or a charge on land and of the character and extent of the interest or charge,
>
> (ii) a declaration that settles the priority between interests or charges,
>
> (iii) an order that cancels a certificate of title or making a title subject to an interest or charge, or
>
> (iv) an order of partition or sale;
>
> (h) the relief, advice or direction sought relates to the determination of a claim of solicitor and client privilege.
>
> [emphasis added]

In relation to subrule (2)(b) ("the proceeding is brought in respect of an application that is authorized by an enactment to be made to the court"), various statutes use the word "apply" in describing the means of obtaining relief, pointing you toward a petition as the document to file in most cases.

Some statutes actually go further and confirm that petitions are to be filed where relief is sought. For example, the *Arbitration Act*, R.S.B.C. 1996, c. 55 — which provides for interfacing with the court on such matters as applications for leave to enforce the arbitral award, appeals from an arbitral award, or challenges to the process followed to obtain an arbitration award — provides as follows in ss. 42 and 43:

> **Applications to the court**
>
> 42 (1)Applications to the court under this Act must be made by a petition proceeding or, if Rule 17-1 of the Supreme Court Civil Rules applies, a requisition proceeding.
>
> (2)An application under section 30 or 31 must be made within 60 days after the parties have been notified of the award and its terms.
>
> **Extension of time limit**
>
> 43 The court may extend any time limit provided for in this Act even if the application for the extension or the order granting the extension is made after time has expired.

Often petition proceedings are commenced in relation to applications for judicial review of the decisions of administrative tribunals, under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. In bringing such a proceeding, you need to keep in mind not only that statute, but also if applicable portions of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 and common law doctrines that these statutes in part codify. Also keep in mind that sometimes, the statute governing the particular tribunal that made the first decision provides for a challenge to be brought not to the B.C. Supreme Court but, instead, to the B.C. Court of Appeal; see, for example, the *Utilities Commission Act*, R.S.B.C. 1996, c. 473, s. 101(1)(b).

In some situations, you may have a choice as to whether to commence a proceeding by notice of civil claim or petition, such as on certain issues related to contractual interpretation. Particularly taking into consideration that this is usually a question of mixed fact and law these days, think about whether there is likely to be controversial evidence or whether documents that you may need for your case are in the possession of the other party; in those circumstances, you may wish to access discovery rights and have the live cross-examination that are outside the norm in proceedings commenced by petition. Reflect as well on the nature of the relief that you ultimately wish the court to grant, and whether the court would be prepared in the particular circumstances to venture beyond declaratory relief when your client might be best served by an injunction (which is not always available in the petition context) or a damages award.

If you are already in the realm of a proceeding commenced by petition, but it is looking as though a fair adjudication would require a trial-like process, consider attempting to convert the modes of proceeding or to bring in some other rules that ordinarily would not apply.

Rule 16(18) (in relation to petitions) of the Supreme Court Civil Rules provides that “[w]ithout limiting the court's right under Rule 22-1 (7) (d) to transfer the proceeding referred to in this rule to the trial list, the court may, whether or not on the application of a party, apply any other of these Supreme Court Civil Rules to a proceeding referred to in this rule.” Rule 22-1(7)(d) provides that the court may “order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.”

III. Logistics and Scheduling the Hearing

Of course, in the types of scenarios discussed in this paper, getting in front of a judge requires not a notice of trial but other process, even where final relief is sought.

A. Hearing Dates

You need to know when "long chambers" **hearing dates** are available for hearing in Vancouver and coordinate call-ins for the dates. Coordinate dates in advance with opposing counsel and ensure you pin down the arrangements for calling in.

If your client wants those dates, try not to leave the responsibility of snaring them solely to the (perhaps less motivated) other firm — call in jointly or have your own assistant phone. At the risk of overloading the system (and incurring the ire of the court registry), consider having multiple assistants phone in to maximize the chances of securing the dates.

