Law Society of New Brunswick

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BAR ADMISSIONS PRACTICE MATERIALS

CIVIL PROCEDURE

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List of contributors

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CIVIL PROCEDURE

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Parties

Chapter 1

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Parties

1. Parties under Disability

Under Rule 7, a proceeding by or against a person under disability shall be commenced, continued or defended by a litigation guardian where the person under disability is (a) a minor, or (b) a person who has been declared either mentally incompetent or incapable of managing his own affairs but has no committee appointed, and (c) a person who is mentally incompetent or incapable of managing his own affairs but has not been so declared.

A minor may not represent himself in a legal proceeding without the assistance of a litigation guardian. This also applies to small claims proceedings under s. 47(1) of the *Small Claims Act* and General Regulation - Small Claims Act, N.B. Reg. 98-84. (*Dugas v. Duguay* (1986), 71 N.B.R. (2d) 93 (C.A.))

The litigation guardian acts on behalf of the disabled party and is entrusted with his or her best interest in regards to commencement, continuation and defending all proceedings concerning the disabled party.

Where a committee has been appointed for a person under disability, the committee has the authority to commence, continue or defend proceedings much the same way as a litigation guardian. It is important to note that some statutes, such as the *Mental Health Act*, provide for very strict adherence to procedures set out for cases whereby this rule applies.

2. Litigation Guardian for Plaintiff or Applicant

Rule 7 does not restrict nor set out any criteria as to who can act as litigation guardian. This is a non court appointed position and the only formality required is the filing of an affidavit of consent which contains the information required under Rule 7.02(2).

3. Litigation Guardian for Defendant or Respondent

Rule 7.03 provides a litigation guardian for a defendant or respondent must be appointed by a court before he can act for a person under disability. In cases where the person under disability has been served with an originating process and has not, within the time limited for his defence, delivered a defence by his committee or litigation guardian, the plaintiff or applicant must, by Notice of Motion, apply for the appointment of a litigation guardian to represent him (see Rule 7.03).

Form 7A allows an applicant to serve a request for appointment of litigation guardian at the time of serving the originating process. This is useful for an applicant who anticipates the person under a disability will not deliver a defence within the time prescribed. By doing so, no further notice is required and the motion for the appointment of a litigation guardian may be made without notice to the person under disability [Rule 7.03(3)].

A motion for the appointment of a litigation guardian must be supported by an affidavit or other evidence setting out the information required in Rule 7.03(4). In many cases, parents or close relatives will be the persons targeted and some investigatory steps on your part will have to be made in order to obtain the information necessary to support your motion.

The rules clearly provide in all cases litigation guardians must act through a solicitor and anything that is required or authorized by the Rules of Court to be done by a party in a proceeding may be done on his behalf by his litigation guardian.

4. Duties and Removal of Litigation Guardian

Rule 7.04(2) sets out the duties of the litigation guardian which include a duty to diligently attend to the interest of the person under disability and to take all proceedings that may be necessary in the circumstances.

Rule 7.05(2) provides that where it appears a litigation guardian is not acting in the best interest of the person under disability, the court, upon Notice of Motion, may substitute another person as litigation guardian upon such terms and conditions as may be just.

Provisions are made for the removal or substitution of a litigation guardian where for instance in the course of the proceeding a minor for whom a litigation guardian has been acting reaches the age of majority. In such a case, a litigation guardian files with the clerk an affidavit verifying this fact and the clerk issues an order authorizing the party to continue the proceeding without a litigation guardian under Form 7B. In all other cases where the party ceases to be under a disability, the litigation guardian may apply by *ex parte* motion for an order allowing him to continue the proceeding.

The liability of the litigation guardian to pay costs applies to a litigation guardian for a plaintiff or applicant but does not apply to a litigation guardian for a defendant or a respondent under a disability unless the litigation guardian is defending a counterclaim after having initiated proceedings.

5. Approval of Settlement or Compromise of Person under Disability

Special provisions are made in regards to approval of settlement or compromise by or on behalf of a person under disability. Unless approved by the court, a settlement or compromise of a claim made by or on behalf of a person under disability, whether or not a proceeding has been commenced is not binding upon him. The court's approval is by way of Notice of Application, but where a proceeding is commenced, the court's approval is obtained by Notice of Motion. Rule 7.06(3) lists the necessary documents which must be served and filed with the Notice of Motion or Notice of Application for the judge's approval of the settlement or compromise of a claim affecting a party under disability.

The affidavits in support of the motion or application should contain all relevant facts and all aspects of the agreement reached between the parties. Unless the court is given specific direction regarding the disposition of the funds, the money shall be paid into a court to the disabled person's credit.

6. Partnerships and Sole Proprietorships

Under Rule 8.06(2) the rights and requirements which apply to a partnership equally apply to sole proprietorships. In cases where the person carries on business under a business name other than his own, a proceeding may be commenced by or against him in either name.

Rule 8 applies to a proceeding by or against two or more persons as partners; between the partnership and one or more of its partners and between partnerships having one or more partners in common.

The proceeding by or against two or more persons as partners may and should usually be commenced in the partnership's name as it existed at the time the cause of action arose and in their own names. (*Simard et al v. Financial Credit Bureau Services Ltd.* (1982), 42 N.B.R. (2d) 416 (Q.B.)) In such a case, a right of recourse would apply against the named partners and the property of the partnership.

Paragraph 8.03 provides a way to impose a judgment on the assets of an unnamed partner by serving him an originating process, together with a Notice to Person Served as a Partner (Form 8A).

A person served with a Notice to Person Served is deemed to have been a partner at all material times unless he enters a defence to that effect. Naturally, he may also defend the proceedings on the merits.

In every other case, unless ordered otherwise, where proceedings have been commenced against the partnership in the firm name, any defence of the partnership and the partners shall be joined in a common defence in the name of the firm.

Rule 8.05 provides a judgment against the partnership may be enforced against the property of the partnership and any person served with a Notice to Person alleged to be a partner. As previously indicated, the partner is deemed to have been a partner unless he has filed a defence. The rules provide for situations where the unnamed partner has admitted that he was a partner or has been adjudicated to have been a partner at the material time. A party who has obtained judgment against the partnership may apply by Notice of Motion for leave to enforce it against the person he alleges to have been a partner at a material time pursuant to Rule 8.05(3) and (4).

In the case of *Bolands, a Division of Oshawa Holdings Limited v. Betts and Elmore* (1983), 50 N.B.R. (2d) 180 (Q.B.), the Court of Queen's Bench, Trial Division, dealt with the style of cause describing the plaintiff. The court held that a style of cause which read "Bolands, a division of Oshawa Holdings Limited" was improper, misleading and amended the style of cause and statement of claim on the ground of misnomer (at pages 182). It held the plaintiff could have been described as "Oshawa Holdings Limited or Oshawa Holdings Limited carrying on business as "Bolands" or "Bowlands".

It is recommended prior to initiating proceedings against a partnership or a business name, verify with the central registry under the *Partnership and Business Names Registration Act* and ascertain the partnership's and business' correct name; and obtain the names and addresses of individuals involved as well as dates of filing, etc.

The *Partnership and Business Names Registration Act* requires certain partnerships and business names to be registered under the act and also provides for suspension of rights to sue in the province if there is non compliance with the filing requirements. However, sections 17 and 18 of the act provide saving provisions in cases where a mistake was made and registration has not taken place.

7. Unincorporated Associations

For the purpose of Rule 9, the word "association" means an unincorporated organization of two or more persons other than a partnership operating under the name of the association for a common purpose or undertaking and includes a club, society, fraternity or syndicate, a trade union, council of trade union or employers organization as defined in the *Industrial Relations Act* and an employer organization as defined in the *Public Service Labour Relations Act*.

The proceeding may be brought by or against an association in the name of the association whether or not it possesses a trust fund.

A judgment against an association may be enforced against the property of the association including property held in trust for the association. A member of an association is not personally liable for the payment of money under a judgment against the association unless he is a party to the proceeding and has been held to be personally liable for all or part of that judgment (*Fineberg and Wallace et al v. Grand Bay* (1986), 76 N.B.R. (2d) 146). With leave of the court, an injunction or mandatory order against the association may be enforced against any officer or member of the association.

The court will consider the circumstances surrounding the setting up of the association in determining whether an association pursuant to Rule 9 existed.

(*Pridham v. Saint John Building and Construction Trades Council* (1985), 64 N.B.R. (2d) 361 (Q.B.) and also *Guarantee Co. of North America et al v. Caisse Populiare de Shippagan Ltée* (1988), 86 N.B.R. (2d) 342 (Q.B.); *LePage v. Communist Party of Canada et al.* (1999), 209 N.B.R. (2d) 58 (Prb. Ct.).

In *Societe des Acadiens du Nouveau-Brunswick Inc. et al v. Minority Language School Board No. 50 et al* (1984), 54 N.B.R. (2d) 198 (C.A.), Mr. Justice Laforest stated as follows (at page 208-209):

"[16] It is true that the parents are not themselves bringing the action, but the reality is that the Association, as the affidavit of the president of the Association reveals, was formed by the parents as an instrument through which to pursue their legal members rights. It is an organization whose members allege that they have suffered direct prejudice by the judgment sought to be appealed against, and it can sue as such; see in this context the judgment of the United States Supreme Court in N.A.A.C.P. v. Button (1963), 371 U.S. 415, at p. 428. Finally there is no difficulty with the fact that the Association is not a natural person and that it is not incorporated. Rule 9 of the Rules of Court permits unincorporated associations to sue and be sued.

The individuals really affected by the decision are the children and their parents in what they conceive to be their rights to educate their children under the programs whose validity was contested in the action. It seems right and proper, in a case like this, that a person whose interests are seriously affected by a judicial decision be accorded the opportunity to be heard so that he can himself raise the issues he considers important in his own way."

This case is particularly interesting due to the fact the intended intervenor was not a party to the action when heard by the judge of the Court of Queen's Bench of New Brunswick, nor when leave to appeal that decision was sought. The Court of Appeal allowed the application under Rule 15 and granted the intended intervenor leave to appeal and an extension of time within which to file its Notice of Appeal.

8. Estates and Trusts

Rule 10.01(1) provides that proceedings may be brought by or against an executor, administrator or trustee as representing the estate or trust of which he is a personal representative or trustee and as representing the persons beneficially interested without joining such persons as parties. This is normally the practice and there is really no necessity to join the beneficiaries, heirs-at-law or next-of-kin in the litigation.

Exceptions to this general rule are provided in rule 10.01(2) and apply to establish or contest the validity of a will or to remove an executor, administrator or a trustee. In such cases, a Notice of Application for the administration of an estate or execution of a trust or to establish or contest the validity of a will is presented to the court.

A Notice of Action or Notice of Application against specific parties could also be presented to the court (for example, in cases of fraud). By making a motion to the court, interested parties could be joined to the proceeding.

Rule 10.01(3) provides that where a proceeding is commenced by executors, administrators or trustees and an executor, administrator or trustee does not consent to be joined as a plaintiff or applicant, he shall be made a defendant or respondent. The court is given a wide discretion and may at any time order that a beneficiary, creditor or other interested person be made a party to a proceeding by or against a personal representative or trustee.

Rule 10.02 provides that where a deceased person has no personal representative and a person wishes to commence proceedings against an estate or continue proceedings against an estate, the court on preliminary motion or on motion, may appoint a litigation administrator to represent the estate in the proceeding. Before making an order appointing a litigation administrator, the court may require notice to be given to any person who may have an interest in the estate.

The litigation administrator may take all proceedings that may be necessary for the protection of the interest of the estate including proceedings by way of counterclaim, cross-claim or third party claim. A judgment in a proceeding to which a litigation administrator is a party binds the estate of the deceased person, but has not effect against the litigation administrator in his personal capacity.

Remedial provisions are found in Rule 10.03 in such cases where proceedings have been commenced before probate or administration. These saving provisions provide for time until the proceedings are properly constituted. If such remedial measures are not taken within a reasonable time, the claims may be dismissed. The court is given a great deal of discretion and may impose such terms and conditions that it may deem just, including a term that an executor or administrator shall not be personally liable in respect of any part of the estate of a deceased person which he has distributed or otherwise dealt with in good faith, while not aware that a proceeding had been commenced against the estate.

It is important to note Rule 10.03(7) clearly provides a proceeding by or against a deceased person or his estate shall not be treated as a nullity because it was not properly constituted. The rule provides for the necessary mechanism so that the proceedings may be reconstituted by the court. This power is in addition to and not in substitution of remedial powers found in Rule 2.02.

9. Representation Order

Rule 11.01 provides for the procedure in dealing with representation of an interested person who cannot be ascertained such as in the case of the interpretation of a deed, will, contract or other instrument or the interpretation of a statute, order-in-council, regulation, municipal by-law or resolution. The court may appoint one or more persons to represent any person including unborn persons, unascertained persons or persons who cannot readily be ascertained, found or served who have a present, future, contingent or unascertained interest in, or may be affected by, the proceeding.

Rule 11 provides that where an appointment is made a judgment in the proceeding is binding upon a person so represented, unless the court orders otherwise in the same or a subsequent proceeding.

10. Joinder of Assignor

Where an assignor is a necessary party and does not consent to be joined as a plaintiff or applicant, he can be made a defendant or respondent unless the assignment is absolute and not by way of charge only, and notice in writing has been given to the person liable in respect of the debt or chose in action that an assignment thereof has been made in favour of the assignee. The assignor shall be joined as a party in a proceeding by an assignee of the debt or chose in action. See also the provisions of the *Judicature Act* in respect to assignments.

Originating process

Chapter 2

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Originating process

1. Issuance of an Originating Process

Rule 16.01(1) provides every action in New Brunswick shall be commenced by issuing an originating process. Generally, all civil proceedings will be commenced by the issuing of a Notice of Action or a Notice of Application. A Notice of Action or a Notice of Application is issued when it is delivered or mailed by prepaid registered post addressed to the Clerk of the judicial district in which the proceeding is to be commenced. The Clerk assigns to the document a cause number, executes it and puts on it the date of issuance. The document is then returned to the solicitor for service. A Counterclaim against a party added by counterclaim and a Third Party Claim are also defined as originating processes in Rule 1.04.

2. When to Issue a Notice of Application

There are cases where the facts are not in dispute and a solicitor merely wishes to seek the direction of the court. In such situations, it is not necessary to issue a Notice of Action with Statement of Claim Attached. Instead, one would proceed with a Notice of Application (Form 16D) under Rule 16.04. Where a Notice of Application is issued, the party commencing the originating process is called the applicant and the opposite party is called the respondent.

Rule 16.04(a) to (h) sets out eight situations wherein it is proper to commence a proceeding by issuing a Notice of Application. In practice, a Notice of Application is used primarily for the opinion and advice or direction of the court on a question relating to the administration of an estate. As well, a Notice of Application can be used for a determination of rights which depend upon the interpretation of a deed, will, statute or municipal by-law. If the relief sought includes an injunction, mandatory order, declaration or the appointment of a receiver, and the claim falls within the categories specified in Rule 16.04(a) to (h) then you may proceed by a Notice of Application. However, Rule 16.04(i) should not be used as a separate category; that is, you do not proceed by Notice of Application to obtain an injunction if the claim does not fall under Rule 16.04 (a) to (h).

Rule 16.04(j) states a Notice of Application can also be used in respect of any matter where it is unlikely there will be a substantial dispute of fact. This rule is frequently used to obtain the approval of the court of a settlement for a party under disability. Prior to issuing a Notice of Application it is necessary to conduct the appropriate inquiries to ensure there will not be a substantial dispute of fact. A question involving mixed fact and law is not a proper question to be considered by way of Notice of Application (*St. John v. St. John's Policemen's Professional Association*, (1988) 94 N.B.R. (2d) 39 (Q.B.), *Baxter v. Fleck* (1989), 94 N.B.R. (2d) 329 (C.A.); *MacDonald v. Apex Industries Ltd.*, (1992) 126 N.B.R. (2d) 427 (C.A.), *Patmar Holdings Ltd. v. Riverview (Town)* (1995), 164 N.B.R. (2d) 1 (C.A.), *Steeves v. Moncton (City) et al.* (2003), 260 N.B.R. (2d) 383 (Q.B.), *Chiasson v. Region 6 Hospital Corp.* (2006), 297 N.B.R. (2d) 311 (C.A.)

Under Rule 43 an application for interpleader relief is made by Notice of Application unless a proceeding was commenced. Under Rule 71 where a petition is presented under the *Infirm Persons Act*, the petition is to be issued by way of Notice of Application.

A Notice of Application may also be used in respect to particular proceedings such as questions of title to real property (Rule 66), proceedings for partition and sale (Rule 67), proceedings in respect to the property of minors (Rule 68) and proceedings for a Judicial Review as contemplated by Rule 69.This latter procedure is in lieu of the former relief granted by way of certiorari mandamus, prohibition or quo warranto and is quite frequently invoked by parties who feel entitled to relief in the nature of what was formerly described as prerogative writs.

3. Content of a Notice of Application

Rule 38.04 provides a Notice of Application must state the grounds to be argued including a reference to any statutory provision or rule to be relied on, and it must list the documentary evidence to be used at the hearing of the application. Most importantly, and as stated by Mr. Justice Stevenson in *Forest Hill Towers Ltd. v. Central Mortgage and Housing Corp.* (1983), 44 N.B.R. (2d) 436 (Q.B.), the application must state the precise order sought.

4. Procedure for Notice of Application

In Rules 38 and 39 the procedure applicable to a Notice of Application can be found. A respondent to a Notice of Application who intends to offer affidavit evidence must serve a copy of such affidavits on the other parties 4 days prior to the hearing date. Four days prior to the hearing, each party files a Pre-Hearing Brief which includes the facts and law. Forty-eight hours before the hearing date the applicant must file a Record which is to include, *inter alia*, a copy of all affidavits or other material to be used at the hearing? Supposedly, the Record filed by the applicant will include the affidavits of other parties. However, on occasion it may be appropriate for a respondent to also file a Record. As well, if the Record is going to contain a significant amount of affidavit evidence, you may wish to file the Record earlier in order to allow the judge more time to review the matter before the hearing.

5. Evidence at a Hearing of a Notice of Application

Prior to the hearing of an application under Rule 39.02, a person who is not a party to the proceeding may be examined and cross-examined. However, it is unlikely this procedure would be necessary since there should not be any dispute of fact in an originating process commenced by Notice of Application. As stated in Rule 32.02(2), it is only with leave of the presiding judge a person may be orally examined or cross-examined on the hearing of an application. Generally speaking, the court will not permit a party to have his evidence heard by viva voce evidence pursuant to Rule 39.02 because to do so would permit a party to be taken by surprise. In *Jeffrey v. Universite de Moncton* (1985), 62 N.B.R. (2d) 115 (Q.B.), the court indicated the exercise of judicial discretion in permitting the examination of a witness at the hearing of a Notice of Application will depend upon the element of surprise, the relevance of the evidence to be heard and the reasons preventing the submission of evidence by affidavit.

As mentioned, a party proceeds by Notice of Application because there does not exist a substantial dispute of fact. In such cases, the evidence can easily be produced by affidavits which are served on the opposite parties prior to the hearing. The hearing of a Notice of Application should therefore be confined to argument based on the facts contained in the affidavits and the law.

6. Disposition of a Notice of Application

Pursuant to Rule 38.09, at the conclusion of the hearing a trial judge may allow or dismiss the application or adjourn the hearing. If the judge is satisfied there is a substantial dispute of fact he can direct the application proceed to trial. He can also give directions in respect to an exchange of pleadings, discovery and setting the matter down for trial.

It is important to remember when proceeding by way of Notice of Application; you are in essence preparing your entire case when you draft the affidavits and the Notice of Application. The application embodies the matter in dispute and upon its resolution or hearing, no further litigation is contemplated.

7. Notice of Action

The majority of civil actions will be commenced by issuing a Notice of Action with Statement of Claim Attached.

