A JUNIOR LITIGATOR'S TOOLKIT

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The junior litigator faces the never-ending process of accumulating and applying both knowledge and experience that constitutes the practice of law. Being junior counsel is (or should be) an apprenticeship in the profession under senior counsel. The roles of senior and junior have been described as follows:

> [Senior counsel] and [junior counsel] worked in the classic relationship of senior and junior counsel. [Senior counsel] provided direction, dealt with matters of strategy, and had overall conduct of the file while [junior counsel] reviewed and prepared documents and dealt with the time-consuming minutiae of the case.[1]

The necessary qualities of a junior litigator are numerous: knowledge of the file and the law, organization and preparation (of both the case itself and, from time to time, senior counsel[2]), and development of the intangibles of an effective advocate.

The "time-consuming minutiae" of the case include understanding the legal principles that apply to that case. This article is intended to assist with the legal knowledge aspect of a junior litigator's role.

The accumulation of knowledge of the law in various areas of civil practice is no small task. Few, if any, litigators have not had the uncomfortable experience early in their career of senior counsel, opposing counsel or a judge referring to a case in an offhand manner that suggests that this is of course a case that junior counsel should know by name. The near-universal response of junior counsel wishing to disguise their obliviousness is not to stop and ask how the name of the case is spelled or for the citation. It is to nod politely, then scurry back to their office and desperately try to divine what was being discussed. In such a situation, the adage "the only stupid question is the one that is never asked" might be seen to conflict with the maxim *ignorantia juris non excusat*.

This article is a junior litigator's "toolkit" of significant cases in various aspects of civil practice before the Supreme Court of British Columbia. The toolkit metaphor is apt because a toolkit necessarily provides only a limited set of fundamental tools of the trade.[3] A toolkit is defined as "a set of tools … used for a particular purpose" or "a personal set of resources, abilities, or skills".[4] According to the *Code of Professional Conduct*, "[c]ompetence

involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which [legal] principles can be effectively applied."

With that in mind, this article is intended to help develop a working familiarity with a few legal principles and procedures that frequently arise in civil practice. We have selected 15 cases. This list is not intended to be an exhaustive resource on civil jurisprudence. The cases are intended to cover some common procedural and substantive aspects of civil practice from the outset of litigation, through trial and after the judgment is rendered. The list is a starting point; legal research and analysis are fundamental to the practice. Our goal is to identify cases that will assist in recognizing an issue and in understanding where to begin the task of legal research and analysis.

CASE LAW

Before Trial

S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.[5]

In *S. & K. Processors*, McLachlin J. (as she then was) outlines the principles of the potential minefield of waiver of privilege. This is a good case to know in order to avoid potentially prejudicing your client's case by waiving privilege. Ordinarily, waiver of privilege is established where the possessor of the privilege (1) knows the privilege exists and (2) voluntarily evinces an intention to waive it. However, waiver of privilege can occur by accident too! Where fairness and consistency so require, the privilege may be waived even in the absence of an intention to waive. Common examples of waiver include partial waiver of privilege over a document leading to waiver of the entire document (and, potentially, related documents), counsel entering the fray on contentious matters by swearing an affidavit, and pleading reliance on legal advice.

Homalco Indian Band v. British Columbia[6]

This case offers a useful, oft-cited, discussion of the principles of pleading. 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; the plaintiff must state, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action. 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. There are few surer ways to annoy a judge than to provide a response to civil claim that is not responsive.

British Columbia (Attorney General) v. Wale[7]

In most of Canada, the leading case for the test on an application for an interlocutory injunction is the three-step test set out by the Supreme Court of Canada in *R.J.R. MacDonald Inc. v. Canada (Attorney General)*.[8] In British Columbia, however, there is still some affinity among the judiciary and senior counsel for the two-step test provided by the Court of Appeal in *British Columbia (Attorney General) v. Wale*. Many cases, including *Wale* itself, say there is no substantive difference between the two tests, as *Wale* does not eliminate the irreparable harm step of the test from *R.J.R. MacDonald*; it merely subsumes that step within the balance of convenience step. The *Wale* test does at least allow counsel to sweep irreparable harm under the rug to an extent if that factor is not favourable to their case. The real reason to refer to *Wale*, however, is to establish your "Made in B.C." credentials.

Biehl v. Strang[9]

Juniors are inevitably charged with the important, albeit generally monotonous and occasionally onerous, task of document production. *Biehl* provides a guide to the two-stage discovery process under the *Supreme Court Civil Rules* (which, seemingly as a matter of principle, senior counsel will continue to refer to as the "new rules", as opposed to the "rules", for the duration of their careers). Under the "old rules", document discovery was expansive, governed by the test in *Compagnie Financiere et Commerciale du Pacifique v. The Peruvian Guano Company* and as such requiring production of every document relating to "any or all matters in question in the action".[10] Under Rule 7-1(1), the initial production obligation is limited to what is required to prove or disprove a material fact. If an application is made under Rule 7-1(11), however, the production obligation follows the *Peruvian Guano* standard, subject to the court's discretion to determine the scope of document production.