For hearings out of town, figure out how they can be booked. Keep in mind the possibility of running into an assize system (e.g., in Kelowna and Kamloops) and needing to keep some flexibility for a hearing week.

B. Thinking about the Judge

Though the differences should not be overstated, different judges may approach matters in somewhat different ways, both procedurally and in substance. Some may have experience in particular matters; others may never have decided a case in your subject area.

In B.C. Supreme Court matters in Vancouver, if you phone Scheduling at the registry before 4 pm on the afternoon before the hearing, you can probably find out who the judge specifically assigned to your matter will be (assuming it is more than two hours and is not on the overflow list). This can be very valuable. Do not count on accessing the information online, so you must make the phone call in time — online the information may only be available the morning of the hearing at some point.

Once you know the judge, try to find the judge's bio in the *Advocate* (most but not all judges have published bios) and do a case law search to give you some context in terms of the judge's familiarity with the issues.

Think about how to make things easy and palatable for a judge; this is a theme picked up on below as well. Go watch chambers proceedings, trials and appeals when you have time, even if they have nothing to do with your firm. You will get a sense of what judges react well (or badly) to, as well as effective and ineffective advocacy more generally.

IV. Application Record

You need to know when to file documents so an application can go ahead and does not get bounced.

Most judges are not weightlifters — **immense binders with long petition or application records are not regarded that highly** (and some judges make a point of making their displeasure with heft known). Of course, the weight is a representation of larger concerns that judges may have,

on being confronted with a large record with minimal explanation of what parts are actually relevant.

Never cram binders or cerlox bindings too tightly — if the binding bursts apart, or the judge cannot turn readily to pages that you or senior counsel need to have the judge look at, it can be embarrassing and counterproductive.

Make sure compilations of documents under a single tab are page numbered (making clear the page number is your insertion — e.g. by handwriting — in case of any doubt).

Unless the flaw is in the original, make sure all documents are legible — the sides are not cut off by binding etc., the font is not too small — and tidy (no black edges). If the original document has small font, think about having a copy (as long as you indicate it has been altered) blown up in size.

Check that your or senior counsel's markings are not on copies of the documents for the court or opposing counsel. Shading from some otherwise tempting colours of highlighters come through even on black-and-white photocopies.

However, always make sure that if you or senior counsel have marked up a set of documents/cases, you have that set available in court for your side's own use — starting afresh is very frustrating and important points can be forgotten.

Keep exhibit lists. In chambers matters, where there are many affidavits/exhibits, create a master index of exhibits to allow you and senior counsel to find documents in the record quickly and be able to point the judge to the right tab. Organizing the list chronologically can be extremely helpful.

V. Affidavits

A. The Importance of Facts

Facts are key and in some respects can be as or more important than the law. In this regard:

(a) Never underestimate the importance of the facts of your case:

  (i) Judges will try to achieve the fair result.

  (ii) Judges may be disinclined to reward liars.

  (iii) Less dramatically, without knowing the facts, you cannot fully analyze what the outcome should be within a particular legal framework.

(b) It is usually very useful early on in a case to **create a chronology, with document references, that can be expanded as knowledge of the case improves**. This saves re-inventing the wheel every time you need to pick up the file, and can be tremendously helpful in terms of illustrating connections that you would not spot when just reviewing documents individually.

(c) Facts can also be key in the case law you rely on for your legal argument — never neglect reading that part of the decisions you want to rely on.

(d) Prepare and update a proof chart to match elements of a cause of action/application against the evidence available. This will assist in preparing affidavits.

B. Preparing Affidavits

Affidavits need to speak for those who would otherwise be testifying live before a judge.

Take the drafting of every affidavit as seriously as if you were going to be the witness swearing it. There can be no mistakes.

Many witnesses do not, unless pushed to do so, read affidavits carefully — they think the content must be fine because that is what comes from the lawyer's office. So:

(a) **Make sure they know THEY need to be comfortable with all the contents**. It is their oath/affirmation, they will be potentially subject to cross-examination, and accuracy is key — you will change the wording to make it accurate if it is not accurate already.