If a limitation period is about to expire or there isn't time to prepare a Statement of Claim to attach to a Notice of Action, then an action can be commenced by simply issuing a Notice of Action (Form 16B) and endorsing on it a brief statement of the claim pursuant to Rule 16.03(2).
The Statement of Claim must then be filed within thirty (30) days of the issuance of the endorsed Notice of Action (Rule 16.03).

What amounts to an effective brief statement of the nature of the claim as required by Rule 16.03(2) remains to be judicially considered. However, having regard to the requirements of the former *Rules of Court*, it is arguable the claim need only be stated in a summary manner. (*Logan v. Board of School Trustees, District No. 14* (1972), 6 N.B.R. (2d) 599 (Q.B.)

8. Notice of Action with Statement of Claim Attached

In a Notice of Action with Statement of Claim Attached (Form 16A), the party commencing the proceeding is called the plaintiff and the opposite party a defendant. The form of the Statement of Claim and the rules to be utilized in drafting a Statement of Claim are covered in Rules 27 through 30 and are discussed in Chapters 8 and 9.

Service of Originating process

Chapter 3

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Service of originating process

1. Service of Notice of Action and Extension of Time for Service

Rule 16.08 provides a Notice of Action shall be served within six (6) months from the date of being issued. If, for some reason, the Notice of Action is not served within six (6) months, then an application for an order extending time for service will have to be made under Rule 3.02. Such an application was successfully made in *Martin v. Goodine* (1983), 53 N.B.R. (2d) 52 (Q.B.).

In the *Martin v. Goodine* case, (supra.), the court reviewed Rule 2.02 which clearly stipulates a procedural error, including failure to comply with the rules, shall be treated as an "irregularity" which can be remedied to secure the just determination of the matters in dispute. In granting the order for extension of time for service, the court referred to three relevant factors:

- **a)** the reasons for failure to observe the rule and lack of promptness in applying for an extension order;
- **b)** whether the defendant had been prejudiced as a result of the plaintiff's failure to comply; and
- **c)** whether the defendant had otherwise been prejudiced.

In *Canada (Procureur General) v. Pelletier* (1984), 58 N.B.R. (2d) 184 (Q.B.), the court also permitted an extension of time to serve the Notice of Action with Statement of Claim Attached because the defendant could not show any prejudice and the Crown would have otherwise lost its right of action. However, in *Walsh v. DeWolfe* (1987), 84 N.B.R. (2d) 76 (Q.B.), an order for an extension of time for service was rescinded because the defendant and its insurer would be prejudiced by the delay.

Presumably, in any affidavit used in support of a motion to extend time for service of an originating process or to oppose such a motion, information relating to the three factors set out in the *Goodine* case should be included. That is, reasons for failure to comply with the rule should be set out in the affidavit.

In *Jardine v. Kent General Insurance Corp. et al* (1988), 90 N.B.R. (2d) 213 (Q.B.), a Notice of Action was filed but not served. Five years later, the Plaintiff's new solicitor applied for an extension of time for serving the Notice of Action. The Court held the insurer would be seriously prejudiced by the delay and refused to extend time for service under Rule 3.02. Apparently no notice of loss had ever been given to the insurer and the insurer could not now make a timely investigation.

In *Morin v. Collin* (1989), 101 N.B.R. (2d) 126 (Q.B.), the Plaintiff's lawyer used the wrong name of the Plaintiff on the Notice of Action and Statement of Claim. The mistake was discovered after the limitation period expired. The Plaintiff's lawyer applied for an Order to correct name of Plaintiff and to extend the time to serve the Notice of Action and Statement of Claim. The Court held the error was a correctible misnomer and not a substitution of one Plaintiff for another. The Defendants were not misled or prejudiced by the extension pursuant to Rule 3.02.

In *Cove v. Blackier et al.* (1997), 194 N.B.R. (2d) 327 (Q.B.), the Court permitted an extension of time for service nineteen months following the expiration of what would otherwise have been the deadline.

The Court held that an extension would not cause substantial prejudice because the defendants and their insurer were aware of the claim, had completed an investigation, were aware that the plaintiffs had retained counsel to pursue the claim, and had made a decision to close the file after denying liability, even though further investigation might and should have been made at the time of the accident.

2. Service of a Notice of Application

Rule 16.08(3) provides a Notice of Application shall be served at least ten days before the date upon which the Application is to be heard except where it is served outside New Brunswick, in which case it has to be served twenty days before the date upon which the application is to be heard. Service of a Notice of Application can be effected in the same way as a Notice of Action. Rule 38.05(2) sets out the circumstances where service may not be required. Generally, copies of the affidavits are served with a copy of the Notice of Application.

3. Personal Service and Proof of Service

An originating process must be served personally. The four ways to effect personal service under Rule 18.03 other than having a sheriff or some other serving officer give a copy of the document directly to the named party are: (a) service on a solicitor; (b) service by prepaid mail or prepaid courier; (c) service at place of residence; and (d) service on a corporation by mail. If a document was served by some other method then, on motion under Rule 18.09, you can apply for an order validating the service (*Bridges v. Daeres* (1985), 64 N.B.R. (2d) 412 (Q.B.)). The exceptions are set out in Rule 33.03 and Rule 55.03, which relate to service of persons required at discovery and persons required at trial.

Under the Rules, it is not necessary for the server to produce the original document, nor does the server have to have it in his or her possession. Although Rule 18 permits service of an originating process by prepaid mail, the common practice is to have a process server or the sheriff serve the document, if only to ensure service can be proven at a later date. Rule 18.10 sets out three ways in which service can be proven.

4. Service on a Corporation, Municipality, Partnership, Crown, etc.

Rule 18.02 sets out how service is effected on the Crown in Right of the Province, a minor, mental incompetent, a municipality, a partnership or an unincorporated association and will not be reviewed in this paper. However, service on a corporation will be reviewed having regard to the frequency in which it has been the subject matter of litigation.

Rule 18.02 (1) (c) provides a corporation may be served by leaving a copy of the document with an officer, director or agent, or with a manager or person who appears to be in control. In *Simmental Farms (N.B.) Ltd. v. Maritime Beef Testing Society* (1977), 18 N.B.R. (2d) 343 (Q.B.), the court concluded service on a company must be effected by service on a responsible official who transacts some part of the business for the company. The case of *Central Trust Co. v. Merrithew* (1982), 44 N.B.R. (2d) 314 (Q.B.) exemplifies the importance of serving the proper official in a company. In this case the court held service of a garnishee order effected by leaving the document, without explanation, with an employee was not valid service. It must be brought to the knowledge of a person in authority in the corporation. (See also *J. D. Irving Limited v. Omega Pipeline Ltd.*, (1977), 16 N.B.R. (2d) 474 (Q.B.))

5. Substituted Service

Rule 18.04 provides that where personal service of the document is required by the Rules and it appears to the Court it is impractical to effect prompt personal service, the Court may make an order for substituted service. This Rule is discussed in the case of *Attorney General of Canada v. Maillet* (1984), 54 N.B.R. (2d) 411 (Q.B.).

In this case the plaintiff's application for an order of substituted service by way of newspaper publication was denied because the Affidavit of the plaintiff did not provide the court with sufficient facts to permit it to determine that it was impractical to require personal service.

In particular, the affidavit did not disclose what attempts to personally serve the defendant had been made by the plaintiff and the court stated the party seeking to obtain an order for substituted service should satisfy the court as to what inquiries had been made to locate the person to be served. It should also provide evidence that the person resided in New Brunswick.

In *Cipolla v. Sleeth et al.* (1996), 172 N.B.R. (2d) 318 (Q.B.), the Court held that difficulty encountered in finding a party is not a sufficient basis on which to obtain substituted service. The applicant must demonstrate that substituted service will be effective in bringing the lawsuit to the defendant's attention.

6. Service out of the Jurisdiction

Under the English common law jurisdiction over the person was, with few exceptions, synonymous with territorial jurisdiction. The court would ordinarily entertain jurisdiction where the defendant was legally served with the originating process commencing a proceeding. With few exceptions, a court would exercise its jurisdiction in personam over all persons either permanently or temporarily resident within the territory in which it could enforce its orders. Where a defendant did not reside in the jurisdiction a plaintiff had to obtain leave of the court before the originating process could be served, even if the tort or breach of contract occurred in the jurisdiction. Service out of the jurisdiction was the subject matter of considerable litigation. (*McCully et al v. Barbourr et al* (1970), N.B.R. (2d) 346 (C.A.); *Nairn v. Archibald* (1975), 13 N.B.R. (2d) 557 (Q.B.); *Mockler v. Carter* (1979), 25 N.B.R. (2d) 181 (Q.B.))

In the majority of cases it is now no longer necessary to obtain leave of the court to serve an originating process on a party who resides outside the jurisdiction. Rule 19.01 delineates 18 different types of claims in which the court may assume jurisdiction. Provided damages are sustained in New Brunswick, this rule permits a plaintiff to commence an action in New Brunswick for damages in contract or tort, even if the tort or breach of contract was committed elsewhere and the defendant resides outside the jurisdiction. If service is made without leave then Rule 19.03(1) requires the originating process disclose the facts relied upon in support of such service. If service is being effected outside the jurisdiction because the claim falls under Rule 19.01(i) then this rule should be pleaded. However, failure to comply with Rule 19.03(1) may not be fatal. (*S.M. White (Woodworking) Ltd. v. Biso Roofing Enterprises Ltd. et al.* (1985), 63 N.B.R. (2d) 349 (Q.B.); *Dubé and Daigle v. Dubé et al.* (1994) 140 N.B.R. (2d) 337 (Q.B.), set aside on other grounds (1994), 147 N.B.R. (2d) 315 (C.A.).

If a claim does not fall within one of the enumerated categories set out in Rule 19.01, then a New Brunswick court can still assume jurisdiction. Pursuant to Rule 19.02(1) the court can grant leave to serve the originating process outside New Brunswick where one of the parties resides in New Brunswick and such service appears necessary to secure the just determination of the proceeding. A motion for leave can be made *ex parte* but must be supported by an affidavit. Presumably, both these items should be stated in the affidavit and reference should be had to some of the aforementioned cases which dealt with the requirement in an affidavit where the originating process was served out of the jurisdiction.

7. Motion to Set Aside Service outside New Brunswick

If a defendant enters an Appearance or Statement of Defence, he submits to the jurisdiction of the court and is precluded from raising a jurisdictional issue (*Thibodeau v. Clavet* (1975), 11 N.B.R. (2d) 32 (C.A.); *Proteau v. Levesque* (1975), 13 N.B.R. (2d) 323 (Q.B.)). In order to contest the jurisdiction of the court a defendant served with an originating process outside New Brunswick must, under Rule 19.05, apply to the court by Notice of Motion for an order setting aside such service and staying or dismissing the proceeding.

This Notice of Motion must be made within the time for filing and serving a pleading or affidavit in response and before filing and serving such pleading or affidavit.

If the motion cannot be brought within the time for filing a pleading, then the defendant should also apply for an extension of time pursuant to Rule 3.02 (*A.B.P. Consultants Limited v. LeMaistre et al*. (1986), 76 N.B.R. (2d) 404 (C.A.)).

A defendant can only succeed in a motion under Rule 19.05 if he can show 1) service outside New Brunswick is not authorized by the rules or by an order made pursuant thereto; 2) the court does not have jurisdiction; or 3) New Brunswick is not a convenient forum for the trial or hearing of the proceeding. [Rule 19.05(2)]. (*John Ewing & Company Limited v. Pullmax Canada Limited et al.* (1977), 13 O.R. (2d) 587 (H. Ct.); *Cornish v. Northern Canada Power Commission* (1983), 47 N.B.R. (2d) 200 (C.A.))

In *Bathurst Broadcasting Co. Ltd. v. Group One Radio* et al. (1982), 42 N.B.R. (2d) 30 (Q.B.), the court set out the following factors to be considered when determining if New Brunswick is a convenient forum:

a) the balance of convenience to all the parties concerned, including the plaintiff,
b) the undesirability of trespassing on the jurisdiction of a foreign state,
c) the impropriety and inconvenience of trying a case in one country, when the cause of action arose in another, where the laws are different,
d) the cost of assembling foreign witnesses, and
e) the existence of some other forum more convenient and appropriate for securing the ends of justice.

It is important to note Rule 19.05(3) which expressly provides a party served out of New Brunswick shall not be held to have submitted to the jurisdiction of the court by serving a Notice of Motion for an Order to set aside such service and staying or dismissing the proceeding. Previous to the enactment of Rule 19.05(3) there had been some conflict in the caselaw as to whether an appearance for the purpose of contesting jurisdiction will confer jurisdiction if the objection is not sustained.

Default proceedings

Chapter 4

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Default proceedings

1. Noting a Defendant in Default

Rule 20 provides that any defendant served with a Statement of Claim in New Brunswick who intends to defend the action must file his Statement of Defence within 20 days of service of the Statement of Claim upon him. However, should that defendant file and serve a Notice of Intent to Defend within the 20 days he has to file his Statement of Defence, then he is provided an additional 10 days under Rule 20.02. If a Statement of Defence is not filed within the time limitation, the plaintiff is entitled to proceed under Rule 21 to have judgment entered against the defendant by default. However, if a Notice of Intent to Defend has been received, it is common practice to notify opposing counsel before noting the defendant in default.

The procedure to note a defendant in default is set out in Rule 21.01. The plaintiff need only file proof of service of the Statement of Claim on the defendant to support his request to the Clerk, which must be in writing, to have the defendant noted in default.

Rule 21.01(2) deals with the requirements for noting a defendant in default whose Statement of Defence has been ordered struck out by the Court without leave to file and serve another. Here, the plaintiff must file a copy of the order with the Clerk, together with his written request that the defendant be noted in default.

If a written request to note a defendant in default is not properly before the Clerk of the Court, the defendant is free to file his Statement of Defence even after the limitation periods provided for in Rule 20 have expired.

2. Multiple Defendants

If there are two or more defendants involved in an action and any one of these defendants has failed to file a Statement of Defence, any of the other defendants who have filed a Statement of Defence and wish to set the action down for trial may, on notice to the plaintiff, apply to the Court for leave to require that the defaulting defendant be noted in default.

3. Effect of Noting a Defendant in Default

Rule 21.02 sets out the consequences of noting a defendant in default. These consequences are far reaching and can be very costly to a delinquent defendant. Upon being noted in default, a defendant is deemed to admit the truth of all allegations of fact made in the Statement of Claim and such a defendant is precluded from filing a Statement of Defence or taking any other steps in the proceeding unless he receives permission of the Court or the consent of the plaintiff to do so. Following the noting in default, the plaintiff may take any further steps in the proceeding without the consent of the defendant. This includes the plaintiff's right to have default judgment entered against the defendant. Note the exceptions to this general rule as provided for in Rule 21.02(2) and Rule 21.07(2).

4. Judgment for Liquidated Damages

Once a plaintiff has noted the defendant in default, he is entitled to have his judgment signed by the Clerk of the Court. The form of this judgment will depend upon the nature of the claim. If the claim is for a debt or liquidated demand, the judgment may be in form 21A.

If the claim is for the recovery of possession of land, the judgment will be in form 21B and finally, if the claim is for the recovery of chattels, the judgment will be in form 21C.

From a practical perspective, rather than follow the two-step procedure of both noting the defendant in default and then requesting the Clerk to sign judgment against the defendant, most plaintiff's counsel, upon filing proof of service of the Statement of Claim on the defendant, will accompany the request to note the defendant in default with the form of judgment requested for immediate execution by the Clerk. The effect is the same as the noting in default but the process is accelerated in terms of obtaining a judgment in a more expeditious manner.

Before being entitled to default judgment, the plaintiff, or his solicitor, must file an affidavit with the Clerk satisfying the requirements of Rule 21.04(2) which essentially consists of an accounting of any payments made by the defendant to the plaintiff and the amount for which judgment should be entered. A plaintiff is only entitled to enter judgment for whatever amount is outstanding and still owing by the defendant. Upon signing the judgment, the plaintiff is also entitled to obtain judgment for his costs which the Clerk will generally fix in accordance with Tariff B of Rule 59.

A default judgment cannot be signed against a party under disability without an order of the Court because such a party is entitled to be represented by a litigation guardian or committee under Rule 7 and the provisions of that Rule will apply throughout the proceeding.

5. Judgment for Unliquidated Damages

If the plaintiff's claim is not for a debt or liquidated demand, nor for the recovery of possession of land, nor for the recovery of chattels as provided for by Rule 21.04, the plaintiff has no alternative but to note the defendant in default and then proceed to an assessment of his or her claim before a judge. Naturally, if the defendant is in agreement with the amount of the claim, there is no need to proceed with the assessment and the judgment may be entered by consent.

To have damages assessed you set the matter down for trial as you would a defended action pursuant to Rule 47. The trial record should include a stamped copy of the letter to the Clerk requesting the defendant be noted in default and the Certificate of Readiness (Form 47B) will have to be amended accordingly. On or before motions day the Clerk will assign to the case a date for the assessment of damages. Although a defendant is not entitled to be notified of the date of the assessment of damages, several judges have indicated they prefer plaintiff's counsel send some form of notice to the defendant and also serve the defendant with a Notice of Trial.

At the assessment hearing, the plaintiff will generally prove his damages by way of affidavit evidence unless the Court directs otherwise. Some solicitors send a copy of the Affidavit to the defendant when they serve the defendant with a notice of the date of assessment of damages.

6. Plaintiff's Right to Other Relief

The effect of obtaining default judgment is provided for under Rule 21.07 and essentially states that notwithstanding the default judgment against a defendant, the plaintiff is not precluded from proceeding against the same defendant for other relief or against any other defendant for the same or other relief.

7. Counterclaims, Cross-Claims and Third Party Claims

The provisions of Rule 21 apply not only to situations involving Statements of Claim against defendants but also to counterclaims by defendants against plaintiffs, cross-claims between defendants and third party claims.

8. Hague Convention

Finally, you should note the default proceedings under the Hague Convention which are spelled out in Rule 21.10. Although this rule is rarely invoked, it is anticipated that with increasing international trade between Canada and foreign countries, Rule 21.10 may acquire more significant importance in the future.

9. Setting Aside a Noting in Default or a Default Judgment

Once a defendant has been noted in default the only steps a defendant may take without leave of the Court or the consent of the plaintiff is to bring a motion under Rule 21.03 to have the noting in default set aside by the Court. Similarly, under Rule 21.08 a defendant on motion can apply to have a default judgment varied or set aside by the Court. Obviously, such motions are not necessary if the plaintiff consents to set aside a Default Judgment or consents to a Statement of Defence being filed.

Rules 21.03 and 21.08 are silent as to the circumstances under which the court will exercise its discretion to set aside default proceedings. However, the case law establishes the defendant must meet the following requirements:

- the application to have the default set aside should be made as soon as possible after the noting in default or default judgment comes to the defendant's attention (*J. Clark & Sons Ltd. v. Proulx*, (1980), 33 N.B.R. (2d) 360 (Q.B.);
- the defendant's affidavit in support of the motion to have the default set aside must show a reasonable excuse for the default and must make full disclosure of all circumstances under which it arose;
- the defendant's affidavit and not an affidavit from the solicitor, in support of the motion must further disclose all facts in support of a defence on the merits of the case.

[See *Brunswick International (Canada) Ltd. v. Albert* (1975), 12 N.B.R. (2d) 296 (C.A.); *Savoie and Savoie v. Lavalle* (1986), 67 N.B.R. (2d) 361 (Q.B.); *Central Trust Company v. Wheeler* (1983), 44 N.B.R. (2d) 159 (C.A.); and *Imperial Insurance Services Ltd. v. Gordon* (1980), 31 N.B.R. (2d) 214 (C.A.); *Cormier et al v. MacKay* (1987), 73 N.B.R. (2d) 189 (Q.B.); *Saco Const v. Roussell* (1987), 73 N.B.R. (2d) 78 (Q.B.); and *J. Clark and Sons Ltd. v. Prouls*, (1980), 33 N.B.R. (2d) 360 (Q.B.)]