Cominco Ltd. v. Westinghouse Canada Ltd. (No. 4)[11]

Understanding the scope of oral discovery assists junior litigators in preparing for and conducting discovery of opposing parties and their own client. Rumour has it that many objections have been made on discovery to questions that, in fact, are not remotely objectionable. The scope of an examination for discovery extends to any matter relating to a matter in question in the action. Questions are limited to relevant issues between the party conducting the discovery and the party being examined. The examination is in the nature of a cross-examination. The question need not be focused directly on a matter in question in the action but need only relate to such a matter.

Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.[12]

Twenty-five years before *Hryniak v. Mauldin*,[13] *Inspiration Management* (prophetically) recognized not every case may permit the "luxury of a full trial" and encouraged the use of summary procedures to determine actions or issues in order to ensure the proper administration of justice.[14] According to CanLII, *Inspiration Management* has been cited approximately 700 times. For some counsel, no application under Rule ~~18A~~ 9-7 is complete without reference to *Inspiration Management*. A summary trial is a trial of the action (or an issue in the action) on affidavit evidence rather than *viva voce* evidence. Each claim (or defence) must be established according to the appropriate onus of proof. The court has discretion to try the issues raised by the pleadings where the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law, unless it would be unjust to do so. In determining whether it would be unjust to proceed summarily, the court may consider the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters that arise.[15]

At Trial

F.H. v. McDougall[16]

Prior to *F.H.*, case law suggested there were a potpourri of civil standards of proof, with intermediate standards or degrees of probability within the civil standard of balance of probabilities depending on the moral blameworthiness of the conduct at issue in the action. *F.H.* confirms that in Canada, there are no degrees of probability within the civil standard of proof. The only standard of proof in a civil case at common law is proof on a balance of probabilities.

R. v. Khelawon[17]

For some, hearsay is akin to obscenity, incapable of a clear definition and approached from the perspective of "I know it when I see it."[18] In practice, *Khelawon* provides a useful definition: Hearsay is an out-of-court statement that is adduced to prove the truth of its contents and where there is no contemporaneous opportunity to cross-examine the declarant. The general exclusionary rule regarding hearsay holds that, absent an exception, hearsay evidence is inadmissible. For exceptions, consult authoritative texts and the various common law multifactorial discretionary tests.

Browne v. Dunn[19]

Browne v. Dunn is a classic rule of English jurisprudence that has important

application beyond simply impressing friends and colleagues. The rule holds that as a matter of fairness, a party cannot "ambush" a witness by not giving the witness an opportunity to state their position with respect to contradictory evidence later called by the party conducting that cross-examination.

Faryna v. Chorny[20]

In a world of flawed humans who are, in turn, flawed witnesses, many cases great and small turn on questions of credibility. *Faryna* provides an analysis that counsel may refer to in explaining to the judge why the imperfect evidence of their key witness must be believed over the "imperfecter" evidence of an opposing party's key witness. Most crucially, this assessment must not be based solely on the demeanour of the witness, but must centrally consider whether the evidence of the witness is in accordance with the preponderance of probabilities in the case.

Vancouver Community College v. Phillips, Barratt[21]

The requirements of expert practice can differ significantly from province to province. In British Columbia, *Vancouver Community College* holds that so long as the expert remains in the role of a confidential adviser, privilege is maintained over documents in their possession. Once the expert becomes a witness, however, their role is substantially changed. The expert is presented to the court as truthful, reliable, knowledgeable and qualified.[22] As stated by Finch J. (as he then was), it is as though the party calling the expert says: "Here is Mr. X, an expert in an area where the court needs assistance. You can rely on his opinion. It is sound. He is prepared to stand by it. My friend can cross-examine him as he will. He won't get anywhere. The witness has nothing to hide." If an expert witness is called to testify, they may be required to produce all documents in their possession that are relevant to matters in their report or their credibility.

Gallen v. Butterley[23]

You may have heard of (but since forgotten) the parol evidence rule: subject to certain exceptions, when the parties to an agreement have apparently set down all its terms in a document, extrinsic evidence is not admissible to add to, subtract from, vary or contradict those terms. Of course, in almost every case requiring interpretation of a contract, one, the other or both of the parties to the contract will seek the admission of just such evidence. *Gallen* identifies eight exceptions under which such evidence may be admitted. In addition to this frequently cited list, there is an aside from Lambert J.A. to the effect that there is "little residual practicality in the parol evidence rule, as a rule of evidence, in cases tried by judge alone".[24]

Re Hansard Spruce Mills Ltd.[25]

Often the law is simply not what you would like it to be. Where there is a decision from the B.C. Supreme Court that says the law is the opposite of what you would prefer (and you cannot distinguish that case), you may turn to *Hansard Spruce Mills*, the leading case on the principles of horizontal *stare decisis* at the trial level in British Columbia. In this case, Wilson J. stated that he would be willing to go against a previous decision of the court only if (a) subsequent decisions have affected the validity of the impugned judgment; (b) it is shown that some binding authority in case law or some relevant statute was not considered; or (c) the judgment in question was unconsidered or *nisi prius*, that is, given in circumstances where an immediate decision is required without the opportunity to fully consult authority.[26] Counsel should only resort to a *Hansard Spruce Mills* argument in a true "Break Glass in Case of Emergency" situation.

