The Law Society of Manitoba

INCORPORATED 1877 | INCORPORÉ EN 1877

CIVIL PROCEDURE

Chapter 1

Commencing an Action

November 2024

TABLE OF CONTENTS

A. INTRODUCTION

This chapter considers selected important topics about the commencement of civil litigation in the Manitoba Court of King's Bench. Its limited scope excludes consideration of Small Claims Court (see chapter 5 of these materials), family law and child protection proceedings (see the Family Law and Child Protection materials), and actions in the Federal Court of Canada (see chapter 4 of these materials).

B. COMMENCING AN ACTION: GENERAL CONSIDERATIONS

1. Pleadings

Pleadings are the formal written statements that each party to a lawsuit has filed and then served upon the other parties to that action or application. Examples include a statement of claim, statement of defence, counterclaim, third party claim, crossclaim, and notice of application.

Pleadings set out essential information, such as the identity of the parties and the jurisdiction of the court. Pleadings especially define the issues that the parties are asking the court to consider and decide, and the pleadings determine the case to be proven or met.

In "The Uses of Pleadings", (1951) 40 KYLJ 46, Edward W. Cleary described pleadings as contributing to "the concept of an orderly judicial process", because they serve the following purposes:

1. notice to the opponent which is adequate to enable them to prepare and present their side of the case effectively;
2. determination of the elements which are relevant to the ultimate decision and allocating between the parties the responsibility for bringing them into the litigation;
3. isolation of the actual controversy;
4. ascertaining the governing substantive principles.

Without them, litigation has no apparent origin or discernible destination.

Pleadings properly focus upon the cause of action. This term requires definition, because it can have two meanings. In some contexts, the cause of action can refer to *the legal theory that underlies an action or application*. For example, where a plaintiff alleges that the defendant has failed to fulfil its contractual obligations without lawful excuse, the cause of action is breach of contract.

Even though they are drafted, filed, and served early in the litigation process, pleadings require exceedingly careful consideration and forethought. If a pleading ignores or

mishandles a cause of action or a defence to a cause of action, the party relying upon that pleading may be fatally prejudiced later in the proceedings.

Problems with pleadings can negatively affect the nature and scope of documentary discovery, the kinds of questions that may arise during examinations for discovery, the pursuit of certain relief at trial, or the advancement of a particular defence.

Such consequences spring from the fact that pleadings are clearly intended to give notice of the case that a party will advance, and other parties to the proceedings and even the court itself may rely upon the pleadings to be complete. In *Rieg*er *v. Burgess*, [1988] 4 W.W.R. 577, Tallis J.A. of the Saskatchewan Court of Appeal aptly noted that:

> *[o]ur civil law system for the administration of justice seeks to achieve these objectives through the means of pleadings and particulars, the purposes of which, apart from serving to define the real issues dividing the parties, include fair warning to the other side of what is going to be claimed, and thus to delimit the scope of discovery, to prevent surprise, to avoid adjournments, and, not unimportantly, to reduce cost by facilitating the orderly and disciplined preparation of evidence for trial.*

Drafting sound pleadings is an art that every litigator must develop and work towards perfection.

2. Preliminary Considerations

a) The King's Bench Rules as a Framework

Every litigant must be familiar with the Court of King's Bench Rules (simply known as the King's Bench Rules or KB Rules).

There also are King's Bench Criminal Rules, as well as two sets of rules for the Court of Appeal, those for civil litigation and the Manitoba Criminal Appeal Rules. The focus of this chapter is on the King's Bench Rules for civil litigation.

Rules 1 to 29 and 38 of the King's Bench Rules are especially relevant to the drafting of pleadings and the commencement of an action or application.

> Unless a statute specially provides otherwise, the King's Bench Rules automatically apply to all civil proceedings in the Court of King's Bench of Manitoba (Rule 1.02(1)). This broad scope captures actions which, for the purpose of this chapter, are legal proceedings that are commenced by way of a statement of claim, a counterclaim, a crossclaim, or a third or subsequent-party claim. In addition, the rules govern proceedings that have been commenced by the filing of a notice of application.

Some KB Rules are administrative, such as Rule 4.01, which prescribes the formatting and layout of pleadings on the page. Although the Court Registry is unlikely to refuse the filing of a pleading that does not reflect, for example, the requirement that the left margin should be wider than the right, lawyers should strive to comply with the formatting requirements. The Court Registry will however strictly enforce font point size in affidavits.

There are at least two general principles that underlie and inform all of the rules, which appear in Rule 1.04.

First, judges and associate judges must adopt a liberal approach to the construction and application of the rules. Rule 1.04(1) requires that:

> *[t]hese rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.*

The application of a liberal approach to the rules may enable an associate judge or judge to achieve results that the specific provisions of the King's Bench Rules did not anticipate. At the same time, Rule 1.04(1) does not create a judicial discretion to ignore the rules entirely: *Bergen v. Manitoba,* 1998 CanLII 28200 (MB KB).

A second general principle underlying the King's Bench Rules is proportionality. Rule 1.04(1.1) requires that,

> *In applying these rules in a proceeding, the court is to make orders and give directions that are proportionate to the following:*
>
> *(a) the nature of the proceeding;*
>
> *(b) the amount that is probably at issue in the proceeding;*
>
> *(c) the complexity of the issues involved in the proceeding;*
>
> *(d) the likely expense of the proceeding to the parties.*

This important rule tempers some of the complexity and expense that would normally result if the rules were always applied with the same rigour and detail, regardless of the nature of the specific proceedings before the court at any time. Indeed, Rule 2.04 permits a judge to sanction a party who unduly complicates or obstructs the progress of an action or application.

Rule 1.04(1.1) came into force in October 2017, but the notion of proportionality is not new to Manitoba law. The original Rule 20(A) brought proportionality to expedited actions when it was added to the King's Bench Rules over a decade ago. The Supreme Court of Canada fleshed out the concept of proportionality when Karakatsanis J. offered this explanation in *Hryniak v. Mauldin*, 2014 SCC 7 at para. 27-29:

> *…the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for*

adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

Writing for the Manitoba Court of Appeal, Steel J.A. elaborated in *Rochelle et al. v. The Rural Municipality of St. Clements et al*., 2014 MBCA 102 at para. 5:

[t]he proportionality principle means that the best forum for resolving a dispute is not always the one with the most painstaking procedure. The courtroom is not the private preserve of any single litigant to be used as they see fit. The appropriate utilization of judicial resources is a public concern and one which courts should consider in reaching their decisions. In that light, the Manitoba courts have applied considerations of proportionality quite apart from any provision in the Queen's Bench Rules, including:

- *discouraging the appealing of interlocutory procedural orders: Loeppky et al v Taylor McCaffrey LLP, 2015 MBCA 83;*
- *altering the standard by which a judge determines the cogency of evidence on a motion for summary judgment: Heritage Electric Ltd et al v Sterling O & G International Corporation et al, 2017 MBCA 85;*
- *discouraging case splitting: Klippenstein v. Manitoba Ombudsman, 2015 MBCA 15; and*
- *ordering an expedited trial: Lodge et al v Red River Valley Mutual Insurance Company et al, 2017 MBCA 76.*

Since coming into force, Rule 1.04(1.1) has brought proportionality to both substantive and procedural issues arising in matters, including awards of costs (*Winnipeg Board of Jewish Education Inc. v. Raam*, 2019 MBQB 186 at para. 44) and the extent of examinations for discovery (*Manitoba Chiropractors' Association v. College of Physicians & Surgeons of Manitoba*, 2020 MBQB 30).

At the same time, proportionality does not justify corner-cutting: the usual rules of pleading relating to the production of particulars apply, despite the overarching principle of proportionality: *61653547 Manitoba Inc. et al. v. Jenna Vandal et al.*, 2019 MBQB 69; a party may not justify its refusal to produce relevant documents as disproportionate, where those documents have a probable benefit in the ultimate outcome of the dispute: *Manitoba Agricultural Services Corp. v. Kachurowski*, 2018 MBQB 159 at para. 47-49.

The trend is to prefer simplicity and brevity over complexity and delay, while the jurisprudence is stacking up against the litigant who prefers that proceedings unfold in a traditional way.

Lawyers researching the King's Bench Rules have several resources, including Woolley and Busby's *Manitoba Court of King's Bench Rules Annotated,* which is a looseleaf service. In addition, because the Manitoba rules closely follow those in Ontario and New Brunswick, materials from those jurisdictions are often useful, including the annual *Watson & McGowan's Ontario Civil Practice 2025*, which is available from Thomas Reuters in book or electronic format.

b) Interviewing the Client and Taking Instructions

Litigation cases will usually begin with a telephone call, letter or e-mail from a prospective client, requesting assistance. Prior to getting into the merits of the case, you must pre-screen the case to determine whether or not your firm may be in a conflict of interest.

> In the initial contact with the prospective client, tell them that you need to ask general questions about the matter to determine if there is a potential conflict. Warn them not to disclose specific details about the case until you are satisfied that there is no conflict. This is crucial, as the prospective client may likely disclose confidential information that warrants protection. The receipt of this information may be sufficient to place your firm in a conflict of interest.

In preparation for the first meeting, ask the client to bring:

- documents that establish the identity of the client for the purpose of complying with client identification and verification rules;
- a detailed, chronological outline of the facts;
- all relevant documents; and
- a list of all persons involved, including contact information.

At the initial interview, the client will be anxious to know whether they have a case, and will press you for your legal opinion on the fact situation presented. In most instances, except those which are blatantly obvious, it is unwise for you to provide a definitive legal opinion at the first interview.

There are a number of considerations that you must take into account on your own and on behalf of your client before providing a legal opinion and drafting pleadings. A basic interview technique which many lawyers employ, uses open-ended questions, with a "who, what, when, where and why" questioning format. The following is a brief checklist of matters to canvass:

- **Who** are the parties?
- **What** are the relevant facts? What is in issue? What does the client want to achieve? What does the client want you to do? You must encourage the client to provide all facts, whether good or bad. The client must provide sufficient facts for the lawyer to provide a proper opinion and draft the pleadings.
- **When** did the events occur? This information is crucial for determining limitation dates. Is there a notification date or an early limitation date? Make a note of the limitation date in the file, on the cover of the file, and in your calendar or diary system. (This is important, as limitation dates have a habit of sneaking up on you.) Under *The Limitations Act* there is a basic limitation period of two years, which begins to run on the day the claim is discovered, and a maximum limitation period of 15 years (beyond which the basic limitation period cannot extend), which begins to run on the day the event giving rise to the claim takes place.
- **Where** did the events take place? The geographical location of the event will determine the jurisdiction of the court.
- **Why** does the client want to sue? In discussing the reasons why the client wants to sue, you will be able to canvass the potential for settlement.

Through the interview process, you will have to consider other points:

- Does the client have a cause of action? Is the matter worth pursuing (i.e., of sufficient merit or cost effective to pursue?) Is there an alternative to litigation?
- Do you have all of the client's documents? The client must be advised to disclose to you all documents, whether good or bad. Explain to the client the obligation to disclose relevant documents.
- Are there are any other sources of information which require investigation?
- Who are the witnesses or potential witnesses? Do you need to contact or obtain statements from the witnesses prior to drawing pleadings?

- Are you capable of handling the case? Consider your ability and experience.
- Properly establish the solicitor-client relationship. Discuss scope of retainer, legal fees, disbursements, and retainer amount. You should have a written retainer for every file you open. At the very least, you should mail a letter to the client, detailing the nature of the instructions, scope of the retainer and the billing arrangements. Ensure that you advise the client that you cannot provide a precise estimate of legal fees due to the nature of the litigation process. The client must have a realistic understanding of how the litigation process operates at the outset of the relationship. For more information on retainers, see the *Retainers* chapter in the Law Society Education Center under Practice Management.

After an interview you may provide a written and/or oral opinion. However, wherever possible, a written opinion is preferred as it will minimize any misunderstanding between the lawyer and client as to the merits of the case. The opinion may be subject to the client bringing in further documents and/or further information and should be qualified by explaining to the client that the opinion could change once the discovery process begins and you have access to the evidence of the opposing party. An opinion is especially useful to both lawyer and client where the lawyer is unsure as to the merits of the claim.

Guard against providing an opinion which creates unrealistic expectations for the client.

Once you have determined that your client has a case that may be litigated in the King's Bench, you should spend sufficient time explaining the litigation process.

Your client should know and understand the various steps that are taken after pleadings have been completed, including discovery of documents, examinations for discovery, preliminary motions, pretrial conferences, trial and appeal. Your client should also be made aware of the likely time-line of the litigation, as many clients are unaware of how slowly the "wheels of justice" turn.

Be careful when discussing timelines and cost estimates as each often becomes larger than expected. Be sure to alert the client to such possibilities and to keep the client informed on an ongoing basis.

You may choose to write down the various litigation steps while meeting with the client, providing them with the original and keeping a copy on the client's file. Acting as a checklist, this assures that you have canvassed the steps with the client. As litigation can be a very fluid process, these steps should be updated as the case proceeds, especially if unanticipated events arise.

The client should be aware of the cost of the process, including the disbursements, GST and RST, and their obligation to pay both fees and disbursements.