In *Atcan Capital Corp v. Carmichael & Associates Insurance Brokers Limited and Carmichael* (1994) 138 N.B.R. (2d) 151 (Q.B.), the New Brunswick Court of Queen's Bench allowed an application to set aside default judgments where (1) the application was brought without undue delay (2) the defendants had reason to believe that the action would be in Ontario and did not understand that the documentation from the N.B. Court constituted in action and (3) the facts existed to constitute a reasonable defence.

In *Central Trust v. Wheeler, supra*, the trial judge had set aside a default judgment against the defendants, notwithstanding the fact that the defendants had failed to file a proper affidavit of merits in support of their motion to have the default judgment set aside. The New Brunswick Court of Appeal held that the trial judge should have adjourned the application to permit the filing of a proper affidavit or, alternatively, dismiss the application with leave to the defendants to renew. The Court of Appeal then set aside the trial judge's order and granted the defendants leave to renew their application based on proper material. [See also *MacFarlane v. Dunn Matchett* (1986), 76 N.B.R. (2d) 48 (Q.B.)]

In *Roynat Inc. v. Cyr* (1986), 76 N.B.R. (2d) 381 (C.A.), the New Brunswick Court of Appeal drew the distinction between an appeal of a default judgment, which must be done by application to the trial judge to have the said default judgment set aside under Rule 21, as opposed to an appeal of a summary judgment under Rule 22, which appeal can only be taken pursuant to the provisions of Rule 62.

A defendant must satisfy certain requirements in order to obtain an order setting aside a default judgment. In *Sappier v. Tobique Indian Band* (2001), 243 N.B.R. (2d) 98 (C.A.), the Court of Appeal set out the following requirements:

- the motion to set aside summary judgment should be commenced as soon as the judgment comes to the party's attention;
- the party must establish a defence on the merits of the case;
- the party must establish that they had a continued intention to defend the claim in question; and
- the application to set aside the summary judgment must be made within a reasonable period of time.

In *Walker v. McNulty* (1992), 118 N.B.R. (2d) 168 (C.A.), the Court of Appeal noted the difference between motions for orders setting aside default judgments in Ontario and New Brunswick and stressed that, in New Brunswick, a valid reason for setting aside the default judgment is required. A valid reason for setting aside a default judgment is present where the party can present a reasonable defence on the merits of the case as well as a reasonable explanation as to how the default occurred.

In *First Farm Inc. v. Henderson Survey Ltd. et al.* (1994), 141 N.B.R. (2d) 171 (C.A.), the Court of Appeal accepted the decision in *Walker v. McNulty* as the leading authority with respect to the procedure to be followed in a motion for an order setting aside a default judgement. The Court noted that the current rule with respect to such motions was incorporated into the *Rules of Court* in 1982 and that any precedents before this time are not applicable.

Pleadings

Chapter 5

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Pleadings

1. Purpose of Pleadings

The purpose of pleadings is to make the trial of the issues more simple and exact, to enable a party to know more clearly the case he must meet and, by making the facts and issues clear, to hasten settlement and, where settlement is not possible, to enable the court and the parties to reach a just conclusion of the dispute: (*New Brunswick Telephone Co. Ltd. v. John Maryon International Ltd.* (1977), 21 N.B.R. (2d) 83 (Q.B.); *Service Associates Limited v. Legere* (1977), 24 N.B.R. (2d) 271 (Co. Ct.); *Quann v. Chatham (Town) et al* (1990), 107 N.B.R. (2d) 392 (Q.B.))

Pleadings are, of course, for the benefit of the parties. They can narrow the issues and allow the opposite party to know the case to be met. They can also, and are intended to, prepare the court for the matters to be tried. It is therefore in the best interest of a party to have the facts on which his case depends before the court clearly and early. Trial by ambush may allow one party to surprise the other. It is not so good when the party also ambushes the court: (*Savage v. Greco Donair Franchise Ltd.* (1981), 34 N.B.R. (2d) 34 (Q.B.))

A party is bound by the issues as raised in his pleadings: *Guitard's Estate v. Gerard Gagnon Ltée.* (1981), 33 N.B.R. (2d) 672 (Q.B.). It is inappropriate for the court to consider a matter which, even if proved, has not been pleaded: *Valmada Ltée. v. Boulay* (1981), 34 N.B.R. (2d) 74 (Q.B.).

2. Types of Pleadings

Rules 27 to 30 describe the many pleadings which are required or permitted in an action. Depending on the nature of the claim, the pleadings could include a Statement of Claim, Statement of Defence and a Reply or the pleadings could also include (1) a Counterclaim, Defence to Counterclaim, Reply to Defence of Counterclaim; (2) a Cross-Claim, Defence to Cross-Claim, Reply to a Defence to Cross-Claim; (3) a Third Party Claim, Defence to Third Party Claim, Reply to the Defence of Third Party Claim; and (4) a Fourth Party Claim, etc.

In each case pleadings are deemed to be closed upon the noting of the defendant in default or upon service of the Reply or when the time for service of the Reply has expired. Once pleadings are closed no further pleadings can be filed unless by consent or court order: *Savoy v. Newcastle (Town)* (1986), 69 N.B.R. (2d) 434 (Q.B.).

3. Service of Pleadings

Every pleading shall be served on the opposite party and upon every other person who is, at the time of such service, a party to the action or a claim in the action. Where a party is added by an order of the court or is made a party to a counterclaim or to a third party claim, a copy of all the pleadings previously served in the action or in any claim in the action must be served on him by the party obtaining the order or making him a party. Rule 27.03(2) provides personal service is not required where a pleading is an originating process, as defined by Rule 1.04, and is required to be served on a party other than an opposite party. Rule 27.04 prescribes the time for filing and serving pleadings.

4. Particulars

Particulars may be required to be delivered before pleading in answer to the pleading of an opposite party or may be required to be delivered after pleading and before trial. The purpose of particulars required to be delivered before pleading is for the intelligent pleading by the opposite party.

Particulars before trial are required for greater clarity in defining the issues to be tried. (*Wry v. Guimond* (1980), 29 N.B.R. (2d) 289 (Q.B.); *Quann v. Chathem (Town) et al.* (1990), 107 N.B.R. (2d) 392 (Q.B.)) Particulars are requested by filing and serving a Demand for Particulars pursuant to Rule 27.08(1).

If the opposite party fails to supply sufficient particulars within 10 days after service of the Demand, the court may, upon such terms as may be just, order that such particulars be filed and served within a specific time.

Where a party demands particulars for the purpose of pleading, he shall have the same length of time after receipt of the particulars or after failure to supply sufficient particulars to serve such pleading as he had when the demand was served, but such length of time shall not be less than 5 days [Rule 27.08(2)].

Under Rule 27.08(3), a Statement of Particulars must be filed and served on all parties.

5. Striking Out a Pleading

A plaintiff or a defendant, under Rule 23.01(b) may, at any time before the action is set down for trial, apply to the court to strike out a pleading which does not disclose a reasonable cause of action or defence. Pleadings may also be struck out for failure to comply with discovery procedures (Rules 31.08(2) (b); 33.12(c) and 34.05).

On application a court, pursuant to Rule 27.09, may strike out any pleading on the ground that it may prejudice, embarrass or delay the fair trial of the action, is scandalous, frivolous or vexatious or is an abuse of the process of the court. The practice observed by the court on such an application is that it is only the pleading itself which can be considered and, for that purpose, it must be assumed the party pleading is capable of proving all the allegations therein contained. Apparently, the court will not consider the conduct of the parties. [*Northern Meat Packers v. Bank of Montreal* (1984), 52 N.B.R. (2d) 196 (Q.B.); *U.N.B. Student Union Inc. v. Stephen Smith et al* (1987), 81 N.B.R. (2d) 397 (Q.B.) aff'd (1988), 86 N.B.R. (2d) 39 (C.A.) ("*U.N.B. v. Smith*").],]

The court will only reluctantly order an action struck out. As stated in *Corcoran v. Gerwil* (1982), 41 N.B.R. (2d) 32 (Q.B.) aff'd (1983), 45 N.B.R. (2d) 86 (C.A.), "the principle, jealously guarded, is that no person should be deprived of his right to a trial on the merits unless the case is 'beyond doubt' or is 'plain and obvious'". The fact that the matter must be free and clear from doubt is illustrated in the cases of *McCormack & Zatman Ltd. v. McKelvey* (1980), 33 N.B.R. (2d) 399 (Q.B.); *N. B. Public Employees Association v. Province of New Brunswick* (1980), 29 N.B.R. (2d) 474 (Q.B.); *MacArness v. Leaman* (1975), 12 N.B.R. (2d) 306 (Q.B.); and *Augustine v. City of Saint John* (1974), 10 N.B.R. (2d) 93 (Q.B.); *Quann v. Chatham (Town) et al.* (1990), 107 N.B.R. (2d) 392 (Q.B.).

The importance of drafting clear concise pleadings is examplified in the case of *A. I. Enterprises Ltd. v. City of Moncton* (1981), 42 N.B.R. (2d) 33 (C.A.). In this case the Statement of Claim was struck out because it was complicated and confusing and could not be amended. However, leave to file and serve a proper Statement of Claim was granted by the Court of Appeal.

6. Amendment to Pleadings

Under Rule 27.10 (2) a party may amend any pleading filed by him once, without leave, at any time prior to the close of pleadings, provided the amendment does not include or require a change in the parties to the action or at any time, with the written consent of all parties or leave of the court.

In *Lawson v. Poirier Estate* (1995) 159 N.B.R. (2d) 212 (Q.B.) the Court of Queen's Bench did not permit the defendants to amend their statement of defence on the 8th day of trial as the result may have constituted an abuse of process and prejudice which could not have been compensated for by costs or an adjournment.

In *White v. Atlantic Home Improvement et al.* (1999), 219 N.B.R. (2d) 161 (C.A.), the Court of Appeal held that an amendment to pleadings should not be permitted unless the following conditions are met:

- the amendment is necessary to resolve the litigation on its merits;
- the amendment merely incorporates an allegation into the pleading which the opposing party had full opportunity to challenge before the close of the case;
- the amendment does not require any additional evidence to be presented which relate to the merits of the case; and
- the amendment will not cause irreparable prejudice to the opposing party.

Where a party does not obtain the consent of the other parties to amend a pleading he can obtain an order from the court under Rule 27.10 (2) (c). As stated in *Michaud v. Trail* (1986), 70 N.B.R. (2d) 357 (Q.B.), the underlying principle in Rule 27.10 is the need to have everything in dispute before the court so the real questions in issue may be determined. In the vast majority of motions to amend pleadings, the courts will adhere to the principle and allow the amendment. To do otherwise would defeat the purpose of the rule and frustrate the rights of all parties to have their disputes decided at trial.

In cases where an amendment to a Statement of Claim or Statement of Defence or Counterclaim ought to be allowed, but some measure of prejudice will result to a litigant, the court may compensate the litigant by (1) ordering costs against the party seeking the amendment, (2) granting an adjournment, or (3) imposing terms (*MacDonald v. Mitchell* (1969), 2 N.B.R. (2d) 165 (C.A.); *Brunswick International (Canada) Ltd. v. Albert* (1974), 9 N.B.R. (2d) 413 (C.A.); *Letourneau v. Commercial Union Assurance Company* (1977), 17 N.B.R. (2d) 378 (Q.B.); *Moore v. State Farm Fire & Casualty Company* (1982), 42 N.B.R. (2d) 667 (C.A.); *Wilson Roofing Ltd. v. Wayne* (1985), 65 N.B.R. (2d) 145 (Q.B.); *Carrier v. Co-Op Fire & Casualty* (1983), 50 N.B.R. (2d) 241 (Q.B.); *City of Moncton v. Aprile Contracting Ltd.* (1975), 11 N.B.R. (2d) 419 (C.A.); *J. W. Bird & Company Ltd. v. Alex Dupuis Ltd.* (1979), 25 N.B.R. (2d) 285 (C.A.)).

While an amendment will not be allowed to set up a new cause of action which is barred by the expiry of a limitation period, an amendment will be permitted if it is a mere modification or extension of a cause of action already raised (*Pic Realty Canada Limited v. Disher* (1982), 42 N.B.R. (2d) 41 (C.A.); *Patterson v. Canada Life Assurance Co.* (1983), 45 N.B.R. (2d) 401 (Q.B.)).

A party who amends a pleading shall file a copy of the amended pleading with the changes therein underlined where possible and, unless otherwise ordered, shall serve a copy upon all of the parties to the action. [Rules 27.10(3), (4), (5)]

Unless a party who has pleaded to a pleading which is subsequently amended pleads to the amended pleading within the time specified by the Rules, he shall be deemed to rely on his original pleading in answer to the amendment. [Rule 27.10(6), (7)] Separate rules apply with respect to amendments made at trial and noted on the face of the record. [Rule 27.10(8)]

7. Counterclaim

Rule 28.02 provides a counterclaim must be raised by a defendant with his defence in one document called a Statement of Defence and Counterclaim. On filing a counterclaim a fee is payable to the Clerk under Rule 78.01. A separate document filed as a counterclaim some time after the defence is not a pleading and does not require an answer. (*Samu v. Gerald J. Ryan Co. Ltd.* (1972), 4 N.B.R. (2d) 622 (C.A.). A court will not grant relief to a defendant in the nature of a counterclaim unless the defendant has pleaded by way of counterclaim (*J. W. Bird & Company Ltd. v. Alex Dupuis Ltd.* (1979), 25 N.B.R. (2d) 285 (C.A.)).

When a counterclaim has been made by the defendant, the plaintiff must deal specifically with every allegation of fact in the counterclaim which he does not admit to be true. A plaintiff is not entitled to reply to a counterclaim by a mere joinder of issue. He must plead to it as though it were a Statement of Claim.

In addition to presenting a counterclaim against a plaintiff, Rule 28.01(2) allows a defendant, in his counterclaim, to join any other person who is a necessary or proper party to the counterclaim against the plaintiff. However, the subject matter of the counterclaim against the person joined must relate to the original cause of action. [*Atwood v. Rothwell*, [1924] 1 D.L.R. 43 (Man. C.A.); *Guy v. Regan* (1920), 52 D.L.R. 700 (Sask. C.A.)].

Rule 28.01(1) states a defendant may assert, by counterclaim, any right or claim which he may have against the plaintiff. However, Rule 28.07(1) permits a court to order a separate trial or strike out a counterclaim if it appears a counterclaim will unduly complicate or delay the trial of the main action. In *Allto-Import, A. Larson A.B. v. Christy Crops Ltd. and Gaklis* (1981), 35 N.B.R. (2d) 56 (Q.B.), the court granted an application to strike out a counterclaim because it was entirely separate and distinct from the original cause of action.

It is important to distinguish between a set-off and a counterclaim. A set-off is a defence and not a sword. If only a set-off is pleaded and the amount of the set-off exceeds the plaintiff's claim, a judgment may not be entered for the amount of the balance in the defendant's favour. (*Langlais v. Lavoie* (1975), 12 N.B.R. (2d) 426 (C.A.); *Cheminski v. Engineering Consultants* (1971), 3 N.B.R. (2d) 760 (C.A.))

8. Cross-Claim

Like a counterclaim, a cross-claim pursuant to Rule 29.02 must be pleaded in one document called a Statement of Defence and Cross-Claim (Form 27F), and a filing fee is paid to the clerk on filing. Generally, a cross-claim is by one defendant against another defendant for contribution and/or indemnity towards that amount he is found liable in the main action.

The *Tortfeasors Act*, R.S.N.B. 1973, c. T-8 or the *Contributory Negligence Act*, R.S.N.B. 1973, c. C-19 are generally pleaded. If a cross-claim for contribution and indemnity is not made and the co-defendants are found jointly and severally liable to the plaintiff, the court cannot order one defendant to contribute to or indemnify the other. (*Robinson v. Betts* (1970), 4 N.B.R. (2d) 66 (Co. Ct.))

Under Rule 29.01 a defendant is permitted to cross-claim for contribution and indemnity and "any other relief". In *Defour v. Bellerose* (1982), 44 N.B.R. (2d) 1 (Q.B.), it was held a defendant claiming against a co-defendant for personal injuries was not a proper cross-claim as it was not connected with the original subject matter of the action which was the damages of the plaintiff sustained in the motor vehicle accident. In that case, the claim of the defendant was barred by reason of the limitation period.

9. Third Party Proceedings

Unlike a claim against a co-defendant, the leading purpose of third party proceedings is so that the third party is bound by the decision of the Court in the action involving the plaintiff against the defendant. Other objectives of third party proceedings include the third party being permitted to defend the plaintiff's claim against the defendant, and the defendant having the issue against the third party decided as soon as possible, in order that the plaintiff cannot force a judgment against him before the third party issue is determined. (*Dufour v. Bellerose et al.* (1982), 44 N.B.R. (2d) 1 (Q.B.) var'd (1983), 46 N.B.R. (2d) 388 (C.A.))

A defendant's claim against a third party must be one of those types of claims set out in Rule 30.01. In *Allan v. Bushnell T.V. Co.*, 67 D.L.R. (2d) 499 (Ont. C.A.), Laskie, J.A., as he then was, describes a third party proceeding in the following terms "What in my view is central to resort to third party proceedings is that the facts upon which the plaintiff relies against the defendant should issue out the relations between the defendant and the third party".(*Bryant and May (Holdings) Ltd. v. R.O.C. Transport (N.B.) Ltd. et al* (1977), 19 N.B.R. (2d) 86 (Q.B.))

The issues raised in a third party claim should relate to the subject matter of the main action. Where the issues between a defendant and the third party are so complex and difficult that the conduct of the plaintiff's trial would be impeded, a third party notice will be set aside. (*Holohan v. Worton et al.* (1978), 24 N.B.R. (2d) 81 (Q.B.))

Under Rule 30.02, a third party claim without leave must be issued within 10 days after the time limited for filing a Statement of Defence, and it must be served personally within 30 days after being issued. Under Rule 30.02(3), an order for an extension of time can be obtained provided the plaintiff will not be unduly prejudiced. In *Cayouette et al v. Cayouette et al.* (1984), 54 N.B.R. (2d) 178 (Q.B.), the third party claim was issued more than four years after the Statement of Defence. However, the third party's application to have it struck out was dismissed because the plaintiff stated they were not prejudiced by the delay.

In a Third Party Defence the third party can dispute his liability to the defendant or the defendant's liability to the plaintiff or both. If the third party doesn't dispute the liability of the defendant to the plaintiff then the third party, under Rule 30.03(2), is deemed to admit the validity of a judgment obtained by the plaintiff against the defendant except a consent or default judgment.

If a third party disputes the liability of the defendant to a plaintiff then the third party and the plaintiff are entitled to discovery of each other and the third party has the same right to appeal from a judgment or order in the main action as if he were a defendant. (Rules 30.05 and 30.10)

Where the third party and the plaintiff are adverse in interest, the trial judge should consider, on the issue of liability between the plaintiff and the defendant, the evidence emanating from the cross-examination of the plaintiff's witnesses by counsel for the third party, but counsel for the third party is not entitled to the privilege of cross-examining the defendant's witnesses and must recall those witnesses as its own for ex in chief if they so desire. (*Eastland Construction Ltd. v. Village of Gondola Point* (1979), 26 N.B.R. (2d) 604 (C.A.))

The institution of third party proceedings by the defendant does not entitle the plaintiff to claim relief from the third party unless the third party is subsequently added by the plaintiff as a defendant. If A sues B in tort and B claims contribution from C as being the party at fault and, at trial, the court finds C is fully responsible, A's action against B is dismissed and judgment cannot be entered in A's favour against C. (*MacLellan v. Willison* (1969), 1 N.B.R. (2d) 777 (Q.B.); *Beaulieu v. Lavoie* (1973), 6 N.B.R. (2d) 216 (C.A.))

When third party proceedings are taken by a defendant, the plaintiff's solicitor should consider whether or not the third party should be joined as a defendant. In actions based on tort, the provisions of the *Tortfeasors Act* and the *Contributory Negligence Act* should also be considered.

