

DRAFTING BETTER PLEADINGS

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INDEX

A.	INTRODUCTION	1
B.	WHAT TO CONSIDER BEFORE YOU BEGIN DRAFTING	2
C.	DRAFTING PLEADINGS	5
	(1) Material Facts	5
	(2) Causes of Action	7
	(3) Prayer for Relief	7
D.	STRIKING PLEADINGS.....	8
E.	CONCLUSION.....	11
F.	SECONDARY SOURCES	11

A. INTRODUCTION

There are significant proposed changes to the Rules of Court which are to be implemented in early 2010. It is beyond the scope of this paper to summarize the impact of those proposed Rules, however, a brief consideration of the impact on pleadings is required. A “Concept Draft Overview” of the proposed Rule changes was introduced in July 2007 with a comment period ending in November, 2007. As a result of the comments, changes were made and a “Work-In-Progress Draft Rules” were created in March, 2008. The “Work-In Progress Draft Rules” have not been approved by the full Rules Revision Committee, the Attorney General, the Deputy Attorney General or the Chief Justice, however I have used this version to outline some of the anticipated changes. You can find further details of the proposed rule changes at www.bcjusticereviewforum.ca/civilrules.

The items previously required for a Statement of Claim are incorporated in the “Notice of Civil Claim” which is to replace the Writ of Summons and Statement of Claim. The Dispute Summary must contain a concise summary of the material facts, the relief sought and a summary of the legal basis for the relief sought. The appearance has been replaced by a “Notice of Interest” and will not be required in most cases. The “Response” replaces the Statement of Defence. If a fact is not responded to, the presumption is that it is outside the knowledge of the Respondent. For any facts denied, the Response must set out the Respondent’s version of that fact and a concise summary of any additional relevant facts. If the Respondent denies the Claimant’s right to relief, the Response must set out a concise summary of the legal basis for the denials.

As discussed in more detail below, the Rules relating to the striking of a claim have been revised. The 19(24) application has been replaced by a “summary judgment”. The proposed rules provide that a party responding to a summary judgment may not rest on mere allegations or denials in the pleadings, but must set out, in affidavit material or otherwise, specific facts showing there is a genuine issue for trial.

Set out below are the various strategies for effective drafting of pleadings based on the current Rules, however a review of the proposed Rules above, particularly as they relate to the material

facts, indicate that many of the same considerations that are involved today will be relevant for the new Rules.

B. WHAT TO CONSIDER BEFORE YOU BEGIN DRAFTING

The importance of pleadings cannot be overemphasized. The pleadings define your case. If a claim is not made in the pleadings, it usually cannot be raised at the trial of the matter, nor can evidence be presented if it is not relevant to the pleadings. Further, pleadings define the scope of discovery. This is particularly important if there is an area that your client would be particularly opposed to producing information about. A well crafted pleading can also lead to an early settlement of the action if both parties are able to determine with clarity the real issues in the dispute. Further, pleadings introduce your case to the trial judge.

The Supreme Court of British Columbia discussed the importance and purpose of pleadings in *Homalco Indian Band v. British Columbia* 1998 CanLII 6658 where Smith J. stated:

The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action: *Troup v. McPherson* (1965), 53 W.W.R. 37 (B.C.S.C.) at 39. The defendant, upon seeing the case to be met, must then respond to the plaintiff's allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide.

A useful description of the proper structure of a plea of a cause of action is set out in J.H. Koffler and A. Reppy, *Handbook of Common Law Pleading* (St. Paul, Minn.: West Publishing Co., 1969) at p. 85:

Of course the essential elements of any claim of relief or remedial right will vary from action to action. But, on analysis, the pleader will find that the facts prescribed by the substantive law as necessary to constitute a cause of action in a given case, may be classified under three heads: (1) The plaintiff's right or title; (2) The defendant's wrongful act violating that right or title; (3) The consequent damage, whether nominal or substantial. And, of course, the facts constituting the cause of action should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, to wit, the right, the wrongful act and the damage.