You should also discuss the potential of court costs being awarded against the client if they are unsuccessful at trial.

You should explain the prospect of settlement and, throughout the litigation process, when the most common and appropriate places might be to discuss settlement. You should advise the client of your obligation under the *Code of Professional Conduct* to encourage settlement (Rule 3.2-4) and advise the client you will give them frank advice with respect to settlement.

You should also discuss with your client the general court process and potential difficulties in collecting on a judgment. Many clients may be much more willing to discuss settlement when they realize that a judgment does not guarantee them payment.

> At the early stage of litigation, you have heard only one side of the story. It is very often a biased version, and almost always incomplete. Your client should be aware that any opinion you give as to the merits of an action is based upon the knowledge available to you at that time. Specifically advise the client that your opinion is based upon the information the client has provided, and that your opinion is subject to revision after receiving disclosure from the other side.

Take very detailed notes at the first meeting with the client. You may provide your client with a memo outlining the facts as the client has relayed them to you. This not only prompts the client to recall facts which they may have forgotten to tell you, but also can serve to protect you later if new facts are uncovered during the discovery process that change your view of the case.

Lawyers will sometimes enter into contracts with clients when taking on litigation matters. Generally speaking, however, retainer letters are more common than written contracts. The precedents contain a sample retainer letter. Contingency fee arrangements must be in writing. Section 55 of *The Legal Profession Act* sets out the rules regarding contingency contracts. Rule 3.6-2 of the *Code of Professional Conduct* provides additional direction in this area. The precedents contain a sample contingency fee agreement.

If you are representing a defendant, canvass whether the defendant has any money to pay the plaintiff if the plaintiff's case is successful, or whether the defendant is insured for the potential liability. Ensure that the client has provided the appropriate notice to their insurer.

c) Jurisdiction

One of the primary considerations is whether the King's Bench is the appropriate forum for your client's action.

The Court of King's Bench is a court of record of original jurisdiction. It has the jurisdiction to decide all matters relative to property and civil rights in Manitoba, except as they may have been changed or altered by parliament, or a rule or order of the court (*The Court of King's Bench Act*, ss. 32-33). In other words, the Court of King's Bench has jurisdiction over all matters, except those specifically excluded from its inherent jurisdiction.

Many disputes are determined outside the Court of King's Bench. Your client's matter may be under the jurisdiction of an administrative tribunal such as the Workers Compensation Board, the Automobile Injury Compensation Appeal Commission, the Manitoba Labour Board, or collective agreement arbitration. For administrative procedure see chapter 6 of these materials, "Advocacy before Administrative Tribunals."

As well, some cases can be commenced in either the Court of King's Bench or in the Federal Court of Canada. Cases which involve a choice of jurisdiction require a decision to be made at the outset. (For information on Federal Court practice see chapter 4 of these materials.)

Conflict of laws is another consideration. Your client may not be able to proceed in Manitoba if the cause of action arose in another jurisdiction.

Finally, you should consider whether your client can proceed in Small Claims Court or under Rule 20A, depending on the amount at issue. Small Claims Court practice is discussed in chapter 5. Rule 20A is discussed in more detail in chapter 3.

d) Limitation Periods

The Limitations Act came into force on September 30, 2022, at which time the former *Limitation of Actions Act* was repealed. *The Limitations Act* brought significant changes to the limitation periods for civil causes of action, bringing Manitoba's regime into alignment with many other provinces.

The Limitations Act eliminated the various limitation periods for different causes of action under the former legislation and replaced them with a two-year "basic" limitation period. It also shortened the "ultimate" limitation period to 15 years, with the exception of certain Aboriginal claims. *The Limitations Act* must always be considered.

Section 1 provides:

> *This Act sets out limitation periods for civil claims. A person with a claim must start a court proceeding within the limitation period or lose their right to do so. For most claims, the Act:*
>
> *(a) establishes a basic limitation period of two years, which begins to run on the day the claim is discovered;*
>
> *(b) establishes a maximum limitation period of 15 years (beyond which the basic limitation period cannot extend), which begins to run on the day the event giving rise to the claim takes place;*
>
> *(c) does not apply if another Act contains a specific limitation period that applies to the claim or otherwise conflicts with this Act.*

As set out in section 7:

> *A claim is discovered on the day the claimant first knew or ought to have known all of the following:*
>
> *(a) that injury, loss or damage has occurred;*
>
> *(b) that the injury, loss or damage was caused by or contributed to by an act or omission;*
>
> *(c) that the act or omission was that of a person against whom the claim is or may be made;*
>
> *(d) that, given the nature and circumstances of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.*

Based on the new language of *The Limitations Act*, for most claims the limitation clock starts ticking when a claim is "discovered", which term is defined by the provisions in section 7 above. In most cases, the injury, loss or damage will be discovered on the day it occurs. However, there will be many situations where discovery is a more complex analysis and how these complexities will be handled by the courts will only develop over time. Based on the judicial consideration of similar provisions in other provinces, it seems clear that the damages do not need to be "crystalized" or fully realized, simply that the plaintiff be in a worse position as a result of an act or omission.

The Act sets out exceptions in section 10, and section 18 sets out a list of claims for which there is no limitation period, including sexual assault and assault by a person with whom the victim had an intimate or dependent relationship, and also certain limited debtor/creditor claims. You should always review these sections carefully to see how they apply to the file you are dealing with.

Transitional provisions, which deal with claims commenced or discovered under the former *Limitation of Actions Act,* appear in sections 28-31. However, those transition provisions ended as of September 30, 2024 and so any claims that were discovered before September 30, 2022, must either have been filed by September 30, 2024 or the date the limitation period expired under the previous *Limitation of Actions Act*. For claims moving forward, the provisions of *The Limitations Act* now fully apply.

Remember that the limitation periods contained in the Act do not apply if there are limitation periods in another piece of legislation. Those more specific limitation periods take precedence over *The Limitations Act*. Having said that, *The Limitations Act*, in sections 32-50, amended or repealed many other limitation periods in other Acts, especially in the health care fields, so it is important to be aware of those changes.

Special attention should also be paid to claims against the City of Winnipeg or any municipality in Manitoba or claims involving the Crown, either federal or provincial, as there are certain notice requirements that, if unheeded, can defeat your client's action. Limitation periods might also be different for claims involving such entities.

It should be noted that there are special limitation rules relating to minors and persons under a disability; the limitation period does not begin to run while the claimant is a minor (see s. 13) or under a disability (see s. 14). However, a potential defendant does have an ability under *The Limitations Act* to serve a notice to proceed on a minor plaintiff or person under a disability in order to commence running of the clock (see s. 15).

Each province has its own statute(s) setting out limitation periods. If your client has a claim in another jurisdiction, you ought to immediately determine the applicable limitation period with reference to the appropriate law. You may also have to obtain advice from legal counsel licensed to practice in that jurisdiction.

The doctrine of laches is a form of limitation applicable to equitable claims. The doctrine of laches may be used to defeat an equitable claim, even though the limitation period has not yet expired.

Section 26 of *The Limitations Act* provides:

> *Nothing in this Act precludes a court from granting a defendant immunity from liability under the equitable doctrines of acquiescence or laches.*

In *Rivergate Properties Inc. v. West St. Paul (Rural Municipality),* 2006 MBCA 76 the court held that the effect of a similar section in the former *Limitation of Actions Act* was to preserve equitable defences to claims, including the equitable defence of laches, even where a limitation period was provided for in the Act.

In *Pitblado & Hoskin v. Swerid,* 2003 MBCA 134 the Manitoba Court of Appeal cited the leading case of *Lindsay Petroleum Company v. Hurd* (1874), L.R. 5 P.C. 221 concerning the doctrine of laches:

> *… [T]he doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.*

A good general resource is G. Mew, *The Law of Limitations, 4th ed.* (Toronto: LexisNexis Canada, 2023). For matters within federal jurisdiction, LexisNexis Canada's *Federal Limitation Manual*, 2d ed. (a looseleaf service) is a handy guide.

3. Commencing the Action

a) The Parties

Prior to drafting your pleadings, you must determine who the parties will be and the capacity in which they are suing and/or being sued. You also need to ensure that you have the proper spelling of all names of all parties. Use full legal names, whenever possible.

On occasion, you will encounter persons who use two different names. When dealing with a party who uses two names, make sure you identify the person both ways. For example, use "John William Smith, also known as Jack William Smith." In rare circumstances, where the identity of a party is unknown, it is also possible to commence a claim against a "John Doe" or "Jane Doe" provided that the pleading

makes it clear that the identity of the party is unknown. In these circumstances, the identity can usually be ascertained through the discovery process or through accessing records otherwise only accessible by way of court order.

Always be mindful of how you might collect on a judgment and, if land is a potential asset you intend to realize upon, undertake a title search. It is important that you name the defendant using the same name as used to register title for the land to ensure you can ultimately realize against the land.

If you are acting for or against a corporation it is imperative that you search the Companies Office for the proper spelling of the name and corporate status. You must always do this search even if the client insists that they have told you the correct information. Suing a corporate entity may require considerable care if the corporate organization consists of multiple corporate entities. If the corporation has been dissolved, you may have to sue the individual shareholders.

Not all proceedings are commenced by a single plaintiff/applicant against one or two defendants/respondents. The rules provide for a multitude of parties suing and being sued in personal capacities, representative capacities, and as members of partnerships, associations, etc.

The plaintiff may join a number of claims against an opposite party in the same proceeding, and may sue or be sued in different capacities in the same action (Rule 5.01(2)). Further, two or more persons represented by the same lawyer may join as plaintiffs, or may be joined as defendants, where the claims arise out of the same transaction or occurrence, where there is a common question of law or fact which arises, or where it appears that joining them in the same proceeding may promote the convenient administration of justice (Rule 5.02).

Rules 5.03–5.05 also provide that every person whose presence as a party is necessary to enable the court to effectively adjudicate on a matter shall be joined as a party. It also provides for relief where it appears that a joinder of multiple claims or parties in the same proceeding may complicate or delay the hearing or cause prejudice to any party.

Pursuant to Rule 6, trials of different actions sharing a question of law or fact, claiming relief which arises out of the same transaction or occurrence, or sharing other common aspects, may be consolidated and heard at the same time, or one immediately after the other.

> Rule 7 deals with parties under disability and, in particular, minors and persons who are mentally incompetent.

Litigation involving a minor or a person who is mentally incompetent or incapable of managing their own affairs, but not so declared, requires a litigation guardian. Litigation involving such a person is conducted by the person's committee. Where *The Vulnerable Persons Living with a Mental Disability Act* is applicable, the substitute decision maker must have the authority to commence, continue, settle or defend proceedings (Rule 7.01).

Pursuant to Rule 7.02(2), a litigation guardian of a plaintiff or applicant who is under disability must, before acting as a litigation guardian, file an affidavit in which the person:

a) sets out the nature of the disability of the plaintiff or applicant and, in the case of a minor, the minor's date of birth;

b) consents to act as litigation guardian in the proceeding;

c) confirms that the litigation guardian has given written authority to a named lawyer to act in the proceeding;

d) states whether the litigation guardian and the party under disability are ordinarily resident in Manitoba;

e) sets out the litigation guardian's relationship, if any, to the person under disability;

f) states that the litigation guardian has no interest in the proceeding adverse to that of the person under disability; and

g) acknowledges having been informed of the litigation guardian's liability to personally pay any costs awarded against the litigation guardian or against the person under disability.

A person cannot act as litigation guardian of a defendant or respondent who is under disability unless appointed by the court (Rule 7.03(1)), and must bring a motion seeking to be appointed (Rule 7.03(3)). There is a corresponding obligation of a plaintiff or applicant to bring a motion where no one has come forward after service of an originating process upon a defendant or respondent under disability (Rule 7.03(5)). A litigation guardian of a defendant by counterclaim (plaintiff) may defend a counterclaim without being appointed by the court (Rule 7.03(2)).

Rule 7.03(4) requires that a person seeking an appointment as litigation guardian on behalf of a defendant or respondent file an affidavit detailing the following:

a) the nature of the disability and, in the case of a minor, the minor's date of birth;

b) the nature of the proceeding;

c) the date on which the cause of action arose and the date on which the proceeding was commenced;

d) service on the party under disability of the originating process and the request for appointment of litigation guardian; and,

e) whether the person under disability ordinarily resides in Manitoba; and, except where the proposed litigation guardian is the Public Guardian and Trustee, evidence;

f) concerning the relationship, if any, of the proposed litigation guardian to the party under disability;

g) whether the proposed litigation guardian ordinarily resides in Manitoba;

h) that the proposed litigation guardian,

   i. consents to act as litigation guardian in the proceeding,

   ii. is a proper person to be appointed,

   iii. has no interest in the proceeding adverse to that of the party under disability, and

   iv. acknowledges having been informed that the litigation guardian may incur costs that may not be recovered from another party.

If no one is able to act as litigation guardian, the court will appoint the Public Guardian and Trustee under Rule 7.04.

Default may not be noted against a person under disability, except with leave of the court (Rule 7.07(1)). You must file a notice of a motion for leave to note default. The motion must be served upon the litigation guardian, committee of the estate or substitute decision maker of the party under disability and also the Public Guardian and Trustee (Rule 7.07(2)).