In *Poirier v. Goguen et al.* (1989), 92 N.B.R. (2d) 70 (Q.B.), the Court held that a party seeking an extension of time must demonstrate that the opposing party will not be unduly prejudiced.

10. Fourth Party Proceedings

A third party may institute fourth party proceedings against a person not already a party to the defendant's third party proceedings against him; the fourth party may join a fifth, etc. The provisions governing third party procedures apply *mutatis mutandis*.

The third party may add the plaintiff as a fourth party as the plaintiff is not a party to the third party proceedings. (*Aetna Insurance Company v. Mojan Ltée.* (1979), 27 N.B.R. (2d) 356 (C.A.))

11. Insurance Act

Subsections 250(14), (15) and (16) allow a motor vehicle insurer, who denies liability, to be made, on application, a third party in any action to which the insured is a party and in which a claim is made against the insured for which it might be asserted that indemnity is provided by the insurance contract.

This procedure permits an insurer to be joined in an action in which a claim is made against its insured, for the purpose of defending that claim. No right is conferred upon the insurer to have its rights and liabilities as insurer determined in the action in which it becomes a third party. Such rights can only be determined in a subsequent action brought by the insured, a judgment creditor. (*Doiron v. Brideau* (1979), 28 N.B.R. (2d) 520 (C.A.)) Section 104.1 provides similar provisions for liability policies other than motor vehicle liability policies.

Where a defendant joins the insurer as a third party under Rule 30, if successful, he will be entitled to judgment against the insurer for costs occasioned by adding the insurer as a third party.

(*Ames v. Howard* (1953), 31 M.P.R. 274 (C.A.); *Town of Newcastle v. Mattatall et al.* (1988), 78 N.B.R. (2d) 236 (Q.B.) aff'd (1988), 87 N.B.R. (2d) 238 (C.A.)) Therefore, where an insurer joins an action as a third party under the *Insurance Act*, a defendant should consider presenting a third party claim against the insurer.

12. Joinder of Claims and Parties

A plaintiff or applicant may join any claims he has against an opposite party in the same or different capacities. It is fair to say that a common question of law or fact will generally bind the parties or claims because it is the most expedient way to have the matter completely determined. The rules expressly provide that it is not necessary that every defendant or respondent be interested in all relief claimed or every claim included in the proceeding. In *Pic Realty Canada Limited v. Rocca Group Limited* (1982), 41 N.B.R. (2d) 271 (C.A.), the New Brunswick Court of Appeal stated that a joinder of claims will be ordered when it is in the interest of the convenient administration of justice, and would not unduly complicate or delay the trial or prejudice a party. The court also stated that the granting of an order for the trial together of two or more actions or for the trial of one immediately after the other was not only a discretionary measure, but the order itself was subject to the discretion of the judge who tried the case.
Rule 5.02 requires a plaintiff or applicant to join in as parties to the proceeding everyone jointly entitled to the same relief. The rule guarantees the presence of all parties and grants an opportunity to be heard, thereby enabling the court to adjudicate the matter effectively and completely. In *Leger v. Bourque* (1986), 73 N.B.R. (2d) 380 (Q.B.), the Trial Division of the Court of Queen's Bench discussed Rule 5.02 and the plaintiff's duty to join all necessary parties in the action. The court also discussed the obligation of "interested" non-parties to obtain leave and be added as a party under Rule 15.01.

Under Rule 5, a proceeding may join several claims against an opposite party and a proceeding may also join various claims of plaintiff's against various defendants. One may join a number of claims against opposite parties and may do so whether the defendant or respondent are interested in all the relief being claimed.

Parties may sue personally or as a legal representative such as an executor, litigation guardian or other capacity.

The courts will intervene and sever a proceeding rendered too complex by numerous claims or parties where it creates a prejudice and it prevents the expeditious resolution of the matter.

A single action should be commenced rather than having a duplication of actions where it is reasonable to do so. In some cases, parties may not be added. For example, in the case of an insurer under an S.E.F. 44 endorsement to be added as a third party to the action its insured has brought against a tortfeasor.

Although it may be argued the insurer is interested in the outcome of the action, and that it should be granted its application to be added as a party to the action, the case law appears to indicate such an application would be refused (see *Waterloo Insurance Company v. Zurbrigg et al.* (1983), 43 O.R. (2d) 219 (C.A.); *Sypher et al. v. Somerville* (1985), 66 N.B.R. (2d) 117 (Q.B.); and *Simard, Levesque, Nadeau and Landry v. Financial Credit Bureau Services Ltd.* (1982), 42 N.B.R. (2d) 416 (Q.B.)). Notwithstanding the aforementioned cases, an insurer may be involved in an action by being made a party by the plaintiff.

It will be interesting to see whether an insurer could be made a party to the proceedings if the plaintiff did not contest its application to be joined as a third party.

A person may be made a party defendant or respondent if he refuses to join as a plaintiff or applicant and, in any event, the court may grant relief against the necessity for the joinder of any person.

Unlike the previous rules, the new rules do not empower a judge to add a party on his own motion [see *Mann v. Englehart* (1987), 76 N.B.R. (2d) 121 (C.A.)].

In an attempt to avoid multiplicity of actions, the rules set out the possibility of multiple claims with multiple plaintiffs and multiple defendants. Rule 5.03 provides criterion for allowing and encouraging the joinder of parties.

Under the heading "Permissive Joinder of Parties", plaintiffs or applicants may be joined in one, provided there is only one solicitor of record and the relief arises from the same transaction, occurrence or a series of them; or where a common question of law or fact may arise in a proceeding; and in cases where the presence of the party in the proceeding may promote the convenient administration of justice.

Persons may be joined as defendants or respondents in similar cases. However, additional categories have been provided for. Firstly, where there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief, and secondly, in cases where damage or loss has been caused to the same plaintiff or applicant by more than one person, whether or not there are any factual connections between the several claims.

Notwithstanding the limitations provided for by Rule 5.03, the court may grant leave at any stage of a proceeding to add, delete or substitute a party, either plaintiff or defendant, pursuant to Rule 5.04 through Rule 5.04(2). Where a defendant or respondent is added the plaintiff or applicant is obliged to issue and serve on the new party an amended originating process.

Rule 5.05 provides relief against joinder in cases where the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the trial, or cause undue prejudice to a party. In such cases, the court may order separate trials, require one or more of the claims to be asserted in another proceeding, or even dismiss the proceeding against any defendant without prejudice to the right of the plaintiff to assert the same claims against the defendant in a subsequent proceeding. In such a case, the court may make such order as it considers just and order compensation for a party required to attend or be relieved from attending any part of the trial in which he has no interest.

In the case of *W. H. Violette Ltd. and Violette Motors Ltd. v. Ford Motor Co. of Canada Ltd.* (1980), 31 N.B.R. (2d) 394 (C.A.), during the trial and prior to closing his case, the plaintiff's counsel moved to have Violette Motors Ltd. added as a party to the proceedings. The court assented to the plaintiff's request because the party was necessary to enable the termination of the issue and no prejudice was caused. In the case of *C. & J. Enterprises (1971) Ltd. v. Curtis & McGinnis* (1978), 25 N.B.R. (2d) 537 (Q.B.), substitution of a party plaintiff was allowed despite a two year limitation period because of a bona fide mistake in initiating the proceedings in the name of the wrong company which had since amalgamated.

In the case of *Procureur General du Canada v. Cormier* (1984), 53 N.B.R. (2d) 324 (Q.B.), a plaintiff applied under Rule 5.04 to have a woman's maiden name added to the action after judgment. The court concluded that generally a judgment, once entered, could not be amended except to clarify same.

13. Consolidation or Trial Together

Rule 6.01 provides that where two or more actions are pending, and it appears to the court that:

- some common question of law or fact arises in both or all of them;
- claims therein relate to or arise out of the same transaction, occurrence or series of transactions or occurrences, or;
- for any other reason it is desirable to make an order under this rule,
- the court may consolidate the actions or have them tried at the same time or one immediately after the other. (See for example *Fundy Formwork Ltd et al. v. Basic Management Ltd. et. al*. (1994) 137 N.B.R. (2d) 108 (Q.B.)) The court may also stay an action until the determination of another or on such terms as it may consider just.

The rule also grants the court the power to give directions which will avoid unnecessary cost or delay. Rule 6.01(3) states that an order for the trial together of two or more actions for the trial of one immediately after the other, shall be subject to the discretion of the trial judge. The New Brunswick Court of Appeal confirmed that Rule 6.01(1)(c) grants a wide discretionary power to the trial judges to make orders for any other reason an order ought to be made (see *Pic Realty Limited v. Rocca Group Limited* (1982), 41 N.B.R. (2d) 271 (C.A.)). The trial judge is not restricted by the criterion mentioned in Rule 6.01(1) (a) and 6.01(1) (b). A reading of the aforementioned decision reinforces the inter-relation between Rules 5 and 6 of the Rules of Court.

Disposition without trial

Chapter 6

Table of Contents

Rules 22-26, disposition without trial

As the title indicates, Rules 22-26 deal with situations where issues may be resolved without the necessity of parties proceeding to a full trial. The general purpose of these rules is to provide a mechanism whereby appropriate cases may be wholly or substantially resolved in an expeditious and inexpensive manner and to ensure that matters before the courts are concluded within a reasonable time frame.

1. Rule 22 - Summary Judgment

Rule 22 outlines in some detail the grounds and procedure by which a party may obtain summary judgment. A summary judgment is a final decision of the court and may only be reversed on appeal (*Roynat Inv. v. Cyr* (1986), 76 N.B.R. (2d) 381 (C.A.)). A summary judgment may be obtained in cases where it can be shown that the claim or defence in question has no merit and/or where it can be shown that the only true issue between the parties is as to quantum. The rule may also be used to obtain a resolution of a question of law where that is the only issue between the parties, or to obtain an order for an accounting if that is the only claim being advanced.

The case law has established that an order for summary judgment is a discretionary matter and "should not be granted unless the grounds for it are very clear". (*Guardian Ins. Co. v. McCullogh* (1988), 87 N.B.R. (2d) 210 (Q.B.)) In fact, the party bringing the motion must make out a case which is so obvious that there is no reason for doubt as to what the judgment of the court would be if the matter proceeded to trial (*Irving Oil Limited v. Jos. A. Likely Ltd.* (1982), 42 N.B.R. (2d) 624 (C.A.), *Ripulone v. Pontecorvo* (1989), 104 N.B.R. (2d) 56 (C.A.), *Dubé c. Dion* (1998), 201 N.B.R. (2d) 387 (C.A.), *Caissie v. Senechal Estates* (2001), 237 N.B.R. (2d) 232 (C.A.), *Shareline Systems Ltd. v. New Brunswick*, 2001 NBCA 29, 235 N.B.R. (2d) 162 (C.A.)). An examination of New Brunswick cases show that a party's rights to his day in court and to a full hearing on the merits of a claim frequently prevail over a motion for summary judgment. If there is **any evidence** of a possible defence or **any possibility** of merit to a plaintiff's claim, the motion will fail. On the other hand, as stated by Miller, J., in the *Guardian* case, *supra*, "... it is reasonable for a court to protect a party from the necessity of proceeding to litigation when the result is obvious to the court."

On a motion for summary judgment, the motions judge will consider not only the pleadings, but also any other admissible evidence, such as statements of fact within the personal knowledge of the deponent. This evidence is presented through affidavits and cross-examination on the affidavits (*Cannon v. Lange* (1998), 203 N.B.R. (2d) 121 (C.A.)).

A grounding affidavit on a motion for summary judgment should be drafted in a manner which will satisfy the case law which has developed in this area. Unlike most other motions, the affidavit must establish the facts relied upon on the basis of personal knowledge. It is not sufficient to refer to facts of which the deponent "has been informed and believes to be true" (see Rule 22.02(3)). In addition to setting forth the relevant facts of the particular case, the applicant's affidavit **must** state that he knows of no facts which would constitute a defence in whole or in part to the claim, or where the moving party is the defendant, would substantiate the plaintiff's claim in whole or in part. It is recommended that the affidavit be drafted to track verbatim the wording of section 22.02(1) or 22.02(2) as appropriate.

A solicitor's affidavit should be avoided, although this may not be possible in certain situations in order to establish personal knowledge. In such cases, it is recommended that another solicitor appear to argue the motion.

In preparing an affidavit in defence of a motion for summary judgment, a party must depose to facts sufficient to raise the possibility of a defence or claim, either on the facts or as a matter of law, as the case may be.

It is important for a defendant to establish in his affidavit that he is not simply trying to delay an inevitable judgment. Cost sanctions may be imposed against a party who files an affidavit in bad faith or for purposes of delay (Rule 22.06(2)).

A moving party should consider and specifically move for any alternative relief which may be desired should the motion for summary judgment fail. In determining motions for summary judgment, the court may impose terms and conditions for trial or may give such other directions for trial as are considered just (Rule 22.05). As an example, the court may order payment of the amount of the claim into court or might order an early trial date, and such alternative remedies may greatly assist a party in resolving a claim quickly. Cost sanctions may be imposed where no relief is obtained on a motion for summary judgment and as the case law shows the difficulty in succeeding on such motions, appropriate alternative remedies should be advanced.

There are many New Brunswick cases dealing with motions under Rule 22, in addition to those cited, and reference may be had to:

Gadbois v. Bonte Foods (1982), 40 N.B.R. (2d) 451 (Q.B.)
Corcoran v. Gerwil Ltd. (1983), 45 N.B.R. (2d) 86 (C.A.)
Bank of Nova Scotia v. LePage (1984), 56 N.B.R. (2d) 175 (Q.B.)
N.B. Milk Dealers Assoc. v. N.B. Milk Marketing Board (1984), 56 N.B.R. (2d) 413 (Q.B.)
Flynn v. Canadian General Ins. Co. (1985), 63 N.B.R. (2d) 289 (Q.B.)
Bouchard v. Mehlity (1990), 103 N.B.R. (2d) 97 (Q.B.)
Davidson's Funeral Service Ltd. v. Adams Funeral Home Ltd. (1991), 104 N.B.R. (2d) 382 (Q.B.)
Leger v. Belliveau & Gauvin (1991), 107 N.B.R. (2d) 383 (Q.B.)
Vye Construction Ltd. v. Russell (1990), 110 N.B.R. (2d) 16 (Q.B.)
Canada v. Augustine (1991), 113 N.B.R. (2d) 1 (Q.B.)
Toronto Dominion v. Newco Holdings Ltd. (1991), 115 N.B.R. (2d) 445 (Q.B.)
Fougère v. Acadia Drug (1969) Ltd. et. al. (1994) 145 N.B.R. (2d) 268 (Q.B.)
Palk v. Canada Life Assurance Co. (1994) 157 N.B.R. (2d) 70 (Q.B.)
Duke v. Johnson (1996) N.B.J. No. 353 (Q.B.)
Cannon v. Louge et al. (1998), 203 N.B.R. (2d) 121 (C.A.)
Lapointe v. MacIntosh Foods Ltd. (2000), 238 N.B.R. (2d) 274 (Q.B.)
LeBlanc v. Zurich Insurance Co. (2000), 231 N.B.R. (2d) 112 (Q.B.)
Shareline Systems Ltd. v. New Brunswick, 2001 NBCA 29, 235 N.B.R. (2d) 162 (C.A.)

2. Rule 23 - Determination of Questions before Trial

Rule 23.01 outlines a number of situations where a party may request that the court rule on a specific point or issue before the main trial of an action. In appropriate circumstances, the rule may be used to pre-determine a question of law, to strike out a pleading, or to obtain a judgment on an admission of fact.

In dealing with a question of law, the court must be satisfied that a pre-determination will dispose of the action, shorten the trial, or at the very least result in a substantial saving of costs, otherwise there is no advantage in pre-determining the issue and the court will not proceed. Accordingly, an affidavit filed to ground such a motion must establish how these conditions will be met. It is a matter of discretion whether a trial judge will predetermine a question of law, and the cases indicate that the courts will not do so on the basis of hypothetical facts.

All factual issues relevant to the legal question must be in agreement (see *Thériault v. Nouveau Brunswick (Ministre de l'Agriculture et d'Aménagemant rural*) (2002), 250 N.B.R. (2d) 120 (Q.B.); *Brunswick Construction Ltée v. N.B.* (1985), 66 N.B.R. (2d) 428 (Q.B.); *Temple Sholom v. I.C.B.C.* (1986) 70 B.C.L.R. 69 (S.C.), rev'd (1986), 8 B.C.L.R. (2d) 130 (C.A.), *Baines v. Kaladar et al.* (1985) 52 O.R. (2d) 283 (S.C. (H.C.J.)), *General Host Corp. v. Tantalum Mining* [1972] 1 W.W.R. 229 (Man.

C.A.), *Banks Industrial Supply Ltd. v. Ritchie Bros. Auctioneers Ltd.* [1972] 1 W.W.R. 231 (B.C.C.A.)). As an example, this rule has been used to determine whether an action is statute barred due to the expiration of a limitation period (see *Agnew et al. v. Dow Chemical Co.* [1991] N.B.J. No. 427 (C.A.), *Clark v. Naqvi* (1989), 99 N.B.R. (2d) 271 (C.A.)). The rule has also been used to obtain an interpretation of a term of a contract (see *Richards v. Prudential Ass. Co.* (1990), 111 N.B.R. (2d) 423 (Q.B.), and *Brunswick Construction Ltée v. N.B.* (1985), 66 N.B.R. (2d) 428 (Q.B.), *Régie de l'assurance automobile du Québec v. Brown et al.* (1990), 96 N.B.R. (2d) 361 var'd (1990), 107 N.B.R. (2d) 11 (C.A.))

Pursuant to Rule 23.01 (1)(b) a pleading which does not disclose a reasonable cause of action or defence may be struck out. The cases establish that the court will be guided by many of the principles relevant to a motion for summary judgment. In a motion under Rule 23.01(b), the court will assume that the facts alleged in the pleadings are true, and will only strike the pleading if it can be shown beyond doubt that the claim does not exist. It is not sufficient to establish that a party's case is very weak, it must be shown that the claim is "clearly unsustainable". This rule or its predecessor has been relied upon in many varied fact situations, for examples, see:

R. v. Flemming (1919), 46 N.B.R. 402 (C.A.)
Augustine v. Saint John (1974), 10 N.B.R. (2d) 93(Q.B.)
Tri-Dev. Ltd. v. Auffrey (1976), 15 N.B.R. (2d) 308 (Q.B.)
Brunswick Contractors (1977) Ltd. v. C.J.A. Loc. 1137 (1979), 26 N.B.R. (2d) 266 (Q.B.)
McCormack & Zatzman Ltd. v. McKelvey (1980), 33 N.B.R. (2d) 399 (Q.B.)
Gadbois v. Bonte Food Ltd. (1982), 40 N.B.R. (2d) 451 (Q.B.)
Corcoran v. Gerwil Ltd. (1983), 45 N.B.R. (2d) 86 (C.A.)
Finlay v. Canada (1983) 52 N.R. 155 (S.C.C.)
Frenette Plumbing Ltd. v. Connolly Construction Ltd. (1985) 16 C.L.R. 45 (Q.B.)
Hall & Fineberg v. N.B. et al. (1987), 72 N.B.R. (2d) 399 (Q.B.)
Murphy v. Murphy (1987), 78 N.B.R. (2d) 279 (Q.B.)
Perley v. Sypher et al. (1989), 96 N.B.R. (2d) 355 (Q.B.) and [1990] N.B.J. No. 335 (Q.B.)
Hunt v. T & N plc, [1990] 2 S.C.R. 959
ITT Commercial Finance v. Hawkins (1993) 137 N.B.R. (2d) 335, aff'd at [1994] 144 N.B.R. (2d) 158 (C.A.)
Doucette v. Region 7 Hospital Corp. et al. (2002), 246 N.B.R. (2d) 171 (Q.B.)
Beethaw et al. v. Markessini et al. (2002), 247 N.B.R. (2d) 13 (Q.B.)
GMAC Commercial Credit Corp. v. Loy et al. (2003), 254 N.B.R. (2d) 84 (Q.B.)
Morin v. Maritime Life (2003), 260 N.B.R. (2d) 65 (Q.B.)
Lepointe v. MacIntosh Foods Ltd. (2002), 238 N.B.R. (2d) 274 (Q.B.)