(b) Given that witnesses may tune out for all or part of the above general warnings, but in any event to serve as a backstop even for the most diligent and sophisticated witness, **YOU need to make sure the content IS accurate before giving it to them for review**. Check any documents associated with the events being attested to and flag any discrepancies. Make sure to draw the attention of the witness specifically to any item of uncertainty.

(c) Even if the content of the affidavit comes from notes of what the witness said to you originally, sometimes witnesses do not remember very reliably or overstate — **do any and all cross-checking you can**.

(d) **Never overstate — it will come back and haunt the witness and the case.**

Watch for overwrought statements, hearsay (unless of a permissible form, which is particularly limited where a final order is sought), etc.

Do not make an affidavit from a non-lawyer sound like a lawyer is speaking.

You will be accused of splitting the case if you do not put your best foot forward on your initial filing — attach all the exhibits you will want to rely on. Be rigorous about this — do not just include a smattering of documents where you really need others too. Of course, it is a fine line — do not include documents simply because you are unsure about them, bearing in mind the point made above about judges generally not being weightlifters.

VI. Argument

Both written[1] and oral argument can be important facets of chambers proceedings.

In the kinds of proceedings that are the subject of this paper, counsel are usually the sole live voice in court for their client. It is, of course, important to be organized and know the facts as

1 On matters falling within Rule 8 of the Supreme Court Civil Rules, consider if you will be able to file a written argument — see rule 8-1(16): "Unless an application is estimated to take more than 2 hours, no party to the application may file or submit to the court a written argument in relation to the application other than that included in the party's notice of application or application response."

well as the law very well. It is also important to have a sense of the bigger picture in terms of client goals as the matters may shift over the course of a relatively short hearing through questions from the judge, new propositions from opposing counsel, etc.

Always be able to answer this question: What gives a court or tribunal the power / jurisdiction to make a certain order or take a certain step? Make sure the power exists before seeking an order to that effect and be prepared to justify it.

Judges are your audience and you need them to understand and want to assist:

(a) You need to have a **conversation** with them on important points, not show off your understanding of tangentially related propositions (unless asked about them).

(b) Judges need to understand the **facts**. Most cases are won on facts, not law. Do not skip the factual background in favour of going straight into legal propositions. Make sure that you cite the evidentiary support for factual propositions and make sure what you cite bears out what you have said. Show how the law applies to these particular facts.

(c) Remember to identify clearly what you actually want the court to do.

(d) Make sure judges understand, clearly and fairly, **the test** they are to apply.

(e) **Do not overstate propositions.** Judges need to trust what is being said and if they do not, none of it may be accepted.

(f) **Do not use overwrought words**. It is far easier to use extravagant words when sitting in front of a computer screen back at the office than when you are the person standing up in court to defend the words used, and once used it is difficult to backtrack. Even if you are junior counsel preparing a written argument, put yourself in the position of senior counsel — do not rely on them to be able to catch and strike out every overstatement in a draft before handed up to the judge. And assume judges are generally rightly skeptical of over-the-top language even where warranted.

(g) **If what you submit to the court looks sloppy, the judge may assume the sloppiness extends to more than formatting** — i.e., to analysis, gathering of evidence, dealing with the other side, your client's attitude, etc.

(h) Make sure what is filed/handed up is **not too dense or squished on the page** — the judge needs to be able to read and understand.

(i) Avoid double-sided submissions — judges need **room to make notes**.

(j) Edit/trim (no fluff can remain) and proofread.

(k) Think of the client's goals and get into position for a potential appeal.

(l) **Be careful of alternative positions or too many** of them — they may be entirely appropriate in some circumstances, but sometimes create confusion or an easy "out" for the judge that detracts from your primary point.

Do not assume a seminal case or statutory provision that seems to state the obvious has not changed. For some reason these are the ones most prone to change!