If the statement of claim is to serve the ultimate purpose of pleadings, the material facts of each cause of action relied upon should be set out in the above manner. As well, they should be stated succinctly and the particulars should follow and should be identified as such: *Gittings v. Caneco Audio-Publishers Inc.* (1988), 26 B.C.L.R. (2d) 349 (C.A.) at 353.

Rule 19 provides that pleadings must be as brief as the nature of the case allows and must contain a summary of the material facts but not evidence. Pleadings include the Statement of Claim, Statement of Defence, Set-Off and Counterclaim, Reply, Particulars and Third Party Notice.

Before you begin drafting pleadings, you must consider precisely what it is that your client is seeking, damages, an injunction, return of property, etc. You can then consider the potential causes of action that are available. It is also important that you consider non-legal objectives that your client may have (such as avoiding publicity, setting a precedent etc.). These can impact the way that the pleadings are crafted.

The importance of preliminary legal research cannot be overstated. Research serves many purposes. Research allows you to determine if there is a basis to make various claims. It also allows you to ensure that you properly plead all causes of action. In addition to determining the potential causes of action, you can also determine the potential defences and adjust your pleading accordingly. This could also alert you as to whether the potential defendant also has a cause of action and whether they may file a counter-claim that could potentially exceed the claim of your client. A review of the cases in an area will help you identify the type of evidence that a Court will consider at trial.

The importance of research is equally applicable to drafting a statement of defence as a statement of claim. Although the Plaintiff will often have more time than a Defendant to craft their pleadings, extensions are frequently given to allow a Defendant to properly craft their pleading. A Plaintiff, in most cases, would rather have a responsive Statement of Defence given after an extension of time, than a Statement of Defence provided within the time limits that contains a general denial.

Given that amendments may ultimately not be permitted and that admissions may only be withdrawn with difficulty, you should ensure that enough research has been done or that you

otherwise have enough familiarity with the law in the particular area to draft a pleading which deals appropriately with the situation at hand.

You must also be familiar with the facts upon which the claim is based. Ideally you should have your client provide to you all of the documents that are relevant as they will need to be disclosed at some point in the litigation in any event. It is far better if you have had an opportunity to view a potentially damaging document, which a client is more likely to initially withhold, prior to the drafting of pleadings. You should ask your client the difficult questions that you anticipate the Defendant will raise. In some cases, it may be appropriate to contact witnesses, particularly if they are likely to have key evidence or if they are “independent” witnesses and you expect credibility to be an issue.

Considering a precedent can be a useful tool to ensure that you have covered the basics. If a precedent is not available for a unique cause of action and you find a decision discussing that cause of action, you can obtain a copy of the pleading from the Courthouse, or from BC Online which has many more recent pleadings available electronically. However, you should not be a slave to precedent. Precedents are generally more useful at the end of drafting to ensure that you have plead the material elements than at the beginning. When using a precedent from an electronic database, it is particularly important that you proofread the pleading before filing it.

One other item of importance to bear in mind in drafting pleadings, is the amount of money and time that your client is willing and/or able to spend on the litigation. Raising a claim or making a defence, may not be beneficial for your client if it is likely to greatly increase the cost of the litigation due to the nature of the allegation or the chance of success. However, if your instructions are to be aggressive as possible and your client is not particularly sensitive to costs, it may be beneficial to raise most claims or defences, provided there is some merit to them.

You should also consider whether the type of allegation made, is one that is likely to attract special costs if unfounded and if so, thoroughly discuss this with your client prior to pleading that cause of action.

Another consideration is the Defendant’s ability to pay. If it is going to be very costly to recover a large judgement and the Defendant will likely be able to satisfy only a small portion of the

judgement, you should consider whether it is possible to narrow your claim as it may be cheaper and more expeditious to achieve a smaller judgement which may result in the same recovery as a large judgment. You should always remember that a judgment is valid for 10 years without renewal, so you should consider the Defendant's present, as well as future, ability to pay.

C. DRAFTING PLEADINGS

Once you have mastered the facts and the law related to the case, you need to tell the story. I put my facts in chronological order and set out each of the various causes of action supported by those facts at the end. Use simple language.

(1) Material Facts

One commences a pleading by identifying the parties involved. It can be very useful to identify the relationship of the parties particularly in complex litigation. The text by Meagher, J. *Parties to an Action*, (Vancouver: Butterworths 1988) can be particularly helpful in properly identifying more unusual parties.

As previously stated, the rules require that you plead material facts but not evidence. It can be very difficult to differentiate between the two. Briefly stated, material facts are those that are necessary to prove the cause of action. Evidence is the means by which you will prove those material facts. Each element of a cause of action is a material fact. For example in a breach of contract case one must allege the existence of a contract and the material terms giving rise to a claim in damages, how the Defendant breached the contract and that the Plaintiff suffered damage as a result.

A helpful discussion differentiating between a material fact and evidence can be found in McLachlin & Taylor, *British Columbia Court Forms*, 2d. ed. (Markham: Ont: LexisNexis, 2005) at paragraphs 11.19 to 11.22:

11.19 Rule 19(1) requires that a Party plead the material facts but forbids him to plead evidence. This Rule embodies the long-standing principle of pleading that:

...when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of proving it or the evidence sustaining the allegation: per Lord Denman C.J. in *Williams v. Wilcox* [1835-42] All E.R. Rep. 25 (Q.B.)

11.20 The term “material fact” is defined in *Delaney & Friends Cartoon Productions Ltd. v. Radical Entertainment Inc.*, [2005] B.C.J. No. 573, 2005 BCSC 371, at para. 9, as “one that is essential in order to formulate a complete cause of action”, whence it follows that if “material fact is omitted, a cause of action is not effectively pleaded”. This statement of the law was specifically approved by the Court of Appeal in *Skybridge Investments Ltd. v. Metro Motors Ltd. (c.o.b. Metro Ford)*, [2006] B.C.J. No. 2892, 61 B.C.L.R. (4th) 241, 232 B.C.A.C. 140, 2006 BCCA 500, at para. 9, and in *Young v. Borzoni*, [2007] B.C.J. No. 105, 2007 BCCA 16, at para. 20.

11.21 Facts and evidence may be so intermingled as to be indistinguishable. If setting out the material facts also requires setting out evidence, there can be no objection. On the other hand, evidence should not be pleaded as such.

11.22 Circumstances which merely prove the truth of facts already alleged should not be pleaded. It is improper to plead that a person “was informed” or “made a statement”; this constitutes evidence of the fact, not the fact itself: *Schweiger v. Vineberg* (1905), 15 Man. R. 536, 2 W.L.R. 266 (K.B.). It is also improper to allege that a Party “believes something.” Mere belief is not permissible to support a cause of action which must be founded on allegations of fact: *McLean v. Johnston*, [1923] B.C.J. No. 81, 32 B.C.R. 495, [1923] 3 W.W.R. 913, [1923] 4 D.L.R. 178 (C.A.)

If you are in doubt as to whether a fact is a material fact or evidence, you should include it in the pleadings, particularly if it is necessary to tell the story.

One should also bear in mind that for certain causes of action set out in Rule 19(11), namely misrepresentation, fraud, breach of trust, wilful default or undue influence particulars are required in the pleading. Further, Rule 19(12) requires particulars for libel and slander and states precisely what information should be provided.

Each paragraph should contain a single allegation which can be either admitted or denied. If you combine multiple allegations, some of which may have been admitted and others which would be denied, the opposing party is likely to simply deny the entirety of the paragraph.

Rule 19(19) provides that an allegation of fact, if not denied, is deemed to be admitted. As such, a Defendant should include the normal phrase “the Defendant denies each and every allegation of fact except as expressly admitted herein.” Despite previously conflicting case law, it has now been held that such a denial is a proper pleading and not amenable to being struck under R. 19(24) in *Patym Holdings v. Michalakis* 2005 BCCA 636. However, one should actually take

some effort to determine if there are some facts that can be admitted to narrow issues. If you are in doubt as to whether to admit a fact, the preferable approach is to deny it. Admissions cannot be withdrawn without the consent of the opposing party or leave of the Court.

It may be useful to include specific denials with respect to the particularly important allegations of fact. Specific denials are required for contracts and bills of exchange per R. 19(22), R. 21(2) and R.21(3).