Under Rule 23.01(c), a motion may be brought for judgment on the basis of admissions contained in pleadings, in the examination of an adverse party or in a reply to a Request to Admit Facts.

In many instances, this rule would be used in conjunction with a motion for summary judgment for all or such portion of the claim that may be covered by the admission in question. The case law indicates that the "admission" at issue must be "clear and unequivocal" (see *Allto Import v. Christy Crops Ltd. No. 2* (1981), 35 N.B.R. (2d) 70 (Q.B.), *Carter Estate v. Roy M. Lawson Ltd.* (1981), 36 N.B.R. (2d) 353 (Q.B.)).

It is noted that the "admission" must be contained within the documents referred to in Rule 23.01(c), and presumably an admission contained solely within correspondence would not be sufficient to satisfy the requirements of this Rule.

Rule 23.01(2) provides a mechanism to have an action stayed or dismissed where there is a question of jurisdiction or a question as to the appropriateness of a court to hear a matter.

As stated, the rule may be relied upon, where the jurisdiction of the court is questioned (as an example, where it is alleged that the parties' dispute is subject to binding arbitration or where a matter is subject to an administrative body's jurisdiction, see *Knight v. Railway Workers' Union* (1988), 95 N.B.R. (2d) 342 (C.A.)); where the legal capacity of a plaintiff is questioned (as an example, where the plaintiff is a minor and the action is not brought by a guardian, or see *Co. of North America v. Caisse Populaire* (1988), 86 N.B.R. (2d) 342 (Q.B.), dealing with a class action); where another action is pending between the parties in respect of the same claims (see *Miramichi Pulp & Paper v. Cdn. Paperworkers Union* (1989), 97 N.B.R. (2d) 282 (Q.B.); or where it is alleged New Brunswick is not a convenient forum.)

In applying Rule 23.01(2)(d), reference can be made to cases considered under Rule 19.05(2)(c) which also deals with the issue of forum conveniens (see *Power et al v. Probert et al.*, 19 C.P.C. (2d) 142 (Ont. Dist. Ct.), *Robinson v. Warren* (1980), 55 N.S.R. (2d) 147 (S.C. (Gen.Div.)), *BP Canadian Holdings Ltd. et al.* v. *Westmin Resources Ltd.* (1983), 32 C.P.C. 300 (S.C.(Ont. H.C.)), *Oulton Agencies Inc. v. Knolloffice Inc.* (1988), 66 Nfld. & P.E.I.R. 207 (P.E.I. S.C.) rev'd (1988), 69 Nfld. & PEIR 65 (C.A.)). The leading New Brunswick cases on this issue are *Bathurst Broadcasting Company Ltd. v. Group One Radio Limited and McDermott Broadcast Sales Ltd.* (1983), 42 N.B.R. (2d) 30 (Q.B.), *Khitab v. Boyce* (1987), 83 N.B.R. (2d) 191 (Q.B.), and *Gauthier v. Swain* (1989), 100 N.B.R. (2d) 173 (Q.B.); *National Bank of Canada v. Halifax Insurance Co. et al.* (1996), 173 N.B.R. (2d) 145 (Q.B.).

It is important to note that without leave of the court evidence admissible on a motion under Rule 23 is restricted to affidavits necessary to identify or prove documents and to transcripts of relevant examinations (see Rule 23.02).

3. Rule 24 - Stated Case

Rule 24 sets forth a procedure which may be followed where the parties to an action agree on the facts of the case and any relevant documentary evidence, and require a determination from the court on one or more questions of law. In a stated case, a written statement outlining the facts and attaching necessary documents is filed with the court and the parties then present argument on the questions of law to be determined. There are no witnesses called. It is an inexpensive and expeditious way in which to have a matter resolved in appropriate cases. It is essential that all facts necessary to decide the case are placed before the court (see *Logan v. Giles* (1984), 52 N.B.R. (2d) 444 (C.A.)).

The court will not proceed on the basis of hypothetical facts or assumptions, and the parties must come to the court with the facts fully resolved so that a decision by the court on the questions of law will finally dispose of the matter or at least substantially facilitate a final resolution (see *Timms v. Dodek* (1981) 29 B.C.L.R. 50 (S.C.), *Martin v. Ins. Corp. of B.C.* (1979) 13 B.C.L.R. 163 (S.C.)).

Where parties are in agreement to proceed by way of stated case a motion is prepared requesting leave of the court and affidavits are filed by the parties confirming their agreement and stating how the case will be disposed of or facilitated.

The stated case should be prepared, and attached to the affidavit seeking leave so that the full details of the proposed case are actually before the court on the leave application. If leave is granted, a date is obtained from the court to present argument.

4. Rule 25 - Discontinuance and Withdrawal

Rule 25 is a straight forward rule setting forth the terms by which a matter may be discontinued or a defence withdrawn. A discontinuance is most frequently filed following the settlement of an action, by all parties providing written consents. Rule 25.03 is clear that a party discontinuing an action or withdrawing a defence is responsible for the other party's costs unless the court orders otherwise or the parties otherwise agree.

As well, it is important to note that the filing of discontinuance does not bar a subsequent action unless the discontinuance or order expressly provides. Form 25A contained in the Rules is a basic discontinuance and does not cover the issue of costs or future actions; it is recommended that these issues be expressly dealt with in a discontinuance.

In practice, it is seldom that a request for leave to discontinue would be required, however, authorities on this issue may be found in the cases of *Joseph A. Likely Ltd. v. Peter Kiewet Sons Co.* (1976), 14 N.B.R. (2d) 557 (Q.B.), and *Irving Oil Co. v. Miles Minit Car Wash Ltd.* (1970), 2 N.B.R. (2d) 356 (Q.B.), *Royal Bank v. Ruben* (1980), 29 N.B.R. (2d) 612 (C.A.).

The withdrawal of a defence under Rule 25.02 does not have a great deal of practical application as if a defence is being withdrawn it is usually because the parties have agreed to enter a judgment and the procedure normally followed is to prepare a consent order for judgment. However, in situations where the rule may be applied it is of note that an order for leave to file a withdrawal of a defence or consent of the plaintiff must be obtained where the defence filed contained admissions.

Pursuant to Rule 25.04, where a discontinuance has been filed, a defendant **must** file a notice of election within 30 days in order to continue a counterclaim, otherwise it will be deemed discontinued. A third party claim or cross claim can only be continued if a court order is obtained within 30 days from the filing of a discontinuance of the main action.

There are some special circumstances where a court may allow a discontinuance to be withdrawn, however, this would be unusual. Subject to a right which might exist to bring another action, a discontinuance is a final resolution (see *Royal Bank v. Ruben*, *supra*; *Adam v. I.C.B.C.* (1985), 66 B.C.L.R. 164 (C.A.)).

5. Rule 26 - Dismissal for Delay

Pursuant to Rule 26.01, a defendant may apply to have an action dismissed where the plaintiff has failed to serve his statement of claim on all defendants within the requisite time, has failed to note a defendant in default within 30 days of being entitled to do so or has failed to set an action down for trial within six months after the close of pleadings. An order under Rule 26.01 is discretionary and the timings referred to in this rule are the "minimal" times within which a court will consider a motion.

The case law indicates that a plaintiff's claim will not be dismissed other than for an "inexcusable", "inordinate" delay and/or where the defendant can establish significant prejudice due to the delay (see *Northern Meat Packers v. Bank of Montreal* (1984), 52 N.B.R. (2d) 196 (Q.B.), *Spencer v. King* (1989), 94 N.B.R. (2d) 323 (Q.B.), reversed on appeal 106 N.B.R. (2d) 91 (C.A.)).

The affidavits filed to ground such a motion should be very detailed on the length of delay, and on the prejudice that has or will be suffered by the defendant if the claim is not dismissed. It is unlikely that a defendant would be successful on a motion for dismissal where he has sat back and done nothing to have the matter proceed, and so the grounding affidavit should outline what steps the defendant has taken in this regard (see *Northern Meat Packers v. Bank of Montreal*, *supra*).

An order dismissing a matter for delay does not bar a subsequent action on the same matter, and accordingly unless a limitation period has expired, a party could issue new pleadings on the claim. Other New Brunswick cases dealing with this issue include *Caisse Populaire v. Angotti* (1980), 31 N.B.R. (2d) 157 (C.A.), *MacInnes v. Leaman* (1973), 9 N.B.R. (2d) 170 (Q.B.), aff'd by S.C.C. at 8 N.R. 297 (S.C.C.), *Sirois v. Boudreau* (1986), 75 N.B.R. (2d) 346 (Q.B.), *Wallace v. Bourque & Devarennes* (1985), 65 N.B.R. (2d) 230 (C.A.).

Rule 26 also establishes a procedure requiring "status reports" and "status hearings". As a practical matter, dismissals for delay most commonly arise in conjunction with status hearings. The status report and hearing are methods adopted by the court to regulate the claims before it in an attempt to ensure that matters are dealt with, within a reasonable period of time. Where a matter has not been set for trial within one year from the filing of a statement of defence, the clerk **must** issue a request for a status report to the solicitor of record. The solicitor is then required to explain the reason for delay. The explanation is reviewed by a judge and if deemed appropriate, a status hearing may be ordered. If no reply is made to the request for a status report, a status hearing must be set. On a status hearing, the solicitor of record must file proof that his client was served with notice of the hearing. In this way the court can be assured that the parties themselves are made aware of and do not take issue with ongoing delays. On the status hearing, the judge may make such order as is just. Often an order is made that an action be set down for trial within a specified period. In such cases, if the action is not set down, the clerk is obliged under Rule 26.05(9) to dismiss the action without any further order being required. Accordingly, if the initial order cannot be satisfied, a motion for a further order or extension must be obtained. Where the facts warrant, a judge may dismiss a claim at a status hearing and parties should not ignore the significance of these hearings (see cases referred to under Rule 26) and *Dance Originals et a.l v. Salon de la Mairee Ltée et al.* (1983), 53 N.B.R. (2d) 306 (Q.B.) and *Betts v. Norris* (1991), 120 N.B.R. (2d) 384 (C.A.).

Affidavit of documents

Chapter 7

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Affidavit of documents

1. Rule

Rule 31 governs the requirements for affidavits of documents. Theoretically, an affidavit of documents can be required in every proceeding commenced by notice of action by serving on the opposite party a notice pursuant to Rule 31.03. Notwithstanding, it is not necessary, from either a practical or legal point of view, to require an affidavit of documents in every case.

2. When Affidavit Not Necessary

In simple cases, or where all relevant documents are already identifiable or in the possession of the parties, an affidavit of documents serves little or no useful purpose. To require an affidavit in such cases results in extra work, cost and delay. It often happens the opposite party does not require an affidavit of documents. If you make a request you will get one in return and will be put to additional work.

Sometimes the preparation of an affidavit of documents, even in an uncomplicated case, results in more work and difficulty than is justified. A typical example concerns the evaluation of a business where, theoretically, all corporate documents may have some relevance. It is obvious to produce all documents in preparing an affidavit of documents could be an impossible burden. In such cases it is best to consult with the opposite party in an effort to reach agreement on relevant documents. The documents can then be produced for inspection prior to discovery with the understanding if additional documents become relevant, they will be produced. To have required an affidavit of documents would not have improved your position but, on the contrary, might well have created unnecessary cost and delay in examining hundreds of documents in order to select those that are truly relevant for your purpose.

3. When Affidavit Necessary

In the average case an affidavit of documents is both useful and necessary, depending upon the side you represent. You may have little or no knowledge of the documents in the possession of the opposite party, or there may be problems created by failure to cooperate in disclosing what is necessary. In such cases, you have little choice and would be placing yourself at a serious disadvantage by not requiring an affidavit.

There are also practical benefits in preparing an affidavit of documents for the party you represent. It not only gives you the opportunity to examine all relevant documentation, but forces your client to search all records and make certain that everything relevant is made available. This is particularly important if you have a reluctant client or a client whose records are in disarray. Some clients will simply pay no attention to the case until forced to do so. Once served with a notice requiring an affidavit of documents, you are in a position to compel cooperation from your client, and hence acquire a better and fuller understanding of the case. Finally, always remember not to request an affidavit of documents unless it serves a useful purpose. The practice of automatically sending a notice should be discouraged.

4. Documents Which Must Be Disclosed

In deciding what documents must be disclosed in an affidavit of documents, pay attention to the words of Rule 31.02(1): "Every document which relates to a matter in issue in an action . . . shall be disclosed . . ."

The word "relates" seems to cause much unnecessary confusion and difficulty. It simply means relevant or material to the issues in the action.

In keeping with the philosophy of the rules to require full disclosure, the word "relates" should be taken in a broad, as opposed to a restrictive, sense as a narrow interpretation defeats that purpose. That is not to say every document, no matter how remote, is to be treated as relating to the issues.

A good rule of thumb is that if the document does not assist in proving, disproving, or understanding an issue, it is not relevant.

If documents have no bearing on an issue they are not relevant and cannot be used as evidence. Do not, as some lawyers' do, list pleadings or other documents generated by the requirements of the rules. Not only are such documents not evidence, but they have no probative value and, in any event, are already disclosed and are a matter of record. Also, do not list letters back and forth between lawyers and which relate only to the conduct of the case. Such correspondence is not remotely relevant.

It is important to understand the distinction between what is relevant and what is not. A lawyer preparing an affidavit of documents has an obligation to review the documentation for that purpose. It is not appropriate to simply list all documentation handed over by the client, leaving it to the opposite party to sort out. This happens from time to time, particularly in burdensome cases with huge quantities of documents. The party producing the documents takes the easy way out by producing everything in sight, saying, "You decide what you want and what you do not want". This is often done on the excuse that the word "relates" covers every document, no matter how remote, thereby avoiding the task of carefully examining the documentation in order to narrow it down to what truly relates to the issues.

Note that Rule 32.01(1) requires disclosure of a document "whether or not privilege is claimed". Privilege is a rule of evidence that protects such documents from inspection by the opposite party. This principle is embodied in Rule 31.02(2).

The need to list, but not to produce for inspection, privileged documents is to assure that documents relating to the issues are not being deliberately hidden under the guise of privilege. The questions of privilege will be considered later in this paper. If a privileged document does not relate to issues in the action then, of course, it need not be disclosed.

5. Time for Preparation of Affidavit of Documents

Rule 31.03(2) requires a party to file and serve an affidavit of documents within ten days of receipt of notice. This is frequently an unrealistic restriction that simply cannot be met. In cases involving large numbers of documents it may take weeks or even several months to prepare an affidavit in final form.

If it is not possible to complete the affidavit within ten days, you should confirm this fact with the opposite party. It is good practice, upon receipt of the notice, to write a letter stating you cannot comply with the time limit, and if this is not acceptable to inform you immediately.

You might also indicate the time it will take to prepare an affidavit. If this is not satisfactory to the other side, then you will be told and can govern yourself accordingly.

Lawyers must be reasonable in this regard, and I have not known them to be otherwise. There is little purpose in making an application to court requiring compliance with time limits if you know ten days is not realistic in the circumstances.

However, if an affidavit is not provided within what might be considered a reasonable time, an application can be made to the court under Rule 31.03(2). It is wise before doing so to write at least one letter to the opposite party fixing a deadline and advising that if not met, an application will be made. Such a warning not only gives the party one last chance to comply, but will assist in requesting costs on the application.

6. Form and Content of Affidavit of Documents

An affidavit of documents is in Form 31B. Although it is important to follow the form as closely as possible, it should be changed to suit the particular case.

This is quite appropriate and is specifically provided for in Rule 4.08(1) which provides the forms shall be used where applicable "with such variations as the circumstances of the particular proceeding require".

The content of an affidavit is governed by Rule 31.03(4). The subparagraphs of the Rule relate directly to the paragraphs and schedules in Form 31B as follows:

Rule	**Form**	
31.03	(4) (a)	Paragraph (1) - Schedule A
31.03	(4) (b)	Paragraph (2) - Schedule B
31.03	(4) (c)	Paragraph (3) - Schedule C
31.03	**(**4) (d)	Paragraph (4) - Schedule D
31.03	(4) (e)	Paragraph (5) - No Schedule

It can be seen by reference to the above that all relevant documents which you do not object to produce are to be listed in Schedule A; documents in your possession that you object to produce in Schedule B; documents which you no longer have in your possession or control in Schedule C. Schedule C is to be contrasted with Schedule D which relates to documents which were never in your possession or control but which belong to someone else.

Notwithstanding the requirement of Rule 31.03(4) (d) to list and describe documents, it may not be possible to do so in Schedule D, in which case it is sufficient to give a general description of the documents you think may exist together with the name and address of the person having possession or control.

7. Organization of Documents

An affidavit serves the purpose of disclosing documents to the opposite party, and it also serves to provide you and your client with a ready reference to documents relevant to the case. For this reason alone it is worth taking the trouble to organize the documents in a way that will be useful to you and your client in later stages of the action, especially discovery.

In cases involving a large number of documents, it is useful to have a chronology of events. Schedule A to the affidavit can serve this purpose if documents are listed in chronological order, starting with the oldest document first. It can also be used to make notes and to add additional references.

In more complicated cases there are often common categories of documents which are better listed or described as a group, and not chronologically with other documents in Schedule A. They can be listed chronologically, if suitable, within their own category.

Typical examples are photographs, plans, drawings, or form documents such as invoices and income tax returns. It is preferable to list the common categories of documents as the last items in Schedule A.

Once documents are arranged in chronological order they should be numbered consecutively in Schedule A. It is good practice to place the corresponding number on the document itself so that it is readily identifiable. If it is not possible to write a number on a document, attach a sticker or label on which the number can be written. Common categories of documents should be given an individual number and then numbered or lettered consecutively within the category.

For example, a common category of documents may be item 20 in Schedule A. They can then be numbered 20A, 20B, etc. within the category. Documents listed in Schedules B, C and D should be similarly organized, if possible.

8. Description of Documents

It is important documents be described in sufficient detail so they may be readily identified. It is preferable to list the document numbers down the left hand side of Schedule A and, opposite each number, in a separate column, the date of the document. Opposite the date should be a description. For example, "Letter from A to B" or "Contract between A and B for purchase of property". It is also useful in describing the document to give a brief explanation of its purpose. This is particularly important where simply identifying by party and date may not distinguish one from the other.

In the case of documents which are not dated, or do not pass between parties, it is best to describe the document by using its exact title or purpose. Typical examples are printed material such as brochures, operating manuals or advertising materials. Description of documents will be dealt with in further detail when discussing privileged documents.

9. Solicitor's Certificate

Rule 31.03(6) requires the solicitor for the party making the affidavit to certify he has explained to the deponent the necessity of making full disclosure of all relevant documents. It also requires the solicitor to certify he has no knowledge of other documents which should be disclosed.

Certification is a serious matter. It places a heavy onus on the solicitor and is not something to be taken lightly. The purpose is to impose on the solicitor the requirement of seeing that full disclosure is made, and to make certain this is understood by the client.

Before signing the certificate the lawyer should make full inquiry of the client, fully explain the need to make full disclosure, and make certain that all documentation has been produced for his examination before completing the affidavit.

10. Privileged Documents

Any privilege recognized by law may be claimed with respect to a document. Common examples are:

- solicitor-client privilege
- communications in contemplation of litigation, sometimes called legal, professional or litigation privilege
- communications made without prejudice
- certain state documents

Although these examples are most common, privilege can sometimes be claimed in other types of situations depending upon the nature of the issues involved. If in doubt, it is best to claim privilege. If the opposite party disagrees, a challenge can always be made.