Be very aware of everything that will/should be going before the court and consider whether on balance it is truly helpful or otherwise needs to be addressed:

(a) If a case has a good statement on one point but a terrible statement on another, or the facts are wildly off, consider whether to rely on it.

(b) **BUT absolutely do NOT ignore unhelpful authority/facts**. Sometimes counsel might feel it is their obligation to raise a matter with the court, or that it is best (even if not required) to raise it pre-emptively, or that they should structure affidavits/arguments in a way that accommodates the point, or at least that they need to be very prepared if the other side raises it.

Anticipate what the other side's argument will be before presented.

Read the other side's argument and cases critically. Do they stand for the propositions cited for? Do they contain propositions that help you? Are they distinguishable?

Never take anything said in the other side's argument at face value. Read carefully the cases on which the other side relies — they are sometimes used for propositions they do not support, not necessarily deliberately but because of misreading (or over-optimistic reading) under time pressure. Pointing this out to the judge can really undermine the other side's case.

Be careful, though, about picking on small/borderline points — you do not want to look petty to the judge and you may expose yourself to a certain tit-for-tat.

VII. Book of Authorities

In terms of researching the authorities to include:

(a) Do not start with a computer case law search. Go to the library. Look at textbooks, articles, digests (CED, *Halsbury's*, *American Jurisprudence*), indexes to reporter series, annotated statutes, "words and phrases", dictionaries, etc., for ideas. Someone has taken the trouble to pull together ideas with far more time than you have. Of course, do not stop at secondary sources — you need to dig further;

(b) always note up cases and look for more by computer, but a computer case law search is not enough — it does not provide any context and you will not be able to do a search for all the synonyms that might possibly catch everything you need;

(c) think about *Hansard* / legislative history / policy, though not determinative;

(d) if working on a case at the Supreme Court of Canada, remember the judges have wide scope;

(e) if there is a Supreme Court of Canada or B.C. Court of Appeal decision on a point, remember to cite it.

Reported versions of cases where available are ideal. What are "reported" versions? Reported versions of cases are decisions in reporter series like the BCLR and DLR. Where can you get them? If not at your firm, other series/years can be ordered from the courthouse library or beyond. In addition, good quality PDFs are available via CanLii for SCR cases and ICLR for many English cases.

Why is having reported versions of cases important? A good contingent of senior counsel believe that some judges give more weight to reported cases (and cases that are visibly reported — evidence of this being inclusion of a reported copy in the book of authorities) than to computer printouts (and when the legal theory is a stretch, one needs all the help one can get!). Not all decisions are reported — those that are, are chosen by the editors of the reporter series as significant, giving them extra "oomph". At one point, cases that were unreported were viewed with suspicion — they were not worth making readily available to the public (remember, access via CanLii etc. to most decisions is quite new in the greater scheme of things). Besides, some computer printouts:

(a) look shabby rather than giving the professional appearance you want to convey;

(b) worse yet, look as though the lawyer relying on the case typed it himself/herself; and/or

(c) lack readily visible page numbers or other easy means of finding one's spot on the page.

No matter whether you prefer reported or unreported:

(a) Make sure all cases have **legible page numbers, even if there are also paragraph numbers** — be careful eg of certain printouts that have faint and microscopic numbers.

(b) **Make sure the version in the book of authorities is the version cited in the petition/notice of application/argument**.

(c) Do not wind up just including a digest/summary of the case.

(d) **If relying on a textbook, make sure you include the title page; it is best also to include the page with publisher information/year printed, and best not just to include a single page out of context.** If the surrounding pages hurt your point, do not rely on the textbook — it is misleading and there's a good chance that opposing counsel will expose your selective use of the material.

Try to coordinate with other counsel on a joint book of authorities.

Is having a book of authorities that looks trim and efficient a priority? In some cases it might be (e.g., when trying to convince a judge that a short time estimate is realistic). In this regard:

(a) consider whether to have a double-sided book of authorities;

(b) see if you can get slimmer tabs;

(c) pare down on your cases (do not cite many for the same proposition unless it is to make a point).