Rule 7.08 requires court approval for the settlement of a claim made by or against a person under disability. This includes a settlement that is merely a discontinuance of the claim on a without costs basis. The motion for approval of settlement requires an affidavit from the litigation guardian (or committee or substitute decision maker) setting out, in considerable detail, the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian regarding the settlement. The lawyer for the litigation guardian (or committee or substitute decision maker) will also have to file a detailed affidavit, justifying the proposed settlement.

The affidavits must contain enough detail to allow the court to make a decision. The minutes of the settlement must be attached as an exhibit to the affidavits, as should the medical reports, experts' reports, case law and other relevant information. If the person under disability is a minor over the age of sixteen, the minor's written consent must be filed (Rule 7.08(5)). The materials in support of a motion to approve such a settlement should be served on the offices of the Public Guardian and Trustee.

Rule 15.01(1) requires that a party under disability be represented by a lawyer.

Rule 8 sets out the procedures by which partnerships, sole proprietorships and unincorporated associations may be involved in litigation. It allows for a partnership to sue or be sued, and for enforcement against individual partners. It also allows for a sole proprietorship to be named as a party. Where legislation has given an association the legal capacity to sue or be sued or to be a party in legal proceedings, the King's Bench rules applicable to corporations will extend to cover such an association (Rule 8.10).

Rule 9 relates to claims on behalf of and against estates and trusts. A proceeding may be brought by or against the personal representative or trustee as representing an estate without naming the beneficiaries. If an estate does not have a personal representative, the rules allow for an appointment of a litigation administrator to represent the estate in the proceedings. Under earlier court rules, a proceeding commenced by or against a person as executor or administrator before the grant of probate or administration, was a nullity. Rule 9.03 was enacted as a remedial provision, to make the proceeding a correctable irregularity rather than a nullity.

Rules 12 and 13 deal with class actions and intervention. Although rarely used, class action suits can be brought in appropriate circumstances pursuant to Rule 12. Rule 13 provides that a non-party may, with leave, intervene in a proceeding where the court is satisfied that sufficient reasons have been shown (Rule 13.01(1)).

b) How Proceedings Commence

Pursuant to Rule 14 all civil proceedings shall be commenced by issuing an originating process by a registrar, except where a statute provides otherwise. In some cases where the leave of the court is required to commence a proceeding, the leave must be sought by preliminary motion (Rule 14.01(3)).

The originating process for the commencement of an action is a statement of claim (with four exceptions - see Rule 14.03). Rule 14.03 makes reference to Form 14A. Pay attention to the last paragraph of Form 14A, which states:

> *IF YOU PAY THE PLAINTIFF'S CLAIM, and $750.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and $750.00 for costs and have the costs assessed by the court.*

You only include this paragraph if the claim is for a liquidated claim; that is, the plaintiff seeks payment of money in an amount specified in the statement of claim, such as an unpaid debt where the monetary amount is certain. A debt or claim is liquidated when the amount owing is a fixed, determined amount. Make sure you determine whether or not the last paragraph of Form 14A should be included in your statement of claim. It is often used inappropriately. Do not include the last paragraph of Form 14A if you are suing for an unliquidated monetary claim, general damages, or injunctive relief.

The originating process for the commencement of an application is a notice of application. Rule 14.05(2) sets out all the situations in which a proceeding shall be commenced by application. Otherwise, the proceedings will take the form of an action that is commenced by statement of claim.

The forms that are to be followed in preparing a statement of claim and notice of application (and a multitude of other documents which are set out in the rules) are prescribed by the court as part of the King's Bench Rules and numbered for convenience.

Rule 14.06 concerns how the originating process will be titled.

Although a plaintiff may commence proceedings by filing a statement of claim at the registry of any judicial centre in Manitoba, Rule 14.08 allows a defendant in certain circumstances to require the transfer of the action to another judicial centre in Manitoba.

Where a civil action that is not a class proceeding seeks relief in the form of a liquidated or unliquidated amount not exceeding $100,000, exclusive of interests and costs, the claim must take the form of an expedited action. Such proceedings fall within the extensive and detailed Rule 20A, and the Rule applies even if the plaintiff seeks additional but related relief in the action. Expedited actions use a slightly different form of statement of claim, and Rule 20A imposes strict deadlines and altered procedural rules, including the convening of mandatory case conferences. For detailed information about expedited actions and the requirements of Rule 20A, see chapter 3 of these materials.

c) Filing and Service

Rule 4.05 provides that an originating process may be issued and filed by delivering or mailing the original copy and the prescribed fee to the centre in which proceedings are to be commenced.

In emergency matters faxed documents will be accepted, unless a fee is required to file the documents. Further, counsel must attach an undertaking to the faxed document(s) indicating that they will verify the fax by producing the originals.

A statement of claim must be served on all defendants within six months after filing (Rule 14.07). Ensure that you note the six-month time limit on the file and in your calendar. If you experience difficulties serving the statement of claim you will have to bring a motion to court for an order for substituted service (Rule 16.04(1).

In cases commenced by notice of application, the hearing date you have chosen must be named (Rule 38.04(2). The notice must be served 14 days prior to the hearing date (Rule 38.05(3). Where the application is contested, Rule 38.07.1 sets out the schedule for the filing and serving of supporting affidavits, cross-examinations and the filing and serving of briefs.

An originating process must be served personally as set out in Rule 16.02 or by an alternative to personal service, as provided in Rule 16.03.

Under Rule 16.03(4) documents can be served (if an alternative to personal service is permitted) by registered or certified mail, in which case the service is effective on the date the document was delivered to the person. Service by regular mail is also permitted so long as an acknowledgement of receipt form (Form 16A) is included and the person who receives the document signs the form and returns it to the sender. Proof of service is shown to the court by the filing of an affidavit of service.

Rule 16.02 also deals with service on parties other than individuals, such as municipalities, corporations, boards, the Crown, minors, persons who are mentally incompetent, partnerships and sole proprietorships.

Where it is impractical to effect service of an originating process personally or by an alternative to personal service, the court may order substituted service or even dispense with the service (Rule 16.04).

Once a lawyer is on record, service of all further documents may be effected on that lawyer (Rule 16.05). Rule 16.05(1) provides that service on a lawyer of record may be made by mailing a copy to the lawyer's office, leaving a copy with another lawyer or employee in the lawyer's office, faxing a copy to the lawyer in accordance with certain rules (see Rule 16.05(1)(c)), sending a copy to the lawyer's office by courier, or e-mailing a copy to the lawyer.

Service by e-mail on a lawyer of record will only be effective if the lawyer provides the sender an acceptance of service and the date of acceptance by e-mail. An acceptance received after 5 p.m. is deemed to have been received on the following day. See Rule 16.05(6) for further requirements.

While Rule 16.06 deals with service by mail, Rule 17 deals with service outside Manitoba (Rule 17.02). It is important to remember that an originating process served outside Manitoba without leave of the court must specifically refer to the grounds relied upon in support of the service (see Rule 17.04(1)).

Rule 17.05 deals with service outside Manitoba, and Rule 17.05.1 deals with service outside of Canada under the Hague Service Convention.

Rule 18 provides for the time for filing and serving a statement of defence once the statement of claim has been served.

Because the filing of pleadings necessarily involves communication with the Court Registry, it is possible that the Registry staff may reject a document that you present for filing. Obviously, the staff should accept for filing only those documents that comply with the King's Bench Rules and court practice directions. The odds are very high that, in a contest between your best efforts and the experience of a deputy registrar, any rejected document was bounced for a good reason. It is never helpful to become frustrated or emotional and rudely challenge the decision of a deputy registrar about the suitability of some document for filing.

However, the Registry does sometimes make mistakes, and, if left uncorrected, those mistakes can be costly to your client in terms of both added legal fees and delay. Accordingly, where you are convinced that a deputy registrar is in error, it is open to you to request politely that a senior deputy registrar review the problem. When dealing with the Registry, lawyers – especially those who practise litigation – will find themselves dealing with the same Registry staff for years, so the preservation of good relations is beneficial.

d) Change or Withdrawal of Counsel

A lawyer's obligation to their client is governed by the law of contract, the *Code of Professional Conduct* and the Rules. A client has the right to terminate their lawyer's services at any time, for any reason. Once a lawyer's authority has been terminated, the lawyer can no longer act as agent for the client.

Limited retainers create another instance that limit the authority of a lawyer to act throughout the life of an action or application. In a limited retainer, a client engages a lawyer to provide specific legal services that do not encompass the entirety of the

project. For example, a client might hire a lawyer to respond to a motion for summary judgment, but otherwise intend to act on their own behalf at any trial of the action.

Rule 15.01.1(1) permits a lawyer to act as the solicitor of record for a limited purpose and then, generally speaking, automatically withdraw without need to obtain leave from the court. The lawyer is required to advise the court of the terms of their engagement that define the scope of their authority before the appearance, by filing the terms of the retainer, other than terms related to fees and disbursements. (See the *Code* Rule 3.2-1A Commentary [3].) It is good practice for the lawyer to also remind the court of the limited scope of their retainer when first appearing.

Without a limited retainer, the ability of a lawyer to quit is restricted. Rule 3.7-1 of the *Code of Professional Conduct* states that a lawyer must not withdraw services except for good cause and on notice appropriate in the circumstances. However, in certain circumstances withdrawal is obligatory (Rule 3.7-7).

If the lawyer is counsel of record and withdrawal is required or permitted by the *Code of Professional Conduct*, the lawyer must comply with King's Bench Rule 15. Rule 15.04 requires a lawyer of record to continue to represent a party in a proceeding until they are properly removed from the record as permitted under Rule 15.

If a trial date has not been set, a party may change lawyers by serving and filing a notice of change of lawyer (Rule 15.02(1) and Form 15A). A party represented by a lawyer may also elect to act in person by serving and filing a notice of intention to act in person (Rule 15.02(3)).

After a trial date has been set, you cannot use a notice of change of counsel or notice of intention to act in person. A motion must be made before the judge who presided at the pre-trial conference, unless that judge is not available (Rules 15.02.1(1) and (2)).

If, for any reason, you need to get off the record, but the client has not engaged new legal counsel, you need to bring a motion for an order removing you as the lawyer of record (Rule 15.03(1)). If no trial date has been set, you will bring your motion on the regular Associate Judge's civil motions court docket. If a trial date has been set, you will bring your motion before the judge who presided at the pre-trial conference, unless that judge is not available.

Following termination or withdrawal, you must promptly provide to new counsel or your former client all relevant documents, information, exhibits and property. When a lawyer has been terminated, the relationship between the lawyer and client may be quite tense, or even hostile. You must ensure that you continue to act in a professional and courteous fashion. Your professionalism and courtesy will pay off, as you will minimize the chances that the former client will complain about the quality of your work or the amount of your statement of account (*Code of Professional Conduct*, Rules 3.7-8 and 3.7-9).

You need to be cautious about exercising a solicitor's lien for unpaid fees and disbursements, if doing so will cause prejudice to the client (*Code of Professional Conduct*, Rule 3.6-13).

4. Drafting Pleadings

a) Introduction

The purpose of pleadings is twofold:

- to define the issues on which the court must adjudicate in order to determine the matters in dispute between the parties; and
- to give fair notice to the other side as to what case it has to meet.

In practice the importance of proper pleadings is often overlooked.

Rules 25 through 29 deal with pleadings.

b) Types of Pleadings

There are six basic pleadings:

1) Statement of Claim;
2) Statement of Defence;
3) Reply;
4) Statement of Defence and Counterclaim;
5) Statement of Defence and Crossclaim; and
6) Third Party Notice.

c) General Guidelines

Rule 25.06 (1) is the cardinal rule on pleading. It states:

> *Every pleading shall contain a concise statement of the material facts on which the party relies for a claim or defence, but not the evidence by which those facts are to be proved.*

Material facts are those facts which make out the elements of the cause of action. In order to plead the material facts on which the claim is based you must have a thorough appreciation of the law before you start drafting.

You may not plead conclusions, reasons, theories, evidence or arguments. Pleading facts incorrectly or omitting material facts may limit or defeat your remedies, as all or part of the pleading may be struck out or expunged under Rule 25.11. Failing to disclose a cause of action can be fatal if the pleading is struck and the limitation date has passed.

It is critical to focus only upon material facts, which may alternately be thought of as that collection of facts that, when proven, entitle the party to the relief that they seek.

When drafting a claim, the analytical process should be as follows:

- determine the cause(s) of action;
- identify the elements of the cause of action;
- identify the facts which make out the elements of the cause of action;
- draft your claim to plead the facts which make out the elements of the cause of action; and
- plead the damages, or the facts which support the relief you are claiming.

For example, where your claim is in breach of contract your pleading should:

- plead the existence of the contract between the parties to the litigation;
- plead the terms of the contract (you may wish to quote from the contract in your pleading, but only those terms which are material to the cause of action);
- plead the facts which make out the breach of the terms of the contract;
- plead the facts which make out the damages arising from the breach.

Taken together, these material facts comprise the cause of action, and the proof of each of these elements would entitle the plaintiff to judgment.

Similarly, in a negligence claim you would need to:

- plead the relationship between the parties which gives rise to a duty of care;
- plead the standard of care;
- plead foreseeability;
- plead a breach of the duty and/or standard of care; and
- plead the damages flowing from the breach.