Rule 31.03(4) (b) provides for "a list and description of all documents" for which the party "claims privilege and the grounds for such claim". As stated earlier, this part of the Rule relates directly to Schedule B in the affidavit of documents. Common practice is to state the grounds for privilege in the opening statement to Schedule B.

The grounds should be clearly described, the purpose being to establish a *primae facie* case in the event the privilege is challenged. If the reason for claiming privilege is the dominant purpose rule, then this should be stated, or words to that purport.

In *Delta Electric v. Aetna Casualty of Canada et al.* (1984), 53 N.B.R. (2nd) 406, it was held that if the claim of privilege relies on the test of dominant purpose, the affidavit must set out the facts upon which the court can conclude that that was the dominant purpose for which the document was made.

It is necessary to be specific and explicit. It may be that different grounds apply to different documents. If so, such documents should be listed separately in order to avoid confusion. See also: *Junel Ouellet Desing Inc. v. Desbiens* (1998), 207 N.B.R. (2d) 128 (C.A.) at paras. 13 to 17.

Keeping in mind a claim to privilege may be challenged, it is extremely important the description of the document be sufficiently clear to enable the court to make a decision without examining the document itself.

The description should therefore clearly identify the document as to origin and purpose, including the following:

- name or title of document
- author
- Date
- subject matter, if title not sufficient for this purpose
- any other information that may be necessary for clarification purposes

If the documents are described in categories, or as a group, the same detail should be provided.

11. Failure to Properly Describe Privilege

It was stated above that the description of privilege must be sufficient to establish a *primae facie* ground. In such cases the trial judge cannot look behind the affidavit of documents and examine the privileged document itself. The importance of a proper description is therefore apparent.

If you fail to properly claim privilege, the court will not examine the documents but will order production. The result is that you may lose privilege with respect to what would otherwise be a privileged document.

If you properly claim privilege, then such is not open to attack by the opposite party unless there is some over-riding reason which will require the court to go behind the affidavit and examine the document itself. A court will not do this unless there is a compelling reason.

You can see that it is extremely important to take the time and care to describe properly not only the nature of the privilege but also the nature of the document itself. By doing so, you minimize the possibility of the opposite party attacking the privilege and also the possibility of the court going behind the affidavit itself. See Rule 31.06, and discussion under heading "Incomplete Affidavits".

It is not the purpose of this paper to go into the legal aspects of privilege in detail.

However, the following cases set out the basic principles and practice, with which you should become familiar if you intend to practice litigation:

McCaig and McCaig v. Trentowsky (1983), 47 N.B.R. (2d) 71 (C.A.); *McCaig and McCaig v. Trentowsky* (1982), 45 N.B.R. (2d) 62 (Q.B.); *Delta Electric Co. Ltd. v. Aetna Casualty Company et al.* (1984), 53 N.B.R. (2d) 406 (Q.B.); *Horsman v. LeBlanc* (1984), 55 N.B.R. (2d) 297 (Q.B.); *Hauck v. Cavendish Farms Ltd.* (1984), 56 N.B.R. (2d) 238 (Q.B.); *Dieppe (Town) v. Champlain Development Ltd.* (1984), 56 N.B.R. (2d) 337 (Q.B.); *Case v. Case* (1984), 58 N.B.R. (2d) 89 (Q.B.); *Stamper v. Finnigan et al.* (1983), 45 N.B.R. (2d) 335 (Q.B.); *Stamper v. Finnigan et al.* (1984), 57 N.B.R. (2d) 411 (Q.B.); and *Doiron v. Embree & Sprague* (1987) 77 N.B.R. (2d) 163 (Q.B.). See also *Richards v. Mason and Mason* (1987), 84 N.B.R. (2d) 1 (Q.B.), *Cormier et. al. v. LeBlanc* (1993), 135 N.B.R. (2d) 75 (Q.B.), *Daly et al. v. Petro Canada et al.* (1993), 132 N.B.R. (2d) 346 (Q.B.); *Edgar v. Auld et al.* (2000), 225 N.B.R. (2d) 71 (C.A.); *Gray Acqua Farms Ltd. v. Canadian Liquid Air Ltd.* (1998), 202 N.B.R. (2d) 128 (Q.B.); *Janel Ouellet Design Inc. v. Desbiens* (1998), 202 N.B.R. (2d) 151 (C.A.); *Turnbull-Burnight v. CIBC World*

Markets, 2007 NBCA 43, [2007] N.B.J. No. 220; *Lamey (Litigation guardian of) v. Rice* (2000), 227 N.B.R. (2d) 295 (C.A.); *Main v. Goodine et al*. (1997), 192 N.B.R. (2d) 230 (C.A.).

12. Abandonment of Claim for Privilege

Even though you have claimed privilege, it is possible to abandon the claim by complying with Rule 31.09. This is done by giving notice in writing to all parties before the Motions Day on which the proceeding is set down for trial. The privileged document may then be used in evidence. The converse is that if notice abandoning the claim for privilege is not given, you cannot use the document at trial "except to contradict a witness or by leave of the court".

The use of a privileged document to contradict a witness is, in essence, to use the document as a prior inconsistent statement in the same manner as any other such statement.

This is not something that is likely to occur because you will not have knowledge of the content of a document on which privilege is claimed.

It is difficult to know when a court will grant leave to use a privileged document when privilege has not been abandoned. This is something very much in the discretion of the court and no solid guidelines are available. It is safe to conclude, however, that a court is not likely to allow use of the document unless it can be done without prejudice to the opposite party.

13. Knowing Whether All Relevant Documents are Disclosed

Sometimes it is extremely difficult to know whether your client's affidavit has disclosed all relevant documents. This may be for various reasons, including a large number of documents which may be relevant. The best way to resolve the dilemma is to make an initial decision based upon the issues in the pleadings. This includes issues raised by all parties, not just by the party to whom you are required to make disclosure. If the pleadings require clarification then you can serve a Demand for Particulars or have an informal communication with the opposite party. Once the issues are clarified, it should then be possible to determine what is relevant.

If the difficulty is not knowing what part of a large number of documents the opposite party is interested in, then contact that party and find out. Very often the party will give a clear indication of what is required.

A typical example involves issues as to the value of corporate assets and shares. Such value can often be determined from the financial statements, and the huge variety and quantity of documents necessary to generate the financial statements may not be of interest, and therefore not relevant. It can then be agreed what is required to be disclosed. On occasion, it is even possible to agree that a formal affidavit is not necessary.

Sometimes on discovery the scope of the evidence in relation to the issues turns out to be much greater than anticipated, and necessitates the disclosure of additional documents. In such circumstances, disclosure generally must be made. This can be done by giving an undertaking to produce or, if the opposite party insists, by preparing a revised affidavit which includes all documents now found to relate to the issues in question. In this case, regard should be had to Rule 31.07.

14. Incomplete Affidavits

Reference has already been made to Rule 31.07 in terms of inaccurate or incomplete affidavits. This rule also applies to a situation in which, after having served the affidavit, a party acquires possession or control of additional documents. These documents must be disclosed.

If you find that the opposite party's affidavit is incomplete, documents are inadequately described, or a claim for privilege has been improperly made, then an application may be made by Notice of motion for relief under Rule 31.06. Under this rule the court may do one of four things including ordering a further and better Affidavit of Documents or inspecting any document.

If a party fails to comply with an order under Rule 31.06, then advantage may be taken of Rule 31.08 which gives the court authority to do various things, including dismissing the action of a plaintiff or striking out a Statement of Defence of a defendant. Failure to disclose relevant documents has serious consequences and must be taken seriously by any party.

15. Admissibility of Documents Disclosed

Rule 31.05(1) provides the disclosure or production of a document "is not an admission of its admissibility". This is extremely important. The effect is that the rules of evidence still apply as to admissibility of documents. In other words, documents must be properly proven and be otherwise admissible as evidence in the strict sense. The fact that the document may be listed in the affidavit, and may be referred to and discussed during discovery, does not make it admissible. If at trial a party tries to introduce a document either by itself or by reference to the discovery in which it was referred, you still have the right to object on the basis of any rule of evidence.

16. Electronic Discovery or “E-Discovery”

A party’s obligations regarding the disclosure and production of electronic documents are generally referred to as “electronic discovery” or “e-discovery”.

Various guidelines have been prepared with respect to a party’s e-discovery obligations. In particular, in October 2005, the Task Force on the Discovery Process in Ontario published a “best practice manual” entitled the “Guidelines for the Discovery of Electronic Documents in Ontario”. In February 2007, a group comprised of judges, lawyers and other members of the legal community known as the “Sedona Conference Working Group 7” released a draft paper for public comment entitled “The Sedona Canada Principles: Addressing Electronic Document Production” (the “Sedona Canada Principles”). This document was designed to provide “fundamental concepts of e-discovery” which would be applicable to a “wide range of cases in any jurisdiction”. As of the date of this writing, these guidelines were still in draft form.

There is relatively little Canadian case law (much less New Brunswick case law) addressing a party’s obligation to disclose and produce e-mail or other electronic documents. This is still very much a developing area of the law.

A party must disclose and potentially produce copies of relevant e-mail and other electronic documents. In Canada, a party’s obligations regarding e-discovery are contained in the same rules of civil procedure or rules of court which govern all documentary discovery. In New Brunswick, the rule governing documentary discovery is Rule 31 of the Rules of Court. Pursuant to Rule 31.01, the term “document” includes “information recorded or stored by means of any device”. Accordingly, any e-mail or other electronic document stored by means of a computer hard drive or other device is a “document” within the meaning of Rule 31 of the Rules of Court.

Consequently, pursuant to Rules 31.02(1), a party must disclose every e-mail or other electronic document which “relates to a matter in issue in an action” and which “is or has been in the possession or control” of that party or which the party believes to be in the “possession, custody or control of some person not a party”. Similarly, pursuant to Rule 31.02(2), a party must produce for inspection every e-mail or other electronic document which “relates to a matter in issue in an action” and which “is or has been in the possession or control” of that party, unless “privilege is claimed in respect of that document”.

Examination for discovery

Chapter 8

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Examination for discovery

1. Rules

Examinations for discovery are covered by Rules 32, 33 and 34. Rule 32 covers the form and scope of discovery, parties who may be discovered, use of discovery at trial and other procedural matters. Rule 33 covers the procedure on an oral discovery. Rule 34 covers the procedure on written discovery.

These rules are largely self-explanatory. It is not the intent to go into the detail of the Rules, but rather to deal with the practical aspects of the preparation and conduct of a discovery.

2. Selection of Person to be Discovered

In selecting the person to be discovered it is necessary to consider the nature of the evidence you wish to obtain. There is little point in examining a person who does not have first-hand knowledge of the events, but who can only answer second hand after obtaining the information from others. There are, of course, exceptions but generally, it is best to obtain the information first hand. Otherwise, there is always the possibility of misunderstanding, or even missing evidence that may later prove important. In the case of parties who are individuals there is little choice, and often no difficulty. However, the case of corporate parties, the choice of who to examine can often be extremely difficult.

Under Rule 32.02(2) you have the right to select for examination an officer, director or manager of a corporation. Very often such persons have no first-hand knowledge of the events and, even though they have an obligation to inform themselves, an examination can still be unsatisfactory. If faced with such a situation you should try to arrange with the solicitors for the corporate party to examine someone having first-hand knowledge. The person would be examined on behalf of the corporation and the evidence would be binding on the corporation, just as if the person was an officer, director or manager. If agreement cannot be reached, then you have little choice in the matter unless leave is granted under Rule 32.02(2).

Under Rule 32.02(2) the corporation may apply to the court to have examined an officer, director or employees other than selected by you. The court will usually only grant such a request in circumstances where it is totally inappropriate to examine the person selected. The court will not lightly interfere with the right of an examining party to examine the manager, director or officer of his choice. [*Bank of Montreal v. Stephen et al.* (1986) 76 N.B.R. (2d) 427 (C.A.); *River Road Co-op Ltd. v. Ultra Maintenance Ltd. (1999)*, (1995), 164 N.B.R. (2d) 232 (Q.B.); *Pullman Power Products of Canada Ltd. v. Noell GmbH et al.* (1996), 177 N.B.R. (2d) 305 (Q.B.)]

Rule 32.02(2) prevents you from examining any other officer, director, manager or employee in addition to the one examined without leave of the court. This makes the need for careful selection in the first instance that much more important. See: Montreal Trust Co. of Canada v. Occo Developments Ltd., 1997 CarswellNB 343 (C.A.), Paul (Litigation guardian of) v. Mahmoud, [2005] N.B.J. No. 322 (Q.B.)

On occasion, the nature of evidence against a corporation will be that of a person who is also an expert, and who might be required to give expert evidence at trial. In such circumstances it can sometimes be agreed that the evidence will be treated as if given by an officer, director or manager, binding on the corporation, and will constitute the expert evidence of the party in compliance with Rule 52.An examining party is entitled to examine an officer of a company incorporated under New Brunswick law, notwithstanding that he or she is resident outside New Brunswick: *Von Muenchhausen v. Sunshine Beach Ltd.* (1992), 129 N.B.R. (2d) 179 (C.A.).

Rules 32.02(3) to (8) cover situations other than the examination of a corporation. For example: partnerships, unincorporated associations, and persons under disability. You should pay attention to these rules when dealing with such situations. To some extent, the comments made under the heading "Corporations" apply.

3. Discovery of Non Parties

Rule 32.10(1) provides for the examination for discovery of "any person who there is reason to believe has information relevant to a material issue in the action". The right to examine such a person can only be granted by leave of the court and on such terms as the court may impose. See: *Western Surety Co. v. National Bank of Canada*, [1996] N.B.J. No. 431 (Q.B.), *Victor Bernard & Sons Ltd. v. Grand Falls Steel Building Ltd.*, [1988] N.B.J. No. 937 (Q.B.).

However, in practice the parties often agree to such discoveries, particularly if one of the parties has access to the person whose discovery is requested. It is not possible to discover every potential witness to an action because of the restrictions under Rule 32.10(2).

The court has a discretion where leave to examine a person is opposed. Leave may not be granted where the applicant already has access to statements given by the person and where it seems likely that the person will submit to being interviewed by the applicant's counsel (*King & King v. Larlee* (1984), 54 N.B.R. (2d) 32 (Q.B.); *Bourque v. LeBlanc* (2002), 253 N.B.R. (2d) 231 (C.A.)).

The general purpose of Rule 32.10 is to enable a party to obtain additional information not available from another source. Under Rule 32.10(5) the evidence of the person cannot be used in evidence at the trial. However, such evidence can be used as a prior inconsistent statement in cross-examining such person if called as a witness.

4. Arranging the Discovery

When you reach the stage where discovery is necessary, the standard practice is to contact the opposite solicitor for the purpose of agreeing on the date, time and location. Before doing this, you should make certain your witnesses are available as coordinating times can be difficult. If the date, time and place can be agreed, then generally nothing else is necessary except to confirm arrangements by letter with the opposite solicitor, your witnesses and the Court Reporter.

If it is not possible to reach agreement with the opposite solicitor, then you have no choice but to take out a Notice of Examination under Rule 33.03(1).

The form is 33A and must be signed by the Court Reporter. It is then served on the opposite solicitor. Some solicitors use form 33A even when agreement is reached.

Rule 33.01 provides an examination shall take place in the judicial district where the proceeding was commenced. However, the parties can agree to another location and this is commonly done if it is more convenient.

If the person to be examined is not a party, or is not being examined on behalf of a party, the proper notice is by Summons to Witness in Form 33B. This is provided for in Rule 33.03(3). Keep in mind that under Rule 33.04 "at least seven days notice" is required.

5. Preparation for Discovery: Outline of Questions

It is important pleadings be complete prior to discovery because under Rule 32.06(1) questions may only be asked "relating to an issue in the action". If pleadings are not complete, amendments should be made as soon as possible in order that all relevant issues are known.

If questions are asked relating to issues that are not clear from the pleadings, you may be faced with objection, and rightly so. It may then be necessary to adjourn the discovery until the pleadings are amended. This results in additional cost and delay. An alternative is to undertake to make the necessary amendments.

Assuming the pleadings are complete, they should be reviewed for the purpose of knowing the issues to which questions on discovery must be directed. This is important, not just from the point of view of questions you may wish to ask, but also for you to prepare your witness for questions that may be asked by the opposite party.

After having reviewed the pleadings, it is helpful to prepare a broad outline of questions of the subject matter you wish to cover. This should be done in an organized fashion so that the various subject matters follow in a sequence that enables you to build a background of information upon which to base questions for the next subject matter. Once a broad outline has been prepared, then it is necessary to direct your attention to the preparation of the actual questions. It is a good practice to divide such questions into general and specific.

General questions are essentially a further breakdown of the outline of questions you have already prepared. The extent of the generality will depend to a large part on your experience with the subject matter of the discovery and also the nature of the witness to be questioned. After you have done the same sort of discovery many times, there is little purpose in attempting to be overly specific as you will be able to question without the benefit of a precise outline. However, even after gaining experience in doing examinations, it is important to provide at least a good general outline, and absolutely essential to prepare specific questions on certain matters.

Specific questions should be written out in full in the words in which you wish to ask the questions. This is particularly important where you wish to obtain a precise answer because the answer goes to the essence of a legal issue or is important to your expert's evaluation.

In difficult cases involving technical matters, it is often advisable to consult with your clients and experts in preparing the questions you intend to ask. Your clients can often be very helpful by reason of the fact they know what has gone on and can suggest questions you might not otherwise think of yourself. Experts are often indispensable in assisting you to prepare questions, especially in a very technical field.

Often your expert will require additional information in order to prepare an opinion and can suggest questions for this purpose. If you are questioning another expert, then your expert can provide you with lists of questions to be asked, and even suggest the way in which the questions should be worded. This reflects back to the preparation of specific questions discussed earlier.

The manner in which you prepare your questions will depend to a large extent upon your individual work practices and the care you wish to take in doing the discovery. The best discoveries result from careful preparation.

That is not to say it is necessary to stick to an inflexible format as a good deal of flexibility is often required and always desirable. It is important the correct questions be asked, and that they be asked correctly, otherwise the discovery will not be a success.

6. Cross Reference Questions and Documents

In cases involving documents, it is important to cross reference the questions to the documents you intend to use. This can be done in one of two ways. Firstly, by reference to the number of the document used in the affidavit of documents or secondly, by giving the documents predetermined exhibit numbers in the order in which you intend to use them on the discovery.

Such a procedure is particularly important in cases involving large numbers of documents, otherwise you will become hopelessly confused and the transcript of the discovery will be equally confused and difficult to use at a later stage.

It is good practice to isolate the documents you intend to use. Make one set to be marked as exhibits on the discovery and to which the witness can be referred, and a separate working set for your own purpose. Nothing hampers the efficiency of a discovery more than to have insufficient copies of documents so that the ones available have to be passed back and forth amongst the various persons participating. Generally, the opposite party will have a set of documents so that there is no need to provide a separate set. In some cases, exhibit books are agreed upon and made up in advance of the discovery.

7. Preparing Your Witness for Discovery

Most witnesses on discovery will be going through the experience for the first time. Many have never been in a court, let alone given evidence. It is therefore important to explain the procedure, including the purpose of the discovery, who will be present, the location, the manner in which a discovery is conducted, and what is expected of the witness. Witnesses will often have concerns of their own, including such mundane things as whether they can smoke or what they should wear.

It is well worth taking the time to fully explain the procedure. The result will be a more relaxed witness. This will be beneficial in the end result, especially in the case of timid and uncertain witnesses who have never been exposed to formal questioning, let alone an environment that may appear intimidating.

Witnesses are not all of the same ability and intelligence. Some will require a great deal of preparation while others will not. Some witnesses are capable of fending for themselves while others will inadvertently fall into needless traps. Problems can be avoided, or at least minimized, by careful preparation.