A well crafted statement of defence should contain the Defendant's version of facts if they materially differ from the Plaintiff (which they usually do). Indeed, Rule 19(20) requires a party plead their own statement of facts if they intend to prove material facts that differ from those plead by the opposing party. Rule 19(15) requires a party to plead any material fact that makes a claim or defence of the opposite party not maintainable, that might take the other party by surprise or that raise issues of fact not arising out of the previous pleading.

(2) Causes of Action

After setting out the material facts, I set out each of the causes of action so that it is clear precisely which causes of action I am raising. However, it is inappropriate to include argument. The rules do not expressly require that you set out a cause of action, they require only that you have plead the material facts that support a cause of action, however, it is a good practice to set out precisely the causes of action.

Rule 19(8) provides that a pleading can make alternative allegations, however alternative allegations should be pleaded as such. Further, they should be truly alternative and not inconsistent allegations which are prohibited by Rule 19(7).

If you are relying on a statute, it should be included in your pleading.

A Statement of Defence should specifically plead defences that are to be relied upon as required by Rule 19(15).

(3) Prayer for Relief

The prayer for relief is usually the easiest part of the pleadings.

Rule 19(29) prohibits pleading the amount of any general damages claim. A claim must be specifically pleaded for special damages, aggravated damages and punitive damages and must be pleaded with as much specificity as possible.

If you are seeking a declaration, it is extremely advisable to think carefully about precisely what declaration is going to provide the type of benefit that you are seeking.

It is usual to make a claim for interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79. You may also make a claim for contractual interest and make the claim for interest pursuant to the act in the alternative.

It is also normal practice to seek costs. If you are going to seek special costs arising from pre-litigation conduct or for certain types of unfounded allegations, the plea should be made in the pleading.

It is normal practice to include at the end, the catch all claim for ‘such further and other relief as this Honourable Court may deem just.’

D. STRIKING PLEADINGS

When drafting pleadings one of the most important points to bear in mind, are the factors that a Court will consider in striking your pleadings. If you draft your pleadings with these thoughts in mind you are much more likely to be successful in defending against such an application. Having said that, the prime purpose in drafting pleadings should be to persuade and as discussed above to help define the scope of discovery.

When confronted with an application to strike pleadings, the first thought should be a consideration of whether to amend the pleading. Even though the Court will consider the pleadings as they exist or as they may be amended, an amendment may avoid an unnecessary application. Pursuant to Rule 24 a party may amend at any time with leave of the Court, once without leave of the Court before delivery of the notice of trial or at any time with the written consent of the parties.

The grounds to strike a pleading are set out in Rule 19(24). The primary ground for striking a pleading is that it discloses no reasonable claim or defence pursuant to Rule 19(24)(a). If you have properly conducted your research and ensured that you plead the material elements of each cause of action, you should be able to withstand an attack on this ground. The leading case in this area is *Hunt v. Carey Canada Inc.* [1990] 2 S.C.R. 959 which held that the test for striking is whether it is “plain and obvious” that the pleading discloses no reasonable cause of action. The facts alleged in the pleadings are taken as true. Only if the action is certain to fail should the claim be struck. Rule 19(27) provides that no evidence is admissible on an application under Rule 19(24)(a)

A pleading may also be struck under Rule 19(24)(b) because it is unnecessary, scandalous, frivolous or vexatious. A pleading may be struck under R. 19(24)(c) because it may prejudice, embarrass or delay the fair trial or hearing of the proceeding. These grounds are very similar. A discussion of these grounds can be found in *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Conference* (1999), 36 C.P.C. (4th) 266 (B.C.S.C.) where the Court stated at para. 47

Irrelevancy and embarrassment are both established when pleadings are so confusing that it is difficult to understand what is being pleaded: *Gittings v. Caneco Audio-Publishers Inc.* (1987), 17 B.C.L.R. (2d) 38 (B.C.S.C.). An “embarrassing” and “scandalous” pleading is one that is so irrelevant that it will involve the parties in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the issues: *Keddie v. Dumas Hotels Ltd. (Cariboo Trail Hotel)* (1985), 62 B.C.L.R. 145 (B.C.C.A.) at 147. An allegation which is scandalous will not be struck if it is relevant to the proceedings. It will only be struck if irrelevant as well as scandalous: *College of Dental Surgeons (British Columbia) v. Cleland* (1968), 66 W.W.R. 499 (B.C.C.A.). A pleading is “unnecessary” or “vexatious” if it does not go to establishing the plaintiff’s cause of action or does not advance any claim known in law: *Strauts v. Harrigan* (December 2, 1991), Doc. Vancouver C913631 (B.C.S.C.). A pleading that is superfluous is objectionable: *Lutz v. Canadian Puget Sound Lumber Co.* (1920), 28 B.C.R. 39 (B.C.C.A.). A pleading is “frivolous” if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel: *Chrisgian v. B.C. Rail Ltd.* (July 3, 1992), Doc. Prince George 20714 (B.C. Master).

The Court in *Bryfogle v. School District No. 49* 2007 BCSC 459 at para. 12 defines a pleading as frivolous or vexatious if it does not go to establishing the plaintiff’s cause of action or does not advance any claim known in law.

If you keep to the rule regarding material facts and perform your research prior to pleading, you should also withstand an application to strike on the basis of Rule 19(24)(b) and (c).

The final ground for striking a pleading is Rule 19(24)(d) which provides that a pleading can be struck where it is an abuse of the Court. *Citizens for Foreign Aid Reform, supra* also addresses this ground and states at para. 52.

The ambit of abuse of process is very broad. Abuse of process may be found where proceedings involve a deception of the court or constitute a mere sham; where process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose: *Babovic v. Babowech* (September 3, 1993), Doc. Vancouver C931968 (B.C.S.C.). In the case at bar, I am unable to find that the plaintiff's pleadings in paragraph 9 and 10 of the Statement of Claim are vexatious and without merit, brought with the sole motive and intent to harass the defendants and to interfere with their ability to defend the action.

Regard should also be had to *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 where the Court noted the flexibility of the doctrine of abuse of process and held that relevant considerations include judicial economy, consistency, finality and the integrity of the administration of justice.

In *Bryfogle, supra* at para. 12 the Court also discussed abuse of process

....Abuse of process is easily understood; the use of the word "otherwise" in Rule 19(24)(d) implies that it includes the bringing of unreasonable claims or defences or unnecessary, scandalous, frivolous or vexatious pleadings, but the case authorities extend abuse of process to proceedings and conduct that involve a deception of the court or constitute a mere sham, where process is not being fairly or honestly used, or is being used for some ulterior or improper purpose, or serves no useful purpose.

In *Bryfogle, supra* the Court held that the "plain and obvious" standard applies to the other grounds of Rule 19(24) not only (a).

The manner in which a pleading is set out is not likely to result in it being struck as an abuse of process. It is where the pleading, in and of itself, is improper that it is likely to be struck on this ground.

E. CONCLUSION

You will draft a well crafted pleading if you conduct your research and familiarize yourself with the case prior to drafting the pleading. Your pleading is not likely to be struck if you set out only the material facts and ensure that you have properly plead each element of the causes of action or defences. You should have a satisfied client if you always remember your client's ultimate objective in the litigation.

F. SECONDARY SOURCES

There are several comprehensive textbooks that discuss drafting pleadings and provide precedents. The list below contains some of the most used sources.

- D. Harris et. al. eds., *British Columbia Civil Trial Handbook*, 2d ed., (Vancouver: Continuing Legal Education, 2005)
- Fraser, Horn & Griffin, *Conduct of Civil Litigation in British Columbia* 2d ed. (Markham:Ont, LexisNexis, 2007)
- McLachlin & Taylor, *British Columbia Court Forms*, 2d. ed. (Markham:Ont: LexisNexis, 2005)
- McLachlin & Taylor, *British Columbia Practice*, 3d. ed (Markham, Ont: LexisNexis, 2006)
- Bullen & Leake and Jacobs, *Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975)
- D. B. Casson, *Odgers on High Court Pleading and Practice* (London: Sweet & Maxwell, 1991)