It is not always easy to distinguish between the material facts giving rise to an action and the evidence needed to prove those facts.

Well-drafted pleadings are organized around one or more causes of action. It follows that statements of claim, statements of defence, and the like are almost never the place in which parties should plead evidence or explain how they will prove the material facts that comprise each cause of action (see King's Bench Rule 25.06(1)).

Returning to the preceding example of a claim for breach of contract, it usually is sufficient to plead that, on a certain date and at a certain location, the plaintiff and the defendant entered into a written or oral agreement, the material terms of which are then set out. The pleadings should not usually set out information immaterial to the cause of action, such as the motivations of the parties for making the deal. These details might come out during the trial of the action, but they are not facts that are necessary to prove the cause of action. Therefore, they should not appear in a statement of claim. (Note that there are some inevitable exceptions to this drafting principle, such as actions framed in defamation which have their own drafting requirements.)

Rule 25.06(6) allows a party to make inconsistent allegations in a pleading where they are being pleaded in the alternative. For example:

> *The defendant denies that a contract exists between the defendant and the plaintiff. In the alternative, if a contract does exist, then the defendant says as follows:*

Rules 25.06(13) and (14) set out the rules applicable to the claim for relief. A common problem in statements of claim is that the claim for relief either does not contain all of the types of relief that are sought, or alternatively, contains several types of relief that are not explained in the body of the statement of claim. For example, it is inappropriate to ask for general damages in the claim for relief and not explain in the body of the statement of claim why your client is entitled to general damages.

In addition, the claim for relief must indicate whether costs are sought, and if so, what type of costs, i.e., party and party costs or solicitor and client costs. (See chapter 4 for further information on costs). The word "costs" alone in a claim for relief means party and party costs. Do not claim solicitor and client costs unless you plead sufficient facts to reasonably support such a claim.

Where your relief seeks a liquidated sum make sure you plead pre-judgment and post-judgment interest and, wherever possible, plead the interest rate agreed to in the contract. Otherwise, the court rate of interest, which is often far less, will be presumed. Ideally, these rates ought to be set out in the prayer for relief in case the plaintiff is able to seek default judgment. Having these details set out in the pleadings avoids the need to adduce evidence on a motion for default judgment on a liquidated sum since it can be obtained 'over the counter'.

Finally, the statement of claim must refer to any statutes and the sections of those statutes relied on in support of the claim.

The annotated statement of claim in the precedents illustrates these guidelines.

d) Statements of Defence

The general principles applicable to a statement of claim are equally applicable to a statement of defence.

Rule 25.07 sets out a number of rules applicable to defences. Important among these are:

- you must indicate in your defence which allegations of fact contained in the statement of claim are admitted, which are denied, and those of which your client has no knowledge;
- if you do not deny a fact, or say you have no knowledge of it, you are deemed to admit it;
- where you intend to prove a version of the facts different from that pleaded in the statement of claim, a denial is not sufficient. You must include your own client's version of the facts;
- you must plead all of your defences upon which you intend to rely to defeat the plaintiff's claim, even if they are not pleaded in the statement of claim itself;
- limit yourself to the material facts which make out your defences.

As a rule, where part of a paragraph is admitted, but another part is denied, it should be made clear in the defence which portion of the paragraph is denied.

For example, an allegation in the statement of claim might read:

> *On July 27, 202_, at approximately 3:00 in the afternoon a collision occurred between the plaintiff and the defendant.*

If the client agrees that a collision occurred, but disagrees as to the time of the collision, the paragraph should be denied, but a later section of the statement of defence might read:

In reply to the allegations contained in paragraph x of the statement of claim, the defendant admits that a collision occurred as alleged, but denies that it occurred on the date and time alleged, and says, as the facts are, that the collision occurred on…

e) Reply

The plaintiff may have to file a reply in response to new facts raised in a statement of defence. Rules 25.08 and 25.09 apply.

A reply is usually necessary where the defence raises a version of facts not pleaded in the statement of claim. A plaintiff who intends to dispute those facts should file a reply. This is often the case where the defendant raises facts which were not dealt with in the statement of claim, and which your client disputes (Rule 25.08(1)).

Further, if the plaintiff intends to rely on facts that might take the defendant by surprise or raise an issue that has not been raised in the statement of claim on the basis of something that has appeared in the statement of defence, a reply is required (Rule 25.08(2)).

Otherwise, a reply is not required and the plaintiff is deemed to deny all of the allegations of fact made in the statement of defence without having to file a reply.

When drafting your reply, you should admit every allegation in the statement of defence that you do not dispute, and elaborate on those that you do dispute.

For example, in a wrongful dismissal case the plaintiff will allege that they were dismissed without cause by the defendant employer. The employer's statement of defence sets out a whole list of reasons why the defendant fired the plaintiff, and says that these amount to just cause. It would then be appropriate for the plaintiff to file a reply responding to the allegations of just cause, as they were not dealt with in the statement of claim (and properly so because the statement of claim should not anticipate defences).

Despite the agitated urgings of some clients, you should not file a reply merely to have the last word in the pleadings: your client's chance will come at the trial of the action.

f) Counterclaims

Rule 27 applies to counterclaims. It allows the defendant to assert, by way of counterclaim to the main action, any claim or right, including a set-off which the defendant may have against the plaintiff. Once again, the form is contained in the rules (Forms 27A or 27B).

A counterclaim may also be used against any other person who is not a party to the main action. In other words, a counterclaim may be used to add a non-party to the litigation, in place of a third party claim, in circumstances where the defendant has a counterclaim against the plaintiff.

Rule 27.04 deals with the time for filing and serving the statement of defence and counterclaim. The rule also provides for time for filing and serving the statement of defence to the counterclaim, and allows for filing a reply to the statement of defence to counterclaim.

> A counterclaim is an action which stands on its own. If the main action is discontinued, abandoned or dismissed, you can still proceed with the counterclaim.

g) Set-Off

Section 65 of *The Court of King's Bench Act,* provides that in an action for the payment of a debt the defendant may, by way of defence, claim the right to set-off against the plaintiff's claim, a debt owing by the plaintiff to the defendant. Mutual debts may be set off even if they are of a different nature. Where the defendant's claim is found to be larger than the plaintiff's claim, the defendant is entitled to judgment for the balance. This is often referred to as statutory set-off. The key component is the mutuality of the debts.

Where the debts are not mutual, or in other equitable circumstances, set-off is available in equity. It can apply where mutuality is lost or never existed, or where the cross obligations are not debts. In order to establish equitable set-off, five factors must exist (see *Holt v. Telford,* [1987] 2 SCR 193 at para. 34). They are:

1. The party relying on a set-off must show some equitable ground for being protected against their adversary's demands.
2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed.

3. A crossclaim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the crossclaim.

4. The plaintiff's claim and the crossclaim need not arise out of the same contract.

5. Unliquidated claims are on the same footing as liquidated claims.

h) Crossclaim

Rule 28 provides for a claim by one defendant against another named defendant in an action. There must be some connection to the plaintiff's action for the crossclaim to be considered valid.

A crossclaim is available in three circumstances:

- where the co-defendant may be liable for all or part of the plaintiff's claim;
- where the defendant's claim against the co-defendant is independent of the main action but arises out of a transaction or occurrence involved in or related to the main action;
- where a co-defendant should be bound by the determination of an issue between the plaintiff and the defendant.

The crossclaim is included in the statement of defence and is entitled "Statement of Defence and Crossclaim." Your crossclaim must be served on the defendant against whom you are crossclaiming.

The defendant to the crossclaim must file a specific defence to the crossclaim, unless the crossclaim is made pursuant to *The Tortfeasors and Contributory Negligence Act* (see Rule 28.05(2)).

Rule 28.06 governs the contents of the defence to the crossclaim. Rule 28 also provides for noting default on a defendant who fails to file a defence to crossclaim, the filing of a reply to a defence to crossclaim, and other matters.

i) Third Party Claims

Pursuant to Rule 29, a third party action may only be instituted against someone who is not already a party to the proceeding. If you wish to claim indemnity or contribution from someone who is already a defendant, then you must use a crossclaim.

The third party claim is not independent of the main action. It is incapable of standing alone, and therefore, if the main action is discontinued, abandoned or dismissed, the third party claim is also extinguished.

Rule 29.02 sets out the time in which a third party claim shall be issued.

Rule 29.03 sets out the rules applicable to defending a third party action brought against your client.

A third party may, by commencing a fourth party claim, assert a claim against any person not already a party to the third party claim. Similarly, a defendant to a fourth party claim may add a fifth party (and so on, and so on, and so on...).

5. Miscellaneous Matters

a) Particulars

After your client has been served with a statement of claim, carefully review the document to determine if any material information is missing. Sometimes the statement of claim is poorly drafted. Use the "who, what, when, where and why" technique when you review the statement of claim. Are the allegations incomplete? Do the facts support the prayer for relief? Does the statement of claim give a conclusion without providing the factual particulars for the basis of the conclusion? The most common problem is that there is a sweeping allegation that does not contain sufficient particulars for you to answer. For example:

> *The plaintiff says that the aforesaid collision was caused because the defendant was driving negligently.*

In these circumstances you are entitled to and should always demand particulars (Rule 25.10).

The document you serve is called a request for particulars. It will contain a list of questions for the other side to answer. It must be responded to in writing.

Although a request for particulars does not operate as a stay of proceedings, where particulars are requested, you do not need to file your pleading in response until ten days after the particulars have been provided or refused in writing. In other words, if you are the defendant and you are served with a statement of claim, a demand for particulars will allow you until ten days after you receive those particulars to file your defence (see Rules 25.10(4)) and 25.10(4.1)).

b) Striking Out a Pleading or Other Document

Where you feel that all or part of a pleading or other document:

- may prejudice or delay the fair trial of the action;
- is scandalous, frivolous or vexatious;
- is an abuse of the process of the court;
- does not disclose a reasonable cause of action or defence;

you may apply to have all or part of that pleading struck out or expunged (Rule 25.11).

Where a defendant has filed and served a motion to strike out a statement of claim pursuant to Rule 25.11, Rule 19.01.1(1) permits the defendant to hold off filing a statement of defence until 20 days after the motion to strike has been determined by the court.

The most common use of this rule is where the pleading does not disclose a reasonable cause of action or defence; however, there are situations where the other factors may cause you to bring such a motion. This is why it is imperative that you not merely plead a bunch of facts. Rather, identify the elements of your cause of action first and structure your pleading around your cause of action, and plead the facts material to the elements of the cause of action.

Where you are alleging that a pleading does not disclose a reasonable cause of action or defence, no affidavit material in support of your motion is permitted to be filed. The pleadings as they have been filed are presumed to be true. The basis of your motion is that even if those facts were proved, the court would still not find a reasonable cause of action or defence. However, evidence is sometimes admissible to establish the grounds that a pleading is scandalous, frivolous and vexatious or is an abuse of process.

Proper research of the law is important prior to preparing your pleadings, as the other party might be in a position to strike the pleading as disclosing no reasonable cause of action before you have the chance to make a motion to amend your pleading. This could be especially disastrous if the limitation date has passed.

On a motion to strike a pleading as not disclosing a reasonable cause of action, the test has been well-established and cited from *R v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action.

There is a difference between a tenuous claim and a claim that discloses no cause of action. The court will not strike out a claim that is poorly drafted, novel or stands very little chance of success. As Monnin J., as he then was, stated in *Stanley (Municipality of) v. Morden (Town)*, 1986 CanLII 4949 (MB KB):

> *Furthermore, the court should not become a draftsman of pleadings simply because the pleadings in a case could have been drawn differently than they were. The court may well find the Statement of Claim in this matter to be overly lengthy and verbose and that it incorrectly applied some of the cardinal rules of pleadings, but that is not sufficient to strike out the pleading as not disclosing a reasonable cause of action. The court may have some serious doubts as to the merits of the plaintiff's case, but the mere fact that the party pleading is not likely to succeed is not a ground on which to strike out a Statement of Claim.*

c) Amending Pleadings

Rule 26 allows a party to amend a pleading. In practice, amendments are generally allowed, except where there is prejudice which would result that could not be compensated for by costs or an adjournment.

A party may amend a pleading in three ways:

- on requisition before pleadings are closed or to correct clerical errors at any time;
- with the written consent of the other parties;
- with leave of the court.

Rule 26.07 even allows a pleading to be amended at trial.

6. Disposition without Trial

a) Default Proceeding

A defendant may file a statement of defence at any time before default is noted (Rule 19.01(5). Default proceedings really consist of two steps, which are often performed in series: the noting of default, and the signing of a default judgment.

If the defendant fails to file a statement of defence within the prescribed time, the plaintiff, on filing proof of service of the claim, may note the defendant in default (Rule 19). Then, depending on the nature of the claim, either by filing a requisition for the registrar to sign judgment, or on bringing a motion to a judge for judgment, the plaintiff can obtain judgment against the defendant (see Rule 19.04).

If your claim is for a liquidated amount, or involves the recovery of land, personal property or foreclosure, judgment will be entered by the registrar. Where the claim is for an unliquidated amount, such as general damages, you must, after noting default, appear before a judge with sufficient affidavit material to effectively prove your case before judgment will be entered.