It is important to make certain the witness understands the issues in the case. One way is to provide the witness with copies of the pleadings. Only after gaining an understanding of the issues can the relevance of evidence be properly understood. There is nothing wrong with thoroughly preparing a witness in order to provide guidance as to what evidence is necessary. A poorly prepared witness can be a disaster from your point of view, and can be a source of frustration for the other party. You will learn from experience there is nothing worse than trying to examine a witness who has not been properly prepared, does not understand the issues, and cannot therefore properly answer your questions.

It is never possible to anticipate all of the questions that may be asked by the opposite party. However, it is possible to give a general indication of what may be expected.

Very often the witness will ask if certain questions will be asked and, if so, how they should be answered.

There is nothing wrong with giving the witness guidance as to how to approach a question. In fact, it is the appropriate thing to do as long as there is no attempt to be dishonest or to otherwise prevent the disclosure of relevant facts.

Because of limited knowledge relevant to the issues, a witness may wonder why he has been selected. In such cases, it is good to contact the opposite solicitor and ask what areas of questioning he intends. Generally, the solicitor will cooperate as it is in his interest to question a witness who is prepared to answer questions. You can then pass the information on to the witness so that proper preparation is possible, particularly when it is necessary for the witness to become informed through other sources.

It is important for the witness to have a basic understanding of rules of evidence in order that appropriate answers may be given.

It should be explained to a witness that the obligation is to answer "to the best of his knowledge, information and belief" proper questions relating to the issues. It follows that evidence falling outside the general requirement of Rule 32.06(1) is neither relevant nor appropriate. An exception is a witness for a corporate party: Such a witness has a clear obligation to become informed with respect to all facts pertaining to the issues, and has an obligation to provide such information even though the witness has no first-hand knowledge or information, or any basis for belief in the accuracy of what he may be required to answer.

The witness should understand the part you play in discovery as a solicitor. You should explain to the witness the fact that undertakings may be requested and the manner in which responses should be made. Many witnesses are overly anxious to cooperate with the opposite party to the extent that undertakings which are impossible to fulfill may be given. You should also explain it may be necessary to object to certain questions and that this should be left to the solicitor. Sometimes witnesses simply do not wish to answer questions for one reason or another and will themselves raise objections. This can create an awkward situation, particularly if the question is proper and the witness is required to answer. In order to avoid such eventualities, it is best to have a clear understanding with the witness that you will voice objections if necessary, otherwise the witness will know that an answer must be given.

In cases involving large numbers of documents, or where the witness may not be familiar, it is important to provide an extra set for review. The witness can study the documents independently prior to the discovery and can make notes and cross reference if necessary.

If the witness is an expert, it is necessary to provide copies of other experts' reports relevant to the issues. These can be studied in advance of the discovery in the event that questions relating to them are asked. Not only does it serve this purpose, but also helps the expert understand the broader issues so that, in responding to questions, appropriate answers can be given.

8. Procedure on Oral Discovery

Rule 33.05 provides where two or more parties attend at the same time for the examination, the defendant shall examine first. In other words, the plaintiff is the first to be questioned. The parties can consent to a different order of examination and, also, the court has authority to order otherwise if there is some compelling reason. If the parties attend at different times for examination then, of course, the order of examination will depend upon who has agreed to attend first.

In a case involving more than two parties, then at least one party will be subjected to more than one examination even though Rule 32.05(a) provides there can only be one examination.

The party who examines first is to cover the common ground and whatever matters relate to the issues between the party examining and the party being examined.

Common ground refers to any material common to all parties in the action. Once the first party to examine has finished, then the other parties may cover any common ground not already covered and matters relating to the issues between the party examining and the party being examined.

In cases involving multiple parties, it is advisable for the solicitors to agree beforehand on the order of examination. This eliminates confusion and enables the parties to better plan what is required. Many factors influence the manner in which an examination will be conducted. It is preferable the party having the greatest number of issues in relation to the party being examined proceed first, and parties having fewer issues proceed last. In cases where the issues are balanced, it is frequent practice for the most senior solicitor to proceed first, although this is certainly not an unalterable rule.

Keep in mind Rule 31.05(2) which requires a party, without notice, to bring to the discovery documents listed in the affidavit of documents in order to be produced upon demand.

9. Marking Documents on Discovery

The general practice in New Brunswick is to mark documents referred to on an examination for discovery "for identification", notwithstanding that the document has been identified by the party being examined which, if done at trial, would qualify the document to be marked as an exhibit. Even in such cases, many lawyers will resist having the document marked as an exhibit if requested. There is no reason why such a practice should exist, except with respect to documents that cannot be proven through the witness and will require proof by another means.

Documents properly identified by the witness should be marked as exhibits and not "for identification". This does not mean a document marked as an exhibit on discovery will automatically be acceptable as an exhibit at trial. What it does mean is that if the portion of the examination for discovery in which the exhibit is referred is used at trial, then the exhibit will automatically accompany that part of the discovery evidence without further need to prove the document. This suggested procedure is clearly anticipated by Rules 33.08(4) and (5).

Rule 33.08(4) provides that anything which may be offered as an exhibit at trial shall be numbered by the Court Reporter or, in other words, given an exhibit number. The rule also provides for the manner in which the exhibit is to be held between discovery and the time of trial. Rule 33.08(5) provides that the parties may agree that anything be admitted at trial as an exhibit. This can take into account documents that cannot strictly be proven through the witness on discovery. In such a case the Court Reporter must record the agreement of the parties and, as in the case of other documents marked as exhibits, the document can then either accompany portions of the discovery used at trial or can stand by itself as a separate item of evidence.

There is little purpose in simply marking all documents "for identification" and having, at a later stage, to consent to their use at trial, or to prove them in the ordinary way. It is not only more efficient but, in cases involving large numbers of documents, much less confusing to have documents marked as exhibits during discovery with the idea of having the same numbers used at trial.

Finally, always have a purpose in marking a document at discovery. There is no purpose in marking documents which are not going to be referred to during the examination or do not require identification.

10. How to Question on Discovery

The best method of questioning is to follow the outline you will have prepared. A chronological sequence is preferable but not in all cases. Your outline may be broken into different subject matters or events. However, within the subject matter or event a chronological sequence should be followed. The reason this is important is to facilitate use of the discovery at trial. It is much better to have a block of evidence in the discovery transcript that follows in sequence than to be segmented throughout the discovery.

This only results in confusion and lack of continuity. Keep in mind the purpose of using discovery at trial, as part of your evidence, is to prove your case. If this is not done effectively, it is no different from presenting poorly organized and segmented evidence through a witness present in court. The result is not likely to be good.

When questioning with respect to documents, make certain the document is properly identified on the record.

This applies whether it is marked as an exhibit, for identification, or referred to without being marked. There is nothing more confusing than to try to understand a transcript of discovery which does not clearly identify the document being discussed.

Make certain the subject matter of your questioning is covered completely. It is easy to be sidetracked by a poor or evasive witness, or by objections from the other side. If the subject matter is not covered completely, then you will not have achieved the purpose of discovery which is to elicit as much information as possible relating to the issues in the case.

Sometimes it is not possible for the witness to answer a question. If so, the appropriate procedure is to request an undertaking. It is important the undertaking be clearly worded or explained. Be precise. If the request for the undertaking is not clear, or if the undertaking itself is in equivocal terms, then it may be impossible to enforce it at a later stage. Also, make certain the person giving the undertaking, either the witness or the opposite solicitor, does so in clear terms because frequently the transcript discloses the request for an undertaking but not the undertaking itself.

Sometimes questioning will result in reference to documents not already disclosed by the party. If this happens there is an obligation on that party under Rule 33.08(3) to produce the document for inspection. If the document is not available at the discovery, it is good practice to put the request for its production on the record in the event an application to court is necessary. Generally, an undertaking to produce the document will be given.

Frequently, especially on an examination on behalf of a corporation, a witness does not have knowledge of the subject matter. If this happens, the witness should be asked who has knowledge, and might even be requested to give an undertaking to provide the information you are seeking. It is good practice to place on the record the questions you wish answered or, at very least, a succinct outline of the subject matter. When a person examined on behalf of a corporation does not inform himself with respect to pertinent matters within the records of the corporation the examining party may move for leave under Rule 32.02 (2) to examine a further officer. (*Bank of Montreal v. Stephen et al.* (1987), 78 N.B.R. (2d) 360 (Q.B.); *Com-o-Forest Harvesting Ltd. v. Geo-Pla Consultants Ltd. et al.* (1992), 118 N.B.R. (2d) 252 (Q.B.))

It is important to cover all allegations made in the pleadings of the opposite party. This should be covered in your question outline. Reference to the paragraphs in the pleadings should be made and the witness should be referred specifically to them. For example, refer the witness to the allegation and ask what facts are relied upon in support. This is a good way to find out whether or not there is any substance to the allegation, and opens the door to an application to the court to have the allegation struck out under Rule 27.09, or for summary judgment under Rule 22.

11. Objections

If questions asked are not relevant to issues in the case, then you should object. Notwithstanding the scope of the new rules, an examination is not a "fishing expedition", and cannot be used as an inquiry to go far afield of what is relevant. Objections are covered by Rule 33.10. It is necessary, when objecting, to give the grounds which must be recorded by the Court Reporter.

This lays the foundation for an application for a ruling on the validity of the objection, the procedure for which is also set out in Rule 33.10. You should therefore make certain there is a reasonable basis before objection, and not for the purpose of obstructing the other party's examination.

If for any of the reasons set out in Rule 33.11, such as the right to examine being abused or conducted in bad faith, or in an unreasonable manner, then the discovery may be adjourned for the purpose of making an application to court for a ruling relating to the proper conduct involved.

Frequently, on an examination for discovery, a party will object to questions which are being asked. This can cause difficulty, especially if the ground rules or basis for such objections are not well understood.

You should note the provision in Rule 32.06(1) that a question asked on discovery shall not be objected to on the following grounds:

a) the information sought is evidence;
b) the question is cross-examination if it relates to an issue in the action and is not directed solely
c) to the credibility of the witness, or
the question is cross-examination on the affidavit of documents of the party being examined.

Historically, it was possible on an examination for discovery to object to questions because the answer would require the party to disclose the nature of evidence which might be used at trial. Such objections were well founded because a party had no obligation to disclose the nature of the evidence, but only the facts within the knowledge of the witness. Similarly, cross-examination was not permitted on discovery, and objections could be raised which hampered the ability to get at the information required.

In order to overcome these difficulties, paragraphs (a), (b) and (c) were included in the new rules. It was not the intention that a party would be required to disclose all of the evidence that might be intended to be used at trial, but rather to prevent objections that would block the possibility of obtaining disclosure of relevant facts relating to the issues in the action. Similarly, it was not intended that an examination for discovery be a cross-examination per se of a witness, but rather that questions in the nature of cross-examination would be allowed in order to effectively get at the facts relative to the issues in the action.

There was also a time when an affidavit of documents had to be taken at face value and it was not possible for a party to attack its accuracy or completeness. It is now possible, in the course of an examination for discovery, to ask questions that may tend to contradict an affidavit of documents.

This is generally for the purpose of inquiring whether additional documents may be available, or to obtain more detail as to the nature of the documents that have been listed but not made available for inspection.

If the party being examined refuses to answer a question, the examining solicitor must continue to put his questions on the record in order to apply to the court for a determination of their validity. The examining party may not adjourn the discovery and withdraw because of objections to his questions. (*Bank of Montreal v. Peter J. Donovan Ltd. et al.* (1983) 51 N.B.R. (2d) 208 (Q.B.))

12. Answers by Solicitor on Discovery

Rule 32.08 provides a solicitor may answer questions on discovery. This is something that should be exercised with a good deal of caution because of the fact that admissions made by a solicitor are binding on the party.

Before answering questions on discovery, the solicitor should make absolutely certain what he is saying is correct and, if in doubt, confirm with the party before answering. A solicitor should not answer if it is possible for the witness to do so. However, there are circumstances in which it is more appropriate for the solicitor to answer because of the nature of the question or the peculiar knowledge of the solicitor as a result of his involvement in the case. Often a question will require an answer that is a mixture of fact and law, or may relate to the scope or interpretation of the pleadings. Such questions are more appropriately answered by the solicitor.

13. Undertakings

If a question cannot be answered on discovery, the witness may be asked to undertake to provide the answer at a later date. Undertakings should always be carefully considered before a commitment is given. Make certain the request relates to something which is relevant and necessary, but above all, make certain the undertaking is one within the means of the party to fulfill.

It is advisable to discuss with the witness prior to discovery the nature and purpose of an undertaking so that the witness will not inadvertently, in an attempt to be cooperative, agree to give an undertaking which either may not be required or may be impossible to fulfill.

It is appropriate for a witness to give a commitment to provide information pertaining to facts within his control, but it is not appropriate for a witness to give an undertaking that may be legal in nature. Such is better given by the solicitor on behalf of the party. If it is not suitable to give an undertaking, then it should be refused.

14. Re-examination by Own Counsel

Rule 33.09 covers the right of the party being examined to be re-examined by his own counsel at the conclusion of the examination. This is a provision which is not often used, but which can serve an extremely useful purpose.

It is important all relevant facts are disclosed on discovery. Sometimes this does not happen because of the lack of experience or care taken by the solicitor examining your witness. The result is the examination concludes without the relevant facts being covered. It is therefore important for you to re-examine your witness in order to bring out the facts not covered, or to clarify or otherwise complete the picture left uncompleted by the other solicitor.

If this is not done, the other side will be left with a complete lack of understanding or misapprehension of the facts, and not recognize the strength in your case. This can work a serious disadvantage, and may impede any possibility of settlement.

Finally, at the end of the examination, if there have been undertakings, or for other reasons the examination cannot be concluded, you should request an adjournment and obtain the other side's consent, all of which should appear on the record.

15. Procedure on Written Examination for Discovery

Written examinations for discovery are covered by Rule 34. Rule 32.04(1) provides that you cannot have both oral and written discovery without leave of the court or consent of the parties.

Written examinations for discovery can be extremely useful in the following circumstances:

Technical matters. In cases involving technical matters of some complexity, it is useful to use written discovery. This is done by having your expert prepare questions to be submitted to the opposite party. The opposite party can then give careful consideration to the questions and formulate answers which will be helpful in formulating your position. Often technical matters of complexity require research, and even calculations, before being answered and are not appropriate for oral discovery.

Disabled persons. Persons in this category can be mentally incompetent or, for other reasons, cannot be questioned on an oral discovery. It is therefore expedient to provide the opposite party with a list of questions to be answered pursuant to Rule 34.

Persons out of the jurisdiction. It is sometimes inconvenient or expensive to arrange for an oral discovery of person living outside New Brunswick. In such cases, the most expedient means of obtaining discovery is by written questions.

16. Questions and Answers on Written Examination for Discovery

Written questions should be sufficiently broad to cover the information you wish to acquire. This can take a lot of time and patience, but the end result may be well worth the effort. Under Rule 34.02 answers are to be given by affidavit so that the result is the same as with respect to oral discovery.

If answers are unsatisfactory, a further list of questions may be submitted pursuant to Rule 34.04. Ultimately, the court has the jurisdiction to make an order if answers are evasive, unresponsive, or otherwise unsatisfactory.

There is no reason why, in an appropriate case, a combination of both oral and written examination cannot be held. It is a practice to be encouraged and may save time and expense.

17. Use of Examination for Discovery at Trial

The use of examination for discovery at trial is governed by Rule 32.11. Reference should also be made to Rule 33.16 which covers the method of introducing discovery evidence.

Discovery evidence is used at trial for two purposes. Firstly, as evidence on behalf of the party using it and secondly, for the purpose of cross-examination. Each is covered separately below.

18. Use of Discovery as Evidence

Rule 32.11(1) provides a party may use in evidence all or any part of the discovery of an adverse party. The rule is qualified by requiring that the evidence must be "otherwise admissible". What this means is simply that you cannot use discovery evidence unless it complies with the rules of evidence to the same extent as any other form of evidence at trial.

A party may therefore object to the admission of discovery evidence on the same basis as one would object to the introduction of any other form of evidence.

Rule 32.11(1) refers to the use of the examination for discovery "of an adverse party". This is not restricted to the actual party but, by reason of Rule 32.11(2), may include the discovery of a person examined on behalf of, in place of, or in addition to a party, but, by reason of Rule 32.10(5), does not include a person examined under Rule 32.10.

Because of Rule 32.11(2) it is extremely important when examining a person, other than the party, or a person on behalf of a corporate party, to make certain the capacity in which the person is examined appears on the record. It commonly happens parties will agree to the examination for discovery of an employee of a corporation but will not agree that the person is authorized to give evidence binding on the corporation. Therefore, if you do not wish to risk the possibility of the discovery evidence being used, make certain to clarify the capacity in which the person is called.

If the party using discovery evidence at trial refers only to parts which, if taken alone, are inaccurate or misrepresent the evidence of that witness, then you can take advantage of Rule 32.11(4) and request additional discovery evidence be introduced to explain or qualify that already introduced.

It has been commonly the view that a party adopting discovery evidence as part of the case cannot contradict it by other evidence.

This has now been clarified by Rule 32.11(5) which specifically provides that a party introducing discovery evidence "may rebut that evidence by introducing other admissible evidence". This is a device that can be used very effectively, especially where the opposite party has taken a dishonest or inconsistent position on discovery which can easily be shown to be wrong by other credible and admissible evidence.

19. Use of Discovery for Cross-Examination

The starting point for this procedure is Rule 32.11(3) which provides evidence taken on discovery may be used at trial to contradict a witness. The most important part of this Rule is the requirement that the discovery may only be used "as any previous inconsistent statement" by the witness.

This is something that is not well understood by many lawyers.

The use of a prior inconsistent statement is governed by Section 18 of the *Evidence Act*. The procedure required by that section must be followed.

Generally, this procedure is:

a) The witness must have made a statement in his evidence at trial that is inconsistent with that stated in the discovery.

b) The witness must then be asked if he recalls having been examined for discovery. It is good practice to give the time and location and even the name of the person who conducted the discovery.

c) If the witness acknowledges the circumstances in paragraph 2, then that part of the discovery which is inconsistent with the evidence given at trial must be read to the witness. This will include both question and answer.

d) The witness should then be asked whether or not he made such a statement, that is, the answer to the question.

It is not proper practice, as some lawyers do, to simply ask a witness about what he stated on discovery - such as "on discovery, you stated such and such" without the witness having given any evidence that would be considered inconsistent with the discovery. This is a means of getting in discovery evidence through the back door which is quite improper.

Finally, it should be emphasized the evidence given on an examination for discovery can only be used to cross-examine the same witness. A statement (examination for discovery) by one witness cannot be an inconsistent statement by another; nor can the discovery be used to refresh the memory of a witness.

THE LAW SOCIETY OF NEW BRUNSWICK

Motions

Chapter 9

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Motions

1. Definition of a Motion

Generally speaking, a motion is a mechanism by which a party to a dispute seeks relief collateral to the primary issue or issues separating the parties. Quite often a motion is in the nature of a prayer for relief, direction on a procedural matter within the discretion of the court, or perhaps for clarification of some issue or obligation that is not clearly defined by the pleadings or agreed as between the parties.

2. When to Present a Motion

Having generally defined what a motion is, why then would a particular motion be presented? Aside from the primary dispute between the parties, the adversary system, by its very nature, precipitates substantive, strategic and tactical differences that are peripheral to the main issue. For example:

- one party may wish to have all other parties strictly comply with the rules and time periods prescribed. This may not necessarily be in the interest of the adversary;
- one party may wish further or other parties to be involved in the substantive dispute for purposes of cross-claims or third or fourth party claims. This may not be in the interest of his adversary who has no issue with such other potential parties;
- the pleadings may be irregular or substantively defective and one party may wish to clarify or cure the irregularity or defect, again in the absence of consent from one or other of the parties to the action;
- the discovery process may be proceeding in a fashion that one party considers inappropriate - too rapidly, too slowly, too extensively, too casually, etc.