After Trial

Clayton v. British American Securities Ltd.[27]

Clayton takes the Columbo-approach to finality of judgments: "My lord, there's just one more thing." *Clayton* is the case you turn to when you need it to not be over until it is over. You might think "it is over" at the conclusion of argument at trial. Turns out, not necessarily. You would surely think "it is over" after the trial judge pronounces judgment against your client. Again, not necessarily. *Clayton* stands for the proposition that the trial judge has unfettered discretion to reopen the trial to hear new evidence or new argument and reconsider an issue after pronouncement of judgment but before entry of the final order, although this discretion is to be used sparingly.[28] As with *Hansard Spruce Mills*, counsel should only break the glass with *Clayton* if it is unavoidable.

Miracle Feeds v. D. & H. Enterprises Ltd.[29]

Miracle Feeds provides the test in British Columbia on an application to set aside default judgment and is frequently referred to in both Provincial Court and Supreme Court. The test in *Miracle Feeds* requires the defendant in default to show (1) that they did not wilfully or deliberately fail to file the required defence to the plaintiff's claim, (2) that they made the application to set aside the default judgment as soon as possible, or give an explanation for any delay, and (3) that they have a defence that is at least worthy of investigation; as well as to (4) establish these requirements to the satisfaction of the court through affidavit material. Of course, if counsel has had conduct of a file from an outset, such an application should never be necessary.

CONCLUSION

As with any trade or profession, no one is expected to have every tool—in this context, an exhaustive knowledge of the law on every possible issue—on hand at all times. This article is intended to help with developing a working familiarity with legal principles and procedures that frequently arise in civil practice. For a more substantial list of leading authorities, we recommend consulting the Court of Appeal's practice note, *Frequently Cited Authorities*.[30]

Unfortunately, this article cannot help with the situation where a junior is instructed by senior counsel to embark on the classic junior's fool's errand: "I know there is a case about X, Y, and Z, it may have been from A or B province or court, or not, and it is directly on point." Good luck!

ENDNOTES

1. *Elliot v Finkel*, 1998 CanLII 6282 at para 52 (BCSC).
2. Including, but not limited to, packing the barrister's bag(s), carrying the barrister's bag(s), filling and refilling paper cups with water without spilling on the briefs, repacking the barrister's bags, and repeating the next day.
3. And to be sure, this toolkit is limited. You may find the jurisprudential equivalent of a Phillips-head screwdriver in here, but if you're looking for one of those tiny little jeweller's screwdrivers for a very specific job you're out of luck.
4. *Oxford English Dictionary*, online edition, *sub verbo* "toolkit".
5. (1983), 45 BCLR 218 (SC) [*S & K Processors*].
6. (1998), 25 CPC (4th) 107 (BCSC).
7. (1986), 9 BCLR (2d) 333 (CA) [*Wale*].
8. [1994] 1 SCR 311.
9. 2010 BCSC 1391.
10. (1882), 11 QBD 55 (CA) [*Peruvian Guano*].
11. (1979), 11 BCLR 142 (CA).
12. (1989), 36 BCLR (2d) 202 (CA) [*Inspiration Management*].
13. 2014 SCC 7.
14. *Inspiration Management, supra* note 12.
15. For a recent summary of the leading jurisprudence, see *Gichuru v Paillai*, 2013 BCCA 60.
16. 2008 SCC 53 [*F.H.*].
17. 2006 SCC 57 [*Khelawon*].
18. *Jacobellis v Ohio*, 378 US 184 (1964).
19. (1893), 6 R 67 (HL).
20. [1952] 2 DLR 354 (BCCA) [*Faryna*].
21. (1987), 20 BCLR (2d) 289 (SC).
22. Rule 11-2(1) now makes clear that an expert has a duty to assist the court and is not to be an advocate for any party. At the very least, an expert must certify that he or she is aware of that duty, has made his or her report in that duty, and will give testimony in conformity with that duty: Rule 11-2(2).
23. (1984), 53 BCLR 38 (CA) [*Gallen*].
24. However, as jury trials in cases turning on contractual interpretation seem to be the unicorns of jury trials, this is an aside of broad application.
25. [1954] 4 DLR 590 (SC).
26. For principles regarding horizontal *stare decisis* at Court of Appeal, see *Bell v Cessna Aircraft Co* (1983), 46 BCLR 145 (CA), and *BC (Govt) v Worthington (Can) Inc* (1988), 29 BCLR (2d) 145 (CA).
27. (1934), [1935] 1 DLR 342 (BCCA) [*Clayton*].
28. *Moradkhan v Mofidi*, 2013 BCCA 132 at para 31.
29. (1979), 10 BCLR 58 (Co Ct) [*Miracle Feeds*].
30. British Columbia Court of Appeal, *Frequently Cited Authorities*, issued 21 October 2011, online: <http://courts.gov.bc.ca/Court_of_Appeal/practice_and_procedure/civil_and_criminal_practice_directives/practice_notes/PDF/(CandC)Frequently_Cited_Authorities%20_Updated.pdf>.