Often the registrar will decline to sign judgment after default has been noted because it is uncertain, based on your prayer for relief, whether the claim is for a liquidated or unliquidated amount. If so, you may be compelled to make an application to court for judgment.

On signing final judgment, the plaintiff is entitled to costs in accordance with the tariff, as well as interest. Interest is calculated pursuant to the prejudgment interest rates that are published under *The Court of King's Bench Act*. Section 84(1) provides for post judgment interest at rates to be published quarterly in the Manitoba Gazette.

Where a defence is not filed due to oversight, Rule 19.08(1) permits the court to set aside the default judgment on certain grounds. The key to setting aside any default is the existence of a *bona fide* defence, and an application must be made to set it aside as soon as possible.

In practice, a breach of this rule, as compared to a breach of a limitation pursuant to *The Limitations Act*, is not regarded as being fatal to a party's ability to defend. Most applications to set aside default judgment are allowed, and in most cases, especially where the reason is inadvertence, the plaintiff's counsel consents to default being set aside. In order to avoid unnecessary default proceedings, the first step of the lawyer retained to represent a defendant is to contact the plaintiff's lawyer and negotiate an

appropriate time frame during which the defence will be filed. In almost all cases, an extension of time is granted by plaintiff's lawyer.

Where a defendant is under disability at the time an originating process is served, default may not be noted against the defendant without leave of a judge (Rules 19.01(4) and 7.07)).

If the defendant files and serves a notice of motion to strike out the statement of claim pursuant to Rule 25.11 within the time prescribed by Rule 18.01 for filing and serving a statement of defence, a defendant is not required to file and serve a statement of defence until 20 days after the defendant's motion to strike out the statement of claim has been finally determined. Rule 25.11 also applies to a counterclaim, a crossclaim or a third party claim. The registrar will not note default against a defendant during the period referred to in Rule 19.01.1(1) unless the court orders otherwise (Rule 19.01.1(2)).

Just as the inaction of a defendant to respond to an originating process can have a prejudicial effect, undue delay by a plaintiff can also become the basis for a motion to dismiss. Pursuant to Rule 24, the court must, on motion, dismiss an action if three or more years have passed without any significant advance in the litigation.

This rule took effect in 2019, as part of reforms that aim to reduce complexity, delay, and cost in civil litigation. The provision also includes judicial discretion to make procedural orders that would put delayed proceedings back on track (see Rule 24.04).

The Courts have been strict in following these rules since their implementation. There are only limited exceptions. You can expect that the Court will dismiss a proceeding for delay unless significant steps are made in Court to move the case forward.

In *Smoke v Attorney General of Canada* 2022 MBQB 148 Associate Judge Goldenberg said:

> *Determining whether a step significantly advances the action requires a functional approach … The court must view the whole picture of what transpired in the three-year period framed by the real issues in dispute and viewed through a lens trained on a qualitative assessment. This necessarily involves assessing various factors, including the nature, value and quality, genuineness and timing of the step at issue and whether that step moved the lawsuit forward in a meaningful way in the*

context of the action … The focus is on the substance of the step taken and its effect on the litigation rather than its form.

Rule 24.02(1) provides for the extension of time in certain circumstances:

a) where all parties have expressly agreed to the delay. The agreement must be clear and specific;
b) where an action is stayed or adjourned pursuant to an order;
c) where an order extending the time is obtained in advance to allow for a significant advance in the action to occur;
d) where the delay is provided for as the result of a case conference, case management conference or pre-trial conference;
e) where a motion or other proceeding has been taken since the delay and the moving party has participated in the motion or other proceeding for a purpose, and to the extent that warrants the action continuing, the action may survive.

For more on dismissal for delay, see Tana Christianson's article *Dismissal for Delay in Civil and Family Files* in the March 2023 Communiqué.

b) Summary Judgment

Under Rule 20, summary judgment is available on a motion by the plaintiff or a defendant. The remedy will be ordered where the outcome of the action can be determined without the necessity and resulting expense of proceeding to trial. The question on such a motion is whether there is a genuine issue requiring a trial (Rule 20.03(1)).

The court will also take into account considerations of proportionality when deciding motions for summary judgment. Affidavit evidence will be required by both the moving party and the responding party. This evidentiary burden is in itself worth emphasizing. Rule 20.02 underlines the need for specific evidence that responds to the moving party's case. It is never an option only to promise more or better evidence would follow at a trial of the action: *Atlas Acceptance Corp. v. Lakeview Development of Canada Ltd.,* 1992 CanLII 2769 (MB CA).

In reviewing case law about summary judgment, researchers should keep in mind two critical developments that may diminish the usefulness of past decisions. First, the Supreme Court of Canada reworked the summary judgment remedy in its 2014 decision in *Hryniak v. Mauldin,* 2014 SCC 7, which explains and applies the principle of

proportionality to motions for summary judgment. The principle of proportionality was discussed in the context of the Manitoba summary judgment rules in *Dakota Ojibway Child and Family Services et al. v. MBH*, 2019 MBCA 91.

The second research point relates to amendments to procedural rules for summary judgment. In 2018, Manitoba changed the way in which the courts heard motions for summary judgment, instituting summary judgment conferences to ready the motion for hearing.

The rules now require that, where a party wants to proceed with a summary judgment motion, it may do so only after the first pre-trial conference has convened. Parties must set out their positions about any proposed summary judgment motion in their pre-trial conference briefs. The pre-trial judge will hear that motion (see Rule 20.01(2)). The pre-trial judge will consider whether a motion for summary judgment may proceed and must allow it to do so if they are satisfied that the summary judgment motion can achieve a fair and just adjudication of the issues in the action by providing a process that:

- allows the judge to make the necessary findings of fact;
- allows the judge to apply the law to the facts; and
- is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial (Rule 50.04(5.2)).

Under Rules 50.04(5.3) and (5.4), if the pre-trial judge determines that a motion for summary judgment should proceed, the judge may give any order or direction considered necessary or appropriate respecting the conduct of the motion, including permitting oral evidence on the motion.

c) Determining an Issue before Trial

Where the pleadings raise a clear question of law, a party may bring a motion to court for a determination of that question without the necessity of, or prior to, going to trial (Rule 21). This order will only be granted in a clear and obvious case.

The court would be inclined to grant an order where such determination would have one of three effects:

- disposal of all or part of the action;
- substantially shortening the trial; or
- substantially saving costs.

Pursuant to Rule 21.01(3) the defendant may also move to have the action stayed or dismissed on grounds of jurisdiction, legal capacity, or that another proceeding is pending in Manitoba or in other jurisdictions between the same parties in respect of the same subject matter.

d) Special Case

Pursuant to Rule 22, where the parties agree on the issues and facts, they may jointly put a case before the court for a determination. This procedure is rarely used; however, in certain circumstances, such as the interpretation of a contract, where all of the facts are agreed upon, it can be an excellent cost-saving technique.

e) Discontinuance and Withdrawal

Rule 23 provides that a plaintiff may discontinue all or part of an action (see Rule 23.01), and the defendant may withdraw all or part of a defence (see Rule 23.04).

Rule 23.01(1) and Rule 23.04(1) set out the form and content of the notice of discontinuance, depending on the stage of the action.

It is important to note that the discontinuance of all or part of an action is not a defence to a subsequent action, unless the order giving leave to discontinue or a consent filed by the parties to the discontinuance provides otherwise (see Rule 23.02). As a result, many notices of discontinuance contain a provision which provides:

> *This discontinuance shall be a defence to any subsequent action pursuant to Rule 23.02(1).*

Finally, in preparing the discontinuance make sure you turn your mind to costs as the defendants may be entitled to costs when the action is discontinued. The discontinuance should address whether any of the parties are entitled to costs, and if not, should state that the discontinuance is on a "without costs basis".

7. Conclusion

Good pleadings, whether drafted by you or by opposing counsel, make the case proceed more quickly and with less expense to your client. A proper review of the facts, the available documents, and the relevant law before drafting your client's pleading is essential.

C. PRECEDENTS (GENERAL)

1. Retainer Letter

For additional information on Retainers, see the Retainers module in the Law Society Education Center under *Practice Management*.

September 8, 20__

Dear

Re: Legal Fees

This letter confirms that you have retained the writer, [Robert D. Jones], of our firm to act on your behalf in relation to the above-noted matter and sets out below our agreement with you regarding the payment for our work on your behalf.

Scope of retainer
We will provide you with legal services in connection with [description of matter in a way that defines a definite and identifiable end to the engagement]. Based upon your description of your matter, we anticipate that our work will include [specific steps in as much detail as possible]. We will provide you with legal services that, in our professional judgment, are reasonably necessary and appropriate in order to do this work. However, we confirm that you do not want us to [identify all restrictions or limitations; for example, tax advice is not included as part of the legal services to be provided]. We confirm that we are not providing to you any legal services, except as described above.

No guarantee of success
You may rely upon us to work zealously in order to protect your position and advance your interests relating to the matter in connection with which we will provide you legal services. However, you must appreciate that we cannot – and do not – guarantee that, at the end of this matter, you will have successfully achieved any or all of the goals that you have set in retaining us. Very simply, the outcome of any legal matter depends upon variables that are beyond the control of any lawyer. For example, in litigation, the demeanour and recollection of witnesses, the availability of substantiating documents and other evidence, and the opposing party's position can all affect the likelihood of a successful lawsuit. Even in other kinds of legal matters, problems can arise from, for example, the receipt of new information, changes in applicable laws, or the availability and cooperation of other parties. Because we cannot guarantee the successful outcome of your matter, you should know that, pursuant to the court rules, you may be liable to pay substantial monetary costs to any opposing party if

a court decides against you or if you choose to abandon your lawsuit before the court can decide it. Such an award of costs would be in addition to the legal bills that you incur for the legal services that we will provide to you in accordance with the terms of this letter.

Identification of client
In this matter, [name of individual(s) or corporate body(bodies)] will be our client. No one else is our client in this matter. We are not providing legal services to any other individuals or corporate bodies that might be somehow related to our client, as described above. Similarly, we are not taking on any responsibilities, obligations, or duties for, any related individuals or corporate bodies. By way of example, this excludes individuals or corporate bodies that are shareholders, directors, or officers of a corporation; parent, subsidiaries, or affiliated corporations; partners of a partnership or joint venture; and, members of a trade association or other organizations. It also excludes family members, friends, acquaintances, or co-workers; and, any corporation, partnership, joint venture, association or other organization, even if you are its owner or a director, officer, partner, shareholder, employee, or member.

Joint representation
[Comply with *Code of Professional Conduct* Rule 3-4.5.]

Receiving instructions
We will accept instructions in connection with this matter from *if the client is an individual* only you or such other person as you may designate in writing to us from time to time. *if the client is a corporate body* *name of person* or such other individual as *name of person* may designate in writing to us from time to time.

How we bill
Our firm normally charges for services rendered on the basis of the time spent working on a client's file. Clients are usually charged at the hourly rate of the lawyer working on their file (or files). Currently, my hourly rate is $_____, but this is subject to change on an annual basis. Work on your matter may also be undertaken by other lawyers, students, paralegals or assistants of our firm under my supervision and in the best exercise of my professional judgment.

You will be charged by the hour for work on your file by lawyers, students and staff including such tasks as interviews, telephone calls with you and with other people involved in your case, letters, negotiations, drafting documents, all court appearances, etc. In determining the amount of time chargeable, our firm includes travel time, unless other agreed upon with you. We will charge a fair and reasonable fee based primarily on time spent on your matter, but may also include such factors as the importance and urgency of the matter, the monetary value of the matter at issue, the result achieved, and other similar qualitative factors; this is sometimes known as a counsel fee and is in accordance with the recommendations of the Code of Professional Conduct of lawyers in Manitoba.

You will be billed on an interim basis at varying intervals during the course of our retainer. For example, in some cases it is our practice to interim bill on a monthly or quarterly basis. This type of a billing arrangement has the advantage of giving you an accurate idea of what the process is costing you up to a given point in time.

We expect your accounts to be paid within 30 days of the date we render them. It is our firm's policy not to do any further work on a file that has a statement of account outstanding for an unreasonable length of time. Furthermore, interest will be charged on all accounts unpaid after 30 days from the billing date at the monthly rate established from time to time by the firm, which is presently __%. Payments received on overdue accounts will first be applied towards interest that has accrued and then towards the outstanding principal. Our firm accepts payments on account through VISA.

If, for some reason, you are unable to pay an interim bill within a reasonable time, please discuss it with us. We are generally prepared to consider making flexible arrangements to deal with the payment of outstanding accounts.

You will be expected to pay for disbursements as they are incurred, or within a short time thereafter. Disbursements are out-of-pocket expenses outside of legal fees that are necessarily incurred as a result of legal work performed on a client's behalf. Examples include charges for filing legal documents in court and the costs of serving those documents on other parties. Other common disbursements include charges for photocopying, faxing, scanning, postage, courier services, transcripts, expert costs and travel costs. We will either send you a bill for disbursements we have incurred on your behalf or, in some cases, we may pay for them by using money you have given us in trust.

With certain steps in the litigation process, such as examinations for discovery or a trial, we may require that you provide us with the estimated cost of the disbursement prior to the event. We reserve the right not to order transcripts of such examinations unless there are sufficient funds on hand to cover their cost.

All legal services and most disbursements incurred on your behalf are subject to the federal Goods and Services Tax ("GST"). The GST will result in an extra 5% tax being added to your statement of account. In addition, legal services and some disbursements are subject to Provincial Sales Tax ("PST").

It is not possible to give a precise estimate of legal costs because we do not know at this early stage how much of our time will be spent working on your case. We will, however, as the case progresses, try to give you estimates of the costs yet to be incurred and we recommend that you ask us from time to time about future costs so that you can budget for them.

Retainer, or advance payment for services
In order to proceed to act on your behalf, we require a retainer in the amount of $_____. These monies will be held in our trust account to your credit. We will draw on these funds to pay disbursements and interim accounts. When the retainer has been fully depleted, you will be asked for a further sum to replenish it. We will usually require that the further retainer be provided to us before any more work is done on your file. If there is still money remaining in our trust account to your credit once all of the work on your file has been completed and all fees and disbursements have been paid, this money will be returned to you.

Termination of legal services
You may terminate our services at any time for any reason. In addition to reserving our right not to do any further work on your file in response to non-payment of our account, or failure to provide a retainer when reasonably requested, we also reserve the right to withdraw our representation as your solicitors if we perceive that you have lost confidence in our solicitor-client relationship, or if you should instruct us to do anything inconsistent with our duties to the Court or our duties as lawyers under the Law Society's Code of Professional Conduct.

At the conclusion of your file, we will return your original documents to you. Material produced in the course of our representation and any correspondence to our office will remain on our file and, after approximately seven years, be destroyed.

Yours truly,

SMITH & JONES LAW OFFICE
Per:

Robert D. Jones

Please confirm your acceptance of the above terms by signing below and returning one copy of this letter.

Date:_____, 20__ _____
Client

2. Contingency Agreement

THIS CONTINGENCY FEE RETAINER AGREEMENT made as of the _____ day of _____, 20__.

BY AND BETWEEN:

_____,
of the City of Winnipeg, in the Province of Manitoba,
(hereinafter called "the Client")

OF THE FIRST PART,

- and -

_____,
of the City of Winnipeg, in the Province of Manitoba,
Barrister-and-Solicitor,
(hereinafter called "the Lawyer"),

OF THE SECOND PART.

WHEREAS the Client wishes to commence a claim regarding **********.

AND WHEREAS it is in the interests of access to justice for the Client to engage the Lawyer in a contingent fee arrangement;

AND WHEREAS the Client desires to retain the Lawyer to pursue a claim against ********** and any other person or entity who may be responsible for the damages or losses sustained by the Client;

AND WHEREAS the Lawyer is a duly licensed barrister and solicitor and is admitted to practice law in all the Courts of the Province of Manitoba;

AND WHEREAS attached hereto and marked as Schedule "A" are subsections 5 and 7 of section 55 of The Legal Profession Act (Chapter L107 Statutes of Manitoba).

NOW THEREFORE the parties hereto do agree as follows:

1. The Client agrees to retain the Lawyer to act as their legal counsel to pursue a claim against ********** and any other person or entity who may be liable for the damages or losses sustained by the Client and to bring any action, claim or proceeding or to take any other steps necessary to obtain a settlement or obtain a judgment through court action.

2. The Lawyer accepts the retainer and agrees to act as legal counsel for the Client and to perform to the best of their ability all services necessary in pursuit of the claim. The Client acknowledges that the Lawyer may also use other lawyers, students and staff of their firm to assist in delivering the legal services.

3. The Client agrees to pay the Lawyer a fee for services rendered, which will be a percentage of the total amount recovered for the Client through a settlement or judgment, which amount includes any final cost award but excludes of any amounts recovered for a third party by way of subrogation (such as Manitoba Health) or any amounts attributable for the recovery of disbursements as discussed below. The Lawyer's fee for services rendered is agreed to be calculated as follows:

(a) 25% of the total amount recovered prior to any trial dates being scheduled;

(b) 33 1/3% of the total amount recovered after the matter is scheduled for trial;

(c) In the event an appeal from trial is taken 35% of the total amount recovered after any appeal is commenced.

If no money is recovered by settlement or judgment, no fee shall be charged or billed, except as may be permitted under the Termination provisions of this Agreement.

4. The Client, whether recovery is had or not by way of settlement or judgment, shall be responsible to reimburse the Lawyer for all disbursements paid or incurred by the Lawyer in the pursuit of the claim. Disbursements are actual expenses or costs incurred by the Lawyer or paid to third parties for items or services, and include things such as photocopy charges, costs for obtaining medical or other records, court reporter fees and transcripts, courier charges, postage costs, court filing and other court related fees, process server fees, travel costs, and expert fees and similar costs.

5. In the event disbursements are recovered in the claim as part of any settlement or judgment and the Client has not already reimbursed them to the Lawyer, the Lawyer shall be entitled to recover as a first charge from the total amount recovered all disbursements incurred by the Lawyer. Should the Client have reimbursed the Lawyer for disbursements which are recovered, the Client shall receive such funds recovered for disbursements without deduction for fee. The Lawyer shall also be entitled to receipt of any interim award of costs from the claim to reimburse for disbursements incurred by the Lawyer but not yet reimbursed.

6. The Client gives authority to the Lawyer to do any and all things necessary and proper in pursuit of the claim and authorizes the Lawyer to make all pleadings and other papers

necessary and proper in connection with filing the claim or settlement of the claim.

7. The Client may not settle or compromise the claim without the knowledge or consent of the Lawyer. In the event that the Client settles or compromises the claim without the knowledge or consent of the Lawyer, the Lawyer shall be entitled to the same compensation for fees and reimbursement for disbursements as though the action herein was prosecuted to a successful completion and a judgment therein obtained in the amount of the settlement collected.

8. The Client can choose to end this Agreement at any time. If terminated by the Client, the Client agrees to pay the Lawyer reasonable fees for the work that has been completed to the date of termination based on the Lawyer's hourly rate charged for such services ($400/hour), plus any amounts still owing for disbursements incurred by the Lawyer, subject always to the right of the Client to have any amounts charged reviewed by an appropriate Court official. If the Client chooses to hire alternative legal representation, the new lawyer must agree to pay the Lawyer for all disbursements not yet reimbursed by the Client or otherwise recovered and agree to pay for or protect through undertaking the Lawyer's fee account prior to releasing the file for further handling.

9. The Lawyer may end this Agreement and withdraw the services in the following circumstances:

(a) if the Client fails to cooperate with the Lawyer in any reasonable requests, including a failure to pay disbursements when requested, or instructs the Lawyer to do anything inconsistent with their duties to the Court or the Law Society's Code of Professional Conduct; or

(b) if there is a fundamental breakdown in the relationship including a failure to communicate or provide reasonable instructions.

In such circumstances, fees for the Lawyer's services to date and any outstanding disbursements, will be owing to the Lawyer from the Client on the same basis as provided for in paragraph 8 herein.

10. The Client acknowledges reading and understanding this Agreement and acknowledges entering it voluntarily. The Client confirms that as an alternative to this Agreement, the Lawyer provided the Client with the option to retain the Lawyer on an hourly rate basis but that the Client has chosen to enter this Agreement on a contingency fee basis of their own choice and without pressure from the Lawyer.

IN WITNESS WHEREOF the parties hereto have set their hands this _____ day of **********.

_____	_____
Witness as to signature of	**********
_____	_____
Witness as to signature of	**********

SCHEDULE "A"

The following is an extract from *The Legal Profession Act*, Chapter L107, being subsections 5 and 7 of section 55 of the Act.

Application for declaration that contract unfair

55(5) The client may, at any time within six months after the remuneration provided for in the contingency contract is paid to or retained by the member, apply to the Court of King's Bench for a declaration that the contract is not fair and reasonable to the client.

Declaration voiding contract

55(7) If the judge hearing the application is satisfied that the contingency contract is not fair and reasonable to the client, the judge must

(a) declare the contract void;

(b) order the costs, fees, charges, and disbursements of the member in respect of the business done to be taxed as if no contingency contract had been made; and

(c) if the member has received or retained more than the amount so taxed, order repayment of the excess to the client.

3. Statement of Claim (Personal Injury Case) - Annotated

File No. CI23-01-54454

The King's Bench
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

plaintiff,

– and –

BROWN & SONS GROCERIES LIMITED,

defendant

STATEMENT OF CLAIM

Downing & Associates
Barristers and Solicitors
500 Edmonton Square
Winnipeg, Manitoba R3C 3R8
Doreen Downing
Telephone: (204) 666-4949

The King's Bench
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

plaintiff,

– and –

BROWN & SONS GROCERIES LIMITED,

defendant

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU BY the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a Manitoba lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *King's Bench Rules*, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it in this court office, WITHIN 20 days after this statement of claim is served on you, if you are served in Manitoba.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is 45 days. If you are served outside Canada and the United States of America, the period is 60 days.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.[1]

17 July 20__ Issued by_____
Deputy Registrar

To: Brown & Sons Groceries Limited
c/o Robert Smith, attorney for service in Manitoba
100 Carlton Way
Winnipeg, Manitoba R3C 3R6

[1] Liquidated damages template
Form 14A prescribes a further paragraph where a claim seeks liquidated damages. The prayer for relief of the instant claim seeks unliquidated damages, so the prescribed additional paragraph has been suppressed in accordance with the direction of the King's Bench Rules.

CLAIM[2]

1. The plaintiff claims:[3]

    a. general damages;

    b. special damages;

    c. pre- and post-judgment interest; and,

    d. costs.

2. The plaintiff is an individual who is employed as a _____ and resides in Winnipeg Manitoba.[4]

---

[2] The cause of action

A cause of action that gives rise to a claim in negligence requires the statement of claim to plead the following points:

1. The defendant owes a duty of care to the plaintiff.
2. A statement of the standard of care.
3. The defendant breached the standard of care that it owes to the plaintiff.
4. The plaintiff suffered damages as a result of the defendant's breach of the standard of care.
5. The plaintiff's damages were reasonably foreseeable.

Other points not specific to negligence must also be pleaded, including jurisdiction and limitation periods.

[3] Prayer for relief

As prescribed by King's Bench Rule Form 14A, the statement of claim opens with the prayer for relief.

[4] Identification of the parties

In almost all statements of claim of any kind, the second paragraph of the claim identifies the plaintiff. The purpose of the identification chiefly aims to establish the jurisdiction of the court to issue, hear, and decide the claim. There are two components to the identification: first, the situs of the party (where does the party "reside"); and secondly, the personality of the party (is the party an individual or a corporate body; and if the latter, does the corporate body have a connection to the geographic area over which the court has jurisdiction).

3. The defendant is a corporation incorporated pursuant to the laws of Alberta, and it is registered to carry on business in Manitoba. It operates retail food stores at various locations throughout Winnipeg, Manitoba.[5]

4. On or about 16 April 20__ at approximately 11:00 a.m., the plaintiff attended as a customer to shop at the defendant's store located in the Shopper's Plaza at 123 Taylor Circle, Winnipeg, Manitoba.[6]

5. While shopping, the plaintiff slipped in a pool of clear liquid that had collected on part of the store's floor.

6. The plaintiff says that, as occupier of the premises at which the plaintiff slipped and fell, the defendant owed a duty of care to the plaintiff to take such care as, in all the circumstances, was reasonable to see that the plaintiff would be reasonably safe while on the premises.[7]

---

5 If this claim included more than one plaintiff or defendant, the identity of each additional party would be separately set out in paragraphs.

6 <u>The material facts</u>
The King's Bench Rules and sound drafting practice require that a claim set out only those facts that comprise the cause of action. Other facts might be relevant to the claim, but they constitute evidence, not material facts comprising the cause of action. Only exceptionally should mere evidence find its way into a statement of claim.

Recalling the points that a claim in negligence must plead, the material facts here include jurisdiction (where the breach of care occurred), limitation (when did the breach of care occur), and the relationship between the parties (how is it that the defendant owes a duty of care to the plaintiff).

The claim here resists the temptation to plead evidence. For example, there is no mention of why the plaintiff chose to shop at the defendant's store or the "sensible footwear" that the plaintiff wore or the "well-polished linoleum floor". In addition, the claim does not use rhetorical language that would add nothing to the pleading. For example, there is no description of the plaintiff as "a careful customer who walks deliberately" or a snide labelling of the defendant as a "profit-driven storekeeper who preferred to save on janitorial expenses". While a statement of claim is correctly described as a document that advocates the client's position, a pleading is not the place to characterize the evidence.

7 Continuing the material facts, the claim must identify and define the duty of care (in this case, occupiers' liability). Some negligence claims spring from duties of care that derive from different sources, in which case it is necessary to plead each source separately. For example, the duty of care in the instant claim derives from statute. If a separate duty of care sprang from common law principles (now abolished in the Manitoba law of occupiers' liability) or from a contract between the parties, each source of the duty would be separately set out.

7. The plaintiff further says that the defendant breached its duty of care owed to the plaintiff, in that it

   a. left unattended the pool of clear liquid, which the defendant knew or ought to have known had pooled on the store's floor and could not have been noticed by the plaintiff;

   b. gave no warning to the plaintiff about the existence of the pool of clear liquid on the store's floor or the hazard that it created for the plaintiff;

   c. failed to remove, clean, or otherwise deal with the pool of clear liquid on the store's floor before the plaintiff had fallen;

   d. failed to establish or follow a suitable schedule by which to maintain and clean the store's floor; and,

   e. failed to provide or use maintenance equipment and techniques adequate to remove the pool of clear liquid before the plaintiff had fallen.

8. As a result of her slip and as the plaintiff says the defendant could have reasonably foreseen, the plaintiff fell to the store's floor and suffered physical injuries.[8]

A claim in negligence must next plead that, having established a duty of care owing by the defendant to plaintiff, that duty has been breached. Such a statement must go beyond a mere assertion as fact. Instead, the claim collects material facts that show a breach of the duty of care.

8 The claim for damages
Having laid out the material facts that establish both a duty of care and its breach, a negligence claim next addresses the damages that foreseeably flowed from the breach.

The prayer for relief in the instant claim refers to general damages (pain and suffering) and specific damages (actual out-of-pocket expenses that the defendant has incurred or other financial losses that the defendant has suffered). The claim should deal with each kind of damages separately, and it should set out particulars (or details) that explain the nature of those damages; in the alternative for cases where damages are continuing to accrue at the time that the claim is filed, a promise of future particulars likely suffices.

Accordingly, the next paragraph sets out the nature of the plaintiff's general damages and their foreseeability.

9. Particulars of the plaintiff's injuries include an injury to her left wrist and left hip, which required and continues to require medical treatment, medication, and physiotherapy. As a result, the plaintiff has suffered and continues to suffer pain, inconvenience, and anxiety, which have all affected in at least in part her ability to enjoy a normal lifestyle.[9]

10. As a further foreseeable result of her injuries, the plaintiff has incurred special damages, including the past and continuing costs of medication and physiotherapy, particulars of which the plaintiff will provide before the trial of this action.

11. The plaintiff has also incurred as further special damages a loss of wages, because she has been unable – and continues to be unable – to perform her employment duties, particulars of which the plaintiff will provide before the trial of this action.

12. The plaintiff further claims recovery of the Manitoba Health subrogated account.

13. The plaintiff pleads and relies upon *The Occupier's Liability Act*, CCSM c. O8, especially s. 3(1).[10]

17 July 20__

Downing & Associates
Barristers and Solicitors
500 Edmonton Square
Winnipeg, Manitoba R3C 3R8
Doreen Downing
Solicitor for the plaintiff
Telephone: (204) 666-4949

---

[9] The claim next turns to the specific damages, which are said to flow from her injuries and are thus also foreseeable.

[10] Statutory basis for the claim
The King's Bench Rules require a party expressly to plead any legislative provision upon which they rely. Although it is common practice to refer only to the statute or regulation as a whole, the correct and prescribed practice is to specify the provision to be relied upon. When referring to a statute, it is unnecessary to note that the reference includes any amendments if the statute's citation is to the Continuing Consolidation (C.C.S.M.).

4. Statement of Defence (Personal Injury Case) - Annotated

File No. CI23-01-54454

The King's Bench
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

plaintiff,

– and –

BROWN & SONS GROCERIES LIMITED,

defendant

STATEMENT OF DEFENCE

Green & Company
Barristers and Solicitors
600 Howe Street
Winnipeg, Manitoba R3C 3T6
Gregory Green
Telephone: (204) 532-2898

The King's Bench
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

plaintiff,

– and –

BROWN & SONS GROCERIES LIMITED,

defendant

STATEMENT OF DEFENCE[1]

1. The defendant admits the allegation in paragraph 3 of the statement of claim.[2]

2. The defendant denies the allegations in paragraphs 1, 6, 7, and 12 of the statement of claim.[3]

---

[1] As its name implies, a statement of defence is not a simple denial of the allegations that a statement of claim sets forth. Instead, the pleading states a defence. To the extent that a defence relies upon a different version of events than set out in the statement of claim, the defendant must recite its own material facts. Materiality depends upon the cause of action, just as would determine which material facts should be included in a statement of claim and which pieces of mere evidence should be excluded. Relevance is not synonymous with materiality.

Form 18A of the King's Bench Rules requires that every statement of defence begins with admissions, denials, and statements of no knowledge by the defendant in relation to the allegations set out in the paragraphs that make up the statement of claim. The corresponding number for every paragraph of the statement of claim should appear only once somewhere in the defendant's admissions, denials, and statements of no knowledge.

When drafting a statement of defence, remember that any allegation by the plaintiff that the defendant does not expressly deny or otherwise state to know nothing about, is deemed to have been admitted.

[2] According to this paragraph, the defendant admits only the statement of claim's description about the defendant as a corporation, and its constitution and operation.

[3] This paragraph's denials essentially define the legal issues that underlie the case: the plaintiff will have to demonstrate the existence and scope of a duty of care owed to the plaintiff (as set out in paragraph 6 of the statement of claim); the defendant's denial of paragraph 7 of the statement of claim operates on both a factual and legal level, rejecting the facts that support an allegation that the defendant breached any duty of care and rejecting the very suggestion itself that the defendant breached a duty of care even if the facts were proven; and, the defendant's denial of paragraph 12 effectively signals the defendant's position that the statutory occupiers' liability provision does not apply or that, if it does apply, it has not been breached.

3. The defendant has no knowledge of the allegations in paragraphs 2, 4, 5, 8, 9, 10, and 11 of the statement of claim.[4]

4. In reply to paragraphs 6 and 7 of the statement of claim, the defendant denies that it owed a duty of care to the plaintiff; in the alternative, if the defendant did owe a duty of care to the plaintiff, the defendant denies that it breached its duty.

5. In reply to paragraphs 8, 9, 10, and 11 of the statement of claim, the defendant denies that the plaintiff suffered the injuries and damages that she alleges.

6. In reply to paragraph 5 of the statement of claim,[5] the defendant says that, if the plaintiff slipped at all, her fall and any resulting injuries and damages were caused solely by the plaintiff's own negligence, particulars of which include:

---

[4] A statement of no knowledge means exactly that: the defendant has no idea whether or not the allegation is correct. The defendant is not obligated to undertake research or investigations in order to try and acquire information that would allow it to state definitely whether or not it has any knowledge about an allegation.

For example, the defendant likely has no idea whether or not the plaintiff was in the store and slipped as paragraphs 4 and 5 allege. (If the defendant knows that an ambulance was called, the defendant might then be able to admit paragraph 4, which describes the attendance of the plaintiff, but the defendant could not know first-hand about the circumstances of the fall.) Similarly, the defendant could not know the extent of the plaintiff's alleged injuries and financial losses.

Where a paragraph in the statement of claim sets out multiple allegations, some of which the defendant can admit or deny while having no knowledge of the rest, it is usual to list such a paragraph among the denials. A well-drafted statement of claim should include only one allegation in each numbered paragraph, but this ideal is not often found in practice.

[5] Pleading all defences

While it is poor form to draft a statement of claim and anticipate the defences that might appear in the statement of defence, it is required that a statement of defence plead all defences upon which a defendant intends to rely, even if those defences do not arise out of an express pleading in the statement of claim.

For example, the defendant would likely choose to advance an alternate defence to its outright denial that the plaintiff ever slipped and suffered injuries and resulting losses. First, the defendant would argue that any fall, if it occurred, was entirely due to the negligence of the plaintiff. As a further alternative, the defendant would allege contributory negligence on the part of the plaintiff. Thirdly, the defendant might claim that the plaintiff willingly assumed any risks.

a. the plaintiff failed to keep a proper look-out or any look-out at all for alleged pools of liquid on the floor;

b. the plaintiff failed to take reasonable care for her own safety; and,

c. the plaintiff failed to avoid the alleged pool of liquid on the floor.

7. In the alternative and in reply to paragraph 6 of the statement of claim, the defendant says that it owed no duty of care to the plaintiff, who willingly assumed any risks by entering on the defendant's premises. The defendant pleads and relies upon *The Occupiers' Liability Act*, CCSM c. O8, especially at s. 3(3).[6]

8. In the further alternative and in reply to the whole of the statement of claim, the defendant says that, if it breached any duty to the plaintiff, the plaintiff was liable for contributory negligence, particulars of which are set out above at paragraph 6 of this statement of defence. The defendant pleads and relies upon *The Tortfeasors and Contributory Negligence Act*, CCSM c. T90, especially at s. 4.

These alternate assertions are necessary, even though the statement of claim correctly does not anticipate such defences. The rules of practice require that the statement of defence must set out all defences upon which a defendant intends to rely at trial. The rationale for this rule is simple: the pleadings define the scope of the subsequent action, including the extent of documents to be disclosed and the kinds of questions to be put during discovery. A defendant who raised a new defence only at trial would disadvantage the plaintiff's ability to advance its claim and address all of the issues before the court.

6 As with the drafting of statements of claim, a statement of defence must expressly plead any legislative provision upon which the defendant intends to rely at trial, and the specific section must be set out.

9. The defendant submits that this action be dismissed with costs.[7]

4 August 20__

Green & Company
Barristers and Solicitors
600 Howe Street
Winnipeg, Manitoba R3C 3T6
Gregory Green
Solicitor for the defendant
Telephone: (204) 532-2898

To: Downing & Associates
Barristers and Solicitors
500 Edmonton Square
Winnipeg, Manitoba R3C 3R8
Doreen Downing
Solicitor for the plaintiff

[7] Closing submission
As a matter of form, a statement of defence closes with a submission. It takes on significance only where a defendant seeks costs beyond the usual party-and-party costs.

5. Statement of Claim (Contract - Sum Certain) - Annotated

File No. CI23-01-12345

The King's Bench
Winnipeg Centre

BETWEEN:

THE COMMON BANK OF CANADA,

plaintiff,

– and –

DAVE SMITH,

defendant

STATEMENT OF CLAIM

Black & White
Barristers and Solicitors
15 Main Street
Winnipeg, Manitoba R3C 0P1
Duncan Jones
Telephone: (204) 555-5555

The King's Bench
Winnipeg Centre

BETWEEN:

THE COMMON BANK OF CANADA,

plaintiff,

– and –

DAVE SMITH,

defendant

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a Manitoba lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *King's Bench Rules*, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it in this court office, WITHIN 20 DAYS after this statement of claim is served on you, if you are served in Manitoba.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is 45 days. If you are served outside Canada and the United States of America, the period is 60 days.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

IF YOU PAY THE PLAINTIFF'S CLAIM, and $750.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and $750.00 for costs and have the cost assessed by the court.[1]

17 July 20__ Issued by_____
Deputy Registrar

To: Dave Smith
123 Main Street
Winnipeg, Manitoba
R3C 5B2

[1] Liquidated damages template
Form 14A prescribes this paragraph for use only in claims for liquidated damages; that is, a sum certain. Do not use this paragraph in any claim for unliquidated damages (such as a claim for unspecified "general damages" in the prayer for relief).

CLAIM

1. The plaintiff claims:

    a. damages in the amount of $15,000.00;

    b. interest on $15,000.00 from 21 February 20__ to the date of payment, calculated at a rate equal to 12% per annum; and,

    c. costs.

2. The plaintiff is a chartered bank incorporated pursuant to a private act of the Parliament of Canada and has its head office at the City of Montreal in the Province of Quebec. It carries on business throughout Canada in accordance with the provisions of the *Bank Act*, S.C. 1991, c. 46, and it carries on business in Manitoba, where it maintains a branch office at 19 Main Street, Winnipeg, Manitoba.

3. The defendant is an individual who resides at the City of Winnipeg in the Province of Manitoba.

4. On or about 9 June 20__ and in consideration of value received from the plaintiff, the defendant executed under seal and delivered to the plaintiff a guarantee and postponement of claim, the terms of which provided that:

    a. the defendant guaranteed payment to the plaintiff of indebtedness owing to the plaintiff by a third party, Dave's Hardware Ltd;

    b. the defendant's liability for the third party's debt was limited to no more than $15,000.00;

c. from the date of the plaintiff's demand upon him for payment until he made payment to the plaintiff, the defendant would additionally pay to the plaintiff interest on the amount for which he was liable; and,

d. the rate of interest on the amount for which the defendant was liable, would be calculated at a rate equal to 12% per annum.

5. On 21 February 20__, the third party named in the guarantee and postponement of claim, Dave's Hardware Ltd, was indebted to the plaintiff in an amount greater than $180,000.00.

6. On 21 February 20__, the plaintiff made demand upon the defendant for payment of $15,000.00, pursuant to the terms of the defendant's guarantee and postponement of claim.

7. As of the date on which this claim issued, the defendant has refused or neglected and continues to refuse or neglect, to pay all or part of the demanded sum of $15,000.00.