The Rules of Court provide the parameters in which the litigation is to be conducted and, provide in and of itself, an area for dispute which may be subject to resolution only on motion. Quite often, the practitioner is called upon to make a judgment call as to whether or not an issue is of such significance that it justifies a motion and one should be well advised to consider the objective in presenting the motion, the actual costs in presenting the motion, the impact or result if the motion or relief is denied, the cost consequences and the overall effect on the court of the litigation on its merits.

It is impossible to provide realistic guidelines for when a motion should be made. It is only the cumulative effect of practice in, and before the courts, that enables the practitioner to judge when a motion is essential, when the presentation of a motion is of marginal utility and when a motion is of a frivolous nature. One must also be cognizant that it is equally incumbent upon a party who has received a Notice of Motion from his adversary to examine whether or not the matter should be resolved by consent or whether the motion is of such a nature that it should be opposed.

3. Jurisdiction of Court to Hear Motion

Motions are generally brought in the judicial district in which the proceeding has been commenced or in which it will be commenced. Pursuant to Rule 37.02, a motion may also be brought in the judicial district where the solicitor of record for a party has given an address for service.

However, some judges have indicated a reluctance to entertain motions in a district other than the district in which the proceeding has been commenced.

4. Date for a Motion

It is important to realize the procedure of obtaining a date for a motion may vary slightly from judicial district to judicial district. For example, in some judicial districts, a judge will review the Notice of Motion, the substance of it, the relief sought and the affidavit in support prior to granting a date for the hearing of the motion.

In other judicial districts, a date for the hearing of the motion can be obtained by a telephone call to the office of the Clerk of the court with an indication of the approximate time required for presentation, including time for the adversaries to argue the converse.

In the latter case, the judge will not know the nature of the motion to be heard until the Record on Motion is filed 48 hours before the actual hearing. In the former case, a judge will have an opportunity to consider the nature of the motion and the type of evidence to be presented to him and, in some cases, if the motion and affidavit are totally inadequate, may refuse to grant a date or give a strong indication as to his thinking of the merits of the particular motion.

5. Presentation of a Motion

Generally speaking, a motion can be brought at any time; either before initiation of proceedings or during the course of the substantive proceeding up to and including the trial of the matter (see Rule 37.01). Rule 37 of the Rules of Court clearly outlines the procedural steps to be followed.

6. Evidence in Support

It may be trite, but worth repeating, that the court, on consideration of a motion, wants to be persuaded:

a) that it has jurisdiction to grant the relief sought; and
b) it has before it evidence upon which to grant relief.

In order to satisfy these prerequisites, counsel must state precisely the order sought, state grounds to be argued including any statutory provision or rules to be relied upon and list any documentary evidence to be used at the hearing of the motion (see Rule 37.03). Further, counsel must tender an affidavit(s) of a witness or party with knowledge of the facts in support of their client's entitlement to the relief sought. (*Conseil de la magistrature (N.-B.) v. Moreau-Bérubé* (1999), 217 N.B.R. (2d) 230 (C.A.))

7. Weaknesses

It is insufficient for counsel to appear with some vague Notice of Motion seeking unspecified or nebulous relief or seeking general "help" from the court. Courts have been critical of catch-all phrasing such as "such further relief as the courts deem just". Reliance on such phrases should not be used to compensate for deficiencies in the pleadings. (*H.C. v. New Brunswick (Minister of Family and Community Services)* (2003), 263 N.B.R. (2d) 106 (Q.B., Fam. Div.))

8. Affidavit(s) in Support

Some counsel have appeared on motions under the mistaken impression that they can explain the circumstances of the issue to the court and obtain some direction or a desired result without evidence or with evidence of a questionable relevance. It is improper, if not foolhardy and naive, to attempt to argue without an affidavit that provides the evidence upon which a court may exercise its discretion or consider the merits of the motion.

It is also prudent to restrict the affidavit in support of the motion to the circumstances relevant to the issue as, in any case, irrelevant assertions are counterproductive and reflect poorly on the party or his counsel seeking to persuade the court to exercise its discretion.

A practitioner or counsel in a proceeding is not, and should not be, a witness; their knowledge, understanding or belief as to the circumstances in dispute is insufficient and irrelevant in respect to the evidence which must be considered by the court. It is not relevant in support of any motion that the lawyer "believes" or "knows". There may be some cases in which the knowledge of the lawyer involved is the only evidence available and is, therefore, the evidence tendered in support by way of affidavit.

If this course is followed, the counsel must still prepare an affidavit, swear it and, if required by the adversary, submit to cross-examination on his affidavit.

There is no doubt that the best practice is for the affidavits in support of motions to be the affidavits of the parties or witness other than the solicitor who will be arguing the merits of the motion. (*Savard Inc. v. Stone Container (Canada) Inc. et al.* (1997), 192 N.B.R. (2d) 347 (C.A.))

When presenting a motion under a particular rule, it is good practice to review the case law on that rule in order to ascertain what information must be included in the affidavit in support of the motion.

With respect to the sufficiency of affidavits, the following cases should be reviewed: *McDowell, Administrator v. Green et al* (1924), 52 N.B.R. 114 (C.A.); *Pinette v. Provincial Bank of Canada* (1958), 41 M.P.R. 178 (C.A.); *Attorney General of Canada v. Maillet* (1984), 54 N.B.R. (2d) 411 (Q.B.); *MacFarlane v. Briggs* (1976), 15 N.B.R. (2d) 153 (Q.B.); *Montreal Trust Co. of Canada v. Occo. Developments Ltd.*, [1997] N.B.J. No. 342 (C.A.); *Roberts v. Legere* (1996), 173 N.B.R. (2d) 1 (Q.B.); *Shareline Systems v. New Brunswick et al.* (2001), 235 N.B.R. (2d) 162 (C.A.); *Levesque et al. v. Borrel et al*. (1997), 190 N.B.R. (2d) 344 (Q.B.); *Charlebois v. Nouveau-Brunswick et al.* (2002), 252 N.B.R. (2d) 335 (Q.B.).

9. Organization of Motion

The relief sought must be clearly defined and precisely stated. The affidavit should be relevant in support of the position to be advanced. Pursuant to Rule 37.05, a Record must be filed with the Clerk at least 48 hours before the hearing of the motion.

The Record should provide the judge with documents supporting the motion, including a copy of the Notice of Motion, copies of all affidavits, and proof of compliance with Rule 37.04 (service requirements).

The adversary is entitled to ten days' notice as to the Notice of Motion and the affidavits should be tendered in full and candid disclosure of the argument should be made.

10. Power of the Court

The court is going to resolve the issue after all parties affected have had an opportunity to address the issue and, if necessary, the court will grant significant adjournments to enable responses that are not clearly disclosed by the documents in advance of the motion. Surprises are not appreciated by the court, nor by the adversary.

Similarly, improperly prepared motions and affidavits in support reflect poorly on the counsel who has been less than candid with the court or his adversary and ultimately cause delay and further expense quite often borne by the party who has been guilty of the imprecision.

Motions generally are resolved on affidavits in support or affidavits in opposition and *viva voce* evidence is generally inappropriate. This reinforces the proposition that the evidence contained in the affidavits must be precise, clear and sufficiently cogent to stand on their own and justify the relief sought.

THE LAW SOCIETY OF NEW BRUNSWICK

Preparation for trial

Chapter 10

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Preparation for trial

1. Rules

Rules 45, 46, 47, 49, 50, 51, 52 and 53 should all be considered during the early stages of preparation for trial. These Rules will be dealt with in some detail in the course of this paper.

2. Steps Prior to Setting Action Down for Trial

Before setting an action down for trial, you should consider the following:

- pleadings are updated or consolidated
- discovery is complete and transcript is available
- undertakings given on discovery are complete
- your witnesses will be available
- whether a jury is necessary or advisable (Rule 46)
- if it is necessary to take evidence prior to trial (Rule 53)
- request to admit facts necessary (Rule 51)
- request to admit documents necessary (Rule 31.10)
- service of experts reports (Rule 52)
- you are or will be ready to proceed by the anticipated trial date

Rule 45.01 provides a trial is to be held in the judicial district where it was commenced. The court can order otherwise under Rule 45.02 if it is more convenient to have it elsewhere or is in the interest of justice. (*Potash Company of America v. Kilborn Limited et al.* (1985), 60 N.B.R. (2d) 227 (Q.B.); *Steiling v. Tantemar Planning District Commission* (1990), 122 N.B.R. (2d) 267 (C.A.))

3. Additional Considerations in Complicated Cases

On occasion, cases are complicated from the point of view of the large number of witnesses required, the availability of witness which may have to travel from outside New Brunswick, the length of the case, and the number of lawyers participating. All of these factors can contribute to the need to make special arrangements.

If a trial is of considerable duration, it may not be possible to schedule it for one of the courtrooms used regularly. Special arrangements may have to be made both as to the place and the location.

It may also be necessary to have a judge assigned to the case who can devote the necessary time without disruption of regular schedules.

The best way to handle such a situation is to confer with the other lawyers in an attempt to agree on a place and location, duration of the trial, and any other factors that may influence how it is to be handled.

Having done this, it is appropriate to approach the Chief Justice of the Trial Division to advise him of the special circumstances so that consideration can be given to assigning a judge. If such arrangements cannot be made on consent of the parties, then it may be necessary to make an application under Rule 45.02 so the court can consider what should be done.

Once a judge has been assigned to a complicated matter, a pre-trial conference is generally held, not only for the purpose of working out some of the practical considerations, but also to deal with matters of substance relating to the case.

4. Setting Action Down for Trial

Rule 47 must be followed in setting an action down for trial. The Rule is largely self-explanatory, but there are certain aspects that justify emphasis.

Under Rule 46.01(2), there is a list of actions which must be tried by a jury, provided a jury notice in Form 46A is served not less than 14 days before the Motions Day at which the action is to be set down for trial. Causes of action not listed in that rule may also be tried by a jury if they can be brought within Rule 46.01(1), in that they are more fit for trial by a jury than by a judge.

It is not common to have jury trials in New Brunswick in civil actions, with the exception of those involving libel and slander. The scope of Rule 46.01(1) is not fully known. In *Justason v. Canada Trust* (1986), 76 N.B.R. (2d) 20 (Q.B.), the court denied a plaintiff trial by judge and jury for unlawful dismissal when the action included a claim for general damages for mental distress, loss of reputation and for libel. However, the court allowed the amendment of pleadings and an order for separate trials for the libel and unlawful dismissal actions.

5. Severability of Trials

Rule 47.03 provides the court may order different issues in an action be tried at different times. Such an order may be made either before or after an action is set down for trial. It is common practice, and generally advisable, to do so before.

The most common use of Rule 47.03 is to try liability separate from damages. This is especially useful where liability hinges on fairly narrow grounds and a determination will avoid the much greater cost of going through trial on the issue of damages. Notwithstanding that this approach may often appear at the outset to save expense and time, there is nothing to prevent an appeal from the preliminary issue which is tried. This, of course, will delay matters and result in additional cost.

In *Belmont Hotel Ltd. et al v. Atlantic Speedy Propane Ltd. et al.* (1982), 41 N.B.R. (2d) 403 (Q.B.) and *Bonnyman v. Goodwin et al.* (1987), 77 N.B.R. (2d) 361 (Q.B.), it was held the severance of the issue of liability and quantum will not be ordered unless there are special circumstances.

In Jeux Maritimes Inc. v. Commission des lotteries du Nouveau-Brunswick *(1995), 150 N.B.R. (2d) 46 (Q.B.), the Court held that there are ten criteria which should be considered before a separate trial is ordered:*

- **a)** there are valid and compassionate reasons (which cannot be invoked by corporations) warranting separate trials;
- **b)** no adverse party will be harassed or inconvenienced by separate trials;
- **c)** separate trials will probably put an end to the action;
- **d)** severance of the issues will ensure a real saving of resources and is not likely to increase the time required for all of the issues to be disposed;
- **e)** severance of these issues will simplify the matters to be disposed of;
- **f)** the case is extraordinary and exceptional (the mere fact that the issue of damages is complicated is not sufficient);
- **g)** the issues to be tried are simple;
- **h)** the issues to be tried separately are not interwoven;
- **i)** the credibility of witnesses who could be called at trial is not at issue (courts will refuse to grant separate trials if the action is based on oral statements);
- **j)** the order is requested by the plaintiff and the defendant does not object.

Rule 47.03(3) is a unique provision providing that once liability is established, and before damages are assessed, the court may direct advance payments of special damages. This is not a frequently used rule but is one which should be used in appropriate circumstances.

6. Certificate of Readiness

A Certificate of Readiness is in Form 47B. It is in fact a certificate and the solicitor signing must take care in assuring its accuracy. This is often not the case.

A Certificate of Readiness, in the form in which it is prescribed, states the action is ready to proceed to trial. If you wait until the action is actually ready before signing the certificate, delays can result. For example, the action may be ready for trial with the exception that certain preliminary matters have not been concluded, but will be ready well in advance of any date the court will assign for trial. To wait until these preliminaries are complete may mean missing one or two more Motion Days, thereby delaying the trial by several months. In order to avoid such delays, you can complete a Certificate of Readiness with the qualification that all pre-trial procedures are completed with certain exceptions, but that these will be complete in advance of any date fixed for trial.

It is not safe to follow the suggested procedure unless you are satisfied the exceptions can be completed before trial. You should also have the concurrence of the opposite parties. The courts are generally understanding of the problems which develop from time to time and will set the action down for trial as long as there is a reasonable assurance it will proceed on the date set and will not disrupt the court schedule.

If you think the action may be set down for trial before it is possible to complete all of the preliminaries, then it is advisable to attend on Motions Day to assist the court in establishing a date which will be far enough away to make certain all preliminaries are concluded.

7. Trial Record

Rule 47.06 sets out the contents of the trial record. Do not include pleadings or other documents which are not relevant to the trial such as answers to undertakings, pre-trial briefs, or anything that is evidence such as documents marked on discovery. Such documents have no place in a trial record and can be prejudicial to the opposite party.

8. Date for Trial

When you receive the Motions Day list provided by the Clerk under Rule 47.07(1), you should immediately consult with your client and witnesses to make certain the suggested date is acceptable. If so, you should immediately confirm the date by letter with your client and witnesses.

If the date is not acceptable, you are required to comply with Rule 47.08, otherwise the date will be confirmed by the court on Motions Day.

9. Steps to be Taken After Action is Set Down for Trial

After the action has been set down for trial, you should do the following, if necessary:

- confirm place, date and time with client and witnesses by letter
- summons witnesses (Rule 55.03)
- prepare pre-trial brief
- inform Clerk of need for interpreter 4 clear days before trial [Rule 47.11(1)]
- offer to settle at any time prior to commencement of trial (Rule 49.03)
- request to admit facts (Rule 51)

- request to admit documents (Rule 31.10)
- notices pursuant to Evidence Act
- in event of settlement, inform Clerk (Rule 47.12)

10. Pre-Trial Brief

Rule 47.11(1) set out what a pre-trial brief must contain. You must pay attention to the required contents. Do not include documents which are evidence. This is specifically prohibited under Rule 47.11(3). The only exception is where the parties have consented to the admission of the documents in evidence. For example, if the issues relate to the interpretation of a contract, it may be included on consent.

The purpose of a pre-trial brief is to enable the court to understand in advance of trial the basic issues and arguments of the parties. In most cases, it is not necessary to go into a lot of detail, and the court does not wish to be burdened in this regard.

The pre-trial brief must include a succinct outline of the facts intended to be established. In some cases, the pleadings contain a sufficient outline of the facts and there is little purpose of repeating them in the pre-trial brief as the court will read the pleadings contained in the trial record. It is sufficient to state in the pre-trial brief the facts intended to be established are as outlined in the pleadings. You may wish to refer to certain exceptions or refer to additional facts that may be relevant. In the event there is an agreed statement of facts, it is usually contained in the trial record and can be referred to in the pre-trial brief.

The requirement of a concise statement of the principles of law, and a citation of relevant authorities in a pre-trial brief does not require an exhaustive treatise unless there is a novel issue which does not usually come before the court. There is simply no purpose in belabouring the points involved as it requires much time and cost, and may be of little assistance to the court in any event. It must be presumed that the court has a working knowledge of the issues and, in most cases it is safe to assume the court has heard the same issues on many occasions.

In the average case, it is sufficient to simply refer to the issue and cite one or two leading authorities. This is generally all the assistance or guidance the court will require or, indeed, will want. If, during the course of a trial, unanticipated issues arise, or the court requests additional argument, such can be done in post-trial briefs.

The point to always bear in mind is not to burden the court with unnecessary detail, but simply to effectively and succinctly communicate the position you intend to make.

No particular form is required for a pre-trial brief. I would suggest, however, that it follow the general format of a submission to the Court of Appeal.

The paragraphs should be numbered, not only for the purpose of making ready reference during argument, but to break the material into self-contained segments that are easy to follow. You should avoid long rambling narrative as this is generally difficult to read and often lacks direction.
A pre-trial brief can be coiled or bound and has a table of contents. It is sometimes useful to include photocopies of authorities for ready reference by the court. On occasion, in a simply straight-forward case, it is adequate to provide the court with a letter simply setting out the salient points involved.

11. Pre-Trial Conference

Pre-trial conferences are covered by Rule 50. Rule 50.01(1) sets out in detail the things that may be considered by the court. The Rule also provides a pre-trial conference may be called by a party or by the court.

Although Rule 50.01(1) provides a pre-trial conference may be held when the proceeding is ready for trial, it is not uncommon in complicated cases to hold a conference at an earlier stage, particularly if directions as to procedure are required.

Generally, if the court calls a pre-trial conference the judge will give some indication of what is to be discussed. If the conference is called by one of the parties, it is good practice to provide the court and the other parties with an outline of what is to be considered. This is no formal requirement for this and no form is provided. It is sufficient if it is done by letter.

At the conclusion of a pre-trial conference, you should prepare a memorandum setting out the results of the conference or, if an order is necessary as a result of directions given by the court, such should be prepared. This is provided for in Rule 50.02.

By reason of Rule 50.03, the judge conducting the pre-trial conference cannot discuss settlement, compromise of liability or damages, without risk of being disqualified. Such issues should therefore be avoided and the conference restricted to dealing with the procedural aspects outlined in Rule 50.01(1).

The practical effect of a pre-trial conference, particularly in a complicated case involving large numbers of witnesses and documents, cannot be over emphasized. It may be possible to reach agreement on large numbers of documents and have them marked as exhibits in advance of trial. It may also be possible to eliminate irrelevant issues and restrict the case to those that are left in issue. Scheduling of witnesses can also be an important consideration, particularly where there are large numbers of expert witnesses that have to travel a considerable distance and are subject to restricted schedules.

Finally, it should be kept in mind Rule 50.06 provides for a conference during the course of a trial as long as there is no discussion of settlement or compromise.

12. Settlement Conferences

Pursuant to Rule 50.07 of the Rules of Court, the Court may, at any time, at the request of a party or on its own motion, direct the solicitors for the parties, any party and any other person, to appear before a judge for a settlement conference at a time and place set by the Clerk of the Court.

The purpose of a settlement conference is to "allow the parties, under the direction of a judge, to discuss the possibilities of settlement" (Rule 50.08).

Judges are present during settlement conferences in order to facilitate the settlement process, and can often encourage parties to settle with an unofficial assessment of the merits of different aspects of the case. However, the judge who presides over a settlement conference cannot preside over the trial of the same action (Rule 50.14).

At a settlement conference, a judge is empowered to do one or more of the following:

- **a)** conduct the settlement conference in any manner the judge deems fair;
- **b)** ask questions of parties, solicitors or other persons in attendance;
- **c)** discuss settlement of the dispute;
- **d)** make a payment order or other appropriate order in the terms consented to on the face of the order by the parties;
- **e)** adjourn the settlement conference;
- **f)** consider the matters referred to in Rule 50.01(1); and
- **g)** direct that expert witnesses meet, on a without prejudice basis, to determine those matters on which they agree and to identify those matters on which they do not agree.

Settlement conferences are confidential. Pursuant to Rule 50.10(1), a judge conducