

# The structure of a pleading: The B.C. Court of Appeal provides guidance on the drafting of responses and counterclaims

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Litigators have different drafting styles when it comes to pleadings. Their goal is often to tell the story from their client's perspective and convince the reader that their client's case is compelling. An effective litigator will accomplish these goals while complying with the requirements set out in the *Supreme Court Civil Rules* (the Rules).

The B.C. Court of Appeal recently reaffirmed the importance of complying with these formal requirements in [Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc., 2021 BCCA 362 \(Mercantile\)](#). While the Rules are well known, the Court affirmed their fundamental importance to the litigation process and signaled that it will enforce them, stating: "These formal and content-based requirements are neither anachronistic nor technical. Instead, they are necessary and serve to further the purposes of the Rules."

*Mercantile* is essential reading for B.C. litigators. Following *Mercantile*, B.C. litigants must take care to follow the Court's guidance on structure, or risk having their cases mired in lengthy and costly preliminary applications and, ultimately, having their pleadings struck.

## Factual and procedural background

The factual background in *Mercantile* is straightforward. The plaintiffs started an action against the defendant for non-payment on a settlement agreement that resolved a contractual dispute between the parties. The defendant filed a response and a counterclaim, each advancing distinct legal claims and defenses:

- The response alleged negligent misrepresentation and duress in entering into the settlement agreement; and
- The counterclaim alleged fraudulent misrepresentation, breach of an advisor agreement, and conversion.

The plaintiffs applied to strike the defendant's response and counterclaim under Rule 9-5(1). At first instance, the chambers judge dismissed the application to strike as the application did not identify specific paragraphs as nonresponsive, argumentative, or containing evidence.

The chambers judge found that the application to strike was "structure-driven," in that the plaintiffs were merely seeking to have the defendant organize its pleadings differently. The plaintiffs appealed the chambers decision to the B.C. Court of Appeal.

## The B.C. Court of Appeal's decision

At the Court of Appeal, Justice Voith authored a unanimous decision reversing the chambers decision and striking the response and the counterclaim, with leave to amend. The Court found various problems with the response and the counterclaim, including how it was structured.

## The importance of pleadings

The Court started its analysis by highlighting the importance of pleadings and compliance with the Rules. The principles the Court highlighted are worth reproducing:

[21] Pleadings are foundational. They guide the litigation process. This is true in relation to the discovery of documents, examinations for discovery, many interlocutory applications and the trial itself.

[22] Pleadings also give effect to the underlying policy objectives of the Rules, which are to ensure the litigation process is fair and to promote justice between the parties [...]. They enable the parties and the court "to ascertain with precision the matters on which parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision". [...]

[23] For the court, pleadings serve the ultimate function of defining the issues of fact and law that will be determined by the court. In order for the court to fairly decide the issues before them, the pleadings must state the material facts succinctly [...]. They must be organized in such a way that the court can understand what issues the court will be called upon to decide [...]. [citations omitted]

## The structure of a pleading

### Response to civil claim

The Court found that the defendant's response was prolix and confusing. More specifically, it did not properly address the material facts as required by Rule 3-3(2) and Form 2. The latter requires a response to be organized in three "Divisions" as follows:

1. The defendant must identify whether each fact is admitted, denied or outside the knowledge of the defendant.
2. If the defendant denies a fact set out in the Notice of Civil Claim, the defendant must set out their version of that fact.
3. The defendant must set out, in a concise statement, any additional material facts that the defendant believes relate to the matters raised by the Notice of Civil Claim.

Among other defects, the response merged Divisions 2 and 3 in a single narrative, including both the defendant's "version of facts" and the "additional facts" under Division 2. It then indicated that Division 3 was "N/A".

As a result, the defendant failed to set out its version of each denied fact in an orderly manner. The defendant's specific versions of the denied facts were interspersed throughout

this narrative. For example, the defendant's version of the first denied fact came in paragraph 17 and the second in paragraph 36. Justice Voith expressed frustration with having to read the entire Division 2 to find the basis upon which the defendant denied each of the plaintiffs' material facts.

The response also failed to provide a specific response to every denied fact. The Court found that the defendant's position on various facts alleged by the plaintiffs was unclear.

## Counterclaim

The defendant's counterclaim was also defective because the counterclaim's factual section simply adopted all the facts stated in the response. The Court found that because the response and the counterclaim advanced different legal claims, the material facts required to support those legal claims were also different.

Using the same facts for both the response and counterclaim resulted in:

- both pleadings stating extraneous and irrelevant facts; and
- an absence of material statements of fact that were necessary to support the claim of fraudulent misrepresentation in the counterclaim.<sup>[1]</sup>

The material facts in a pleading must not contain evidence or argument.

The impugned pleadings also contained impermissible argument and evidence in the facts.

The Court of Appeal stated that, while drafting a pleading is not a mathematical exercise and requires some degree of flexibility, the drafting party must concisely set out material facts. The Court defined material facts as "the elements essential to formulate a claim or a defence" and stated that, while in rare cases including evidence may be appropriate for clarity, that is generally not the case.

The Court concluded that a pleading is not "a story" and that drafting a pleading requires a disciplined exercise governed by the mandatory terms set out by the Rules and the relevant authorities. In so concluding, the Court appears to be sending a message to the profession, demanding a more uniform and structured approach to pleadings. Litigators drafting responses may have to find a new balance between trying to control the factual narrative of the case and abiding by the Court's guidance in *Mercantile*. The decision may also give chambers judges renewed license to strike pleadings for such deficiencies.

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[1] Specifically, the defendant failed to allege a "dishonest state of mind" and failed to plead particulars of fraud as required by Rule 3-7(18).