17 July 20__

Black & White
Barristers and Solicitors
15 Main Street
Winnipeg, Manitoba R3C 0P1
Duncan Jones
Solicitor for the plaintiff

6. Statement of Defence and Counterclaim (Contract – Sum Certain) - Annotated

File No. CI23-01-12345

The King's Bench
Winnipeg Centre

BETWEEN:

THE COMMON BANK OF CANADA,

plaintiff,

– and –

DAVE SMITH,

defendant

STATEMENT OF DEFENCE AND COUNTERCLAIM[1]

Lawman & Co.
Barristers and Solicitors
67 First Street
Winnipeg, Manitoba R3C 4T6
Pete Best
Telephone: (204) 556-5656

[1] A counterclaim accompanies the statement of defence, and Rule 27 prescribes that the title of the pleading is "Statement of Defence and Counterclaim".

The King's Bench
Winnipeg Centre

BETWEEN:

THE COMMON BANK OF CANADA,

plaintiff,

– and –

DAVE SMITH,

defendant

STATEMENT OF DEFENCE[2]

1. The defendant admits the allegation in paragraph 3 of the statement of claim.

2. The defendant denies the allegations in paragraphs 1, 4, 6, and 7 of the statement of claim.

3. The defendant has no knowledge of the allegations in paragraphs 2 and 5 of the statement of claim.

The guarantee and other obligations are null and void and unenforceable.[3]

4. In reply to paragraphs 4, 6, and 7 of the statement of claim, the defendant admits that

---

[2] Although the pleading combines both the statement of defence and counterclaim, the statement of defence comes first, as it were an independent pleading. It must comply with all the usual rules and practices that would apply to a plain statement of defence that did not also come with a counterclaim.

[3] Although this statement of defence is brief, it illustrates a helpful use of headings. Because the defence advances a primary defence (undue influence and misrepresentation vitiate any obligations) and an alternative defence (the debt has been paid), the headings collect the paragraphs in distinct sections of the statement of defence.

Paragraph 4 also demonstrates another way to gather together all related paragraphs under a single heading. In the example given here, paragraph 4 offers an explanation of the facts that appear in the statement of claim. The first level of the outline (a, b, c, d, and e) sets out the legal defence, while the sub-levels (i, ii, iii, etc.) set out the supporting particulars, or material facts.

Admittedly, the use of outline levels shows the intended subordination, but some might find this approach awkward, especially if there are many sub-levels or if there are many related paragraphs. Others might object to using both headings and an outline. It is a matter of personal drafting preference.

he executed a guarantee and postponement of claim on 9 June 20__, but

a. the defendant says that the plaintiff wrongly induced him to sign the document and perform other actions, including:

   i. On 9 June 20__, the plaintiff induced the defendant to pay to the plaintiff $15,000.00, receiving the monies and acknowledging them to be a term deposit (the "Term Deposit").[4]

   ii. On 9 June 20__, the plaintiff also induced the defendant to execute a document that referred to all monies that the defendant had paid – and would thereafter pay – to the plaintiff, which had received – and would continue to receive – those monies as deposits held in favour of the defendant in specified bank accounts maintained at the plaintiff's branch office at 19 Main Street, Winnipeg, Manitoba. However, the document purportedly converted all of those monies into collateral security in favour of the plaintiff.

   iii. On 15 August 20__, the plaintiff further induced the defendant to execute another document that purportedly referenced monies held as deposits, then and thereafter, at the plaintiff's branch office at 19 Main Street, Winnipeg, Manitoba, and that purported to convert all of those monies into additional collateral security in favour of the plaintiff.

[4] The designation of a defined term avoids repetition when the pleading later refers to the same subject.

b. the defendant says that the plaintiff's wrongful inducements consisted of misrepresentation and the exercise of undue influence, particulars of which include:

   i. On 9 June 20__, the plaintiff told the defendant that it was unlikely that the plaintiff would ever enforce the guarantee that the defendant was purportedly giving.

   ii. On 9 June 20__, the plaintiff assured the defendant that, if the plaintiff were forced to make demand under the guarantee and postponement of claim, the proceeds from the Term Deposit would be sufficient to satisfy any obligation that the defendant might purportedly have.

   iii. The defendant executed all of the documents that the plaintiff had presented on 9 June 20__ and 15 August 20__ without the benefit of independent legal advice, but, after later receiving legal advice and relying upon it, the defendant refused to sign all subsequent documents that the plaintiff proposed for execution.

c. the defendant says that, when paying the sum of $15,000.00 to the plaintiff on 9 June 20__ and when executing all of the documents that the plaintiff had presented on 9 June 20__ and 15 August 20__, the defendant acted on the direction of the plaintiff and pursuant to the faith, trust, and confidence that the defendant held in the plaintiff. Moreover, the defendant acted without due consideration of the reasons for, or the effect of, what he was doing.

d. the defendant says that a fiduciary relationship existed between the plaintiff and him.

i. As such, the plaintiff owed the defendant a duty to take reasonable care in providing financial and related advice.

ii. The plaintiff breached its duty of care to the defendant through misrepresentation and exerting undue influence. In addition, the plaintiff further breached its duty of care by failing to advise the defendant that he should obtain independent legal advice before executing all of the documents signed on 9 June 20__ and 15 August 20__.

iii. The defendant relied upon the plaintiff and its advice and direction, and he has suffered a resulting and foreseeable detriment while the plaintiff has enjoyed a benefit.

e. by reason of the plaintiff's undue influence and misrepresentations, the guarantee and postponement of claim and all other documents that the defendant signed on 9 June 20__ and 15 August 20__ are null and void and unenforceable against the defendant.

The alternative defence: the obligation was satisfied.

5. In the alternative, the defendant says that, on 28 February 20__, the plaintiff wrongfully applied the Term Deposit to the credit of a third party, Dave's Hardware Ltd., particulars of which are set out in the defendant's counterclaim. Such application

of the Term Deposit satisfied and discharged any obligation of the defendant owed to the plaintiff, although the defendant denies that any obligation was ever owed.

6. The defendant submits that this action be dismissed with costs.

COUNTERCLAIM[5]

7.[6] The defendant[7] claims:

a. a declaration that the guarantee and postponement of claim and all other documents signed on 9 June 20__ and 15 August 20__ by the defendant in favour of the plaintiff, are null and void and unenforceable against the defendant;

b. damages in the amount of $15,000.00;

c. an accounting of the principal and interest earned on the Term Deposit and any subsequent renewal of that deposit;

d. pre- and post-judgment interest on $15,000.00 from 9 June 20__ to the date of payment; and,

e. costs.

---

5 After the statement of defence, the counterclaim follows. There are two possibilities: in a straightforward counterclaim, the defendant makes out a cause of action that would entitle the defendant to relief against the plaintiff. Where the defendant's counterclaim names a party other than the plaintiff (or any other party already named in the proceedings), King's Bench Rule Form 27B applies. Because the counterclaim is an independent action, the usual rules and practices that apply to a statement of claim should also be kept in mind while drafting a counterclaim.

6 In this combined pleading, the paragraph numbering of the counterclaim simply continues the numbering of the statement of defence.

7 Even though the counterclaim is a distinct claim on the same footing as a statement of claim, the party advancing the counterclaim continues to refer to itself in the role assigned to it in the statement of claim (or other earlier pleading). Accordingly, it is the defendant that advances the counterclaim, not some other label, such as "plaintiff by counterclaim".

8. The defendant repeats and relies upon the allegations made in his statement of defence.[8]

9. Referring to paragraph 5 of the statement of defence, the defendant says that he had instructed the plaintiff to transfer the funds comprising the Term Deposit[9] to another branch office of the plaintiff.

10. Instead, the plaintiff wrongfully redeemed the Term Deposit on 28 February 20__ and applied the monies to the credit of the third party, Dave's Hardware Ltd.

11. By reason of the plaintiff's act, the defendant has suffered financial loss, having been deprived of the monies that comprised the Term Deposit and interest that had accrued thereon.

1 September 20__

Lawman & Co.
Barristers and Solicitors
67 First Street
Winnipeg, Manitoba R3C 4T6
Pete Best
Solicitor for the defendant
Telephone: (204) 556-5656

To: Black & White
Barristers and Solicitors
15 Main Street
Winnipeg, Manitoba R3C 0P1
Duncan Jones
Solicitor for the plaintiff

---

8 This formal paragraph usually appears in a counterclaim. It has at least two aims: first, it saves repetition of facts already set out in the statement of defence, but it also precludes the suggestion that something in the counterclaim somehow undermines a defendant's denial of a material fact.

9 Having defined the term in the statement of defence, the phrase is available for use as a defined term in the counterclaim.

7. Reply and Defence to Counterclaim (Contract – Sum Certain) - Annotated

File No. CI23-01-12345

The King's Bench
Winnipeg Centre

BETWEEN:

THE COMMON BANK OF CANADA,

plaintiff,

– and –

DAVE SMITH,

defendant

REPLY AND DEFENCE TO COUNTERCLAIM

Black & White
Barristers and Solicitors
15 Main Street
Winnipeg, Manitoba R3C 0P1
Duncan Jones
Telephone: (204) 555-5555

The King's Bench
Winnipeg Centre

BETWEEN:

THE COMMON BANK OF CANADA,

plaintiff,

– and –

DAVE SMITH,

defendant

REPLY[1]

1. The plaintiff denies the allegations contained in paragraphs 4, 5, and 6 of the statement of defence and counterclaim.

2. In reply to paragraph 4 of the statement of defence and counterclaim, the plaintiff denies that, at any time whether by misrepresentation or the exercise of undue influence or whether by any other means at all, the plaintiff induced the defendant to perform any act or omit to perform any act.

3. In reply to paragraph 4(b)(i) of the statement of defence and counterclaim, the plaintiff denies that it ever represented to the defendant that it was unlikely that the plaintiff would ever enforce the guarantee that the defendant eventually gave.

---

1 Plaintiffs do not usually file a reply to a statement of defence. In fact, it becomes necessary only where the statement of defence sets out a version of the facts that the plaintiff had not pleaded in the statement of claim. A plaintiff is already deemed to deny all of the allegations set out in a statement of defence, even without filing a reply. However, a reply is required when the plaintiff intends to dispute the new or different version of facts that emerge in a statement of defence. In addition, a reply is necessary if the plaintiff intends to use the defendant's version of facts in a way that would surprise the defendant at trial or raise an issue that did not appear in the statement of claim.

The availability of a right of reply is a further reason that a statement of claim should not be used to anticipate defences. If a statement of defence sets out a position that requires a response, the plaintiff may always file a reply.

4. In reply to paragraph 4(b)(ii) of the statement of defence and counterclaim, the plaintiff denies that it represented to the defendant that the proceeds from the Term Deposit would be sufficient to satisfy any obligation that the defendant had undertaken to the plaintiff. In fact, the guarantee and postponement of claim that the defendant executed expressly provides that

> this agreement covers all of the agreements between the parties hereto relative to this guarantee in assignment and postponement, and none of the parties shall be bound by any representation or promise made by any person relative thereto which is not embodied herein.[2]

5. In reply to paragraph 4(b)(iii) of the statement of defence and counterclaim, the plaintiff says that it has no knowledge about

   a. whether the defendant obtained independent legal advice before signing documents on 9 June 20__and 15 August 20__, and

   b. whether the defendant refused to sign any later documents on the advice of legal counsel.

6. In reply to paragraph 4(c) of the statement of defence and counterclaim, the plaintiff denies that, in executing documents on 9 June 20__ and 15 August 20__, the defendant had acted on the direction of the plaintiff or pursuant to any faith, trust, and confidence that the defendant held in the plaintiff. Instead, the plaintiff says that the defendant acted without due consideration of the reasons for, or effect of, what he was doing.

---

[2] Quoting from supporting documents should be avoided, unless the extract itself is a material fact that goes to the cause of action, as opposed to mere documentary evidence.

7. In reply to paragraph 4(d) of the statement of defence and counterclaim, the plaintiff denies that a fiduciary relationship ever existed between the defendant and the plaintiff. Instead, the plaintiff says that it never provided financial advice to the defendant or owed any duty of care to the defendant to provide such advice or advice to seek independent legal advice before executing any of the documents.

8. In reply to paragraph 5 of the statement of claim and counterclaim, the plaintiff admits that, on or about 28 February 20__, it applied the proceeds of the Term Deposit to the credit of the third party, Dave's Hardware Ltd; however, the plaintiff says that it applied the proceeds pursuant to the defendant's written instructions and that it has never released the defendant from any of his obligations under the guarantee and postponement of claim.

DEFENCE TO COUNTERCLAIM

9. The plaintiff denies the allegations in paragraphs 7, 8, 9, 10, and 11 of the statement of defence and counterclaim.[3]

10. In reply to paragraphs 9 and 10 of the statement of defence and counterclaim, the defendant denies that it applied the proceeds from the Term Deposit on or about 28 February 20__ except in accordance with the defendant's written instructions to apply them to the credit of a third party, Dave's Hardware Ltd.

[3] A defence to counterclaim effectively is a statement of defence, because the counterclaim is akin to a statement of claim and stands on its own as an independent claim. Like a statement of defence, the defence to counterclaim therefore must deny all allegations that the plaintiff does not accept (or declare having no knowledge about them). Otherwise, the plaintiff would be deemed to admit them.

11. The plaintiff submits that the counterclaim be dismissed with costs

16 September 20__

Black & White
Barristers and Solicitors
15 Main Street
Winnipeg, Manitoba R3C 0P1

Duncan Jones
Solicitor for the plaintiff
Telephone: (204) 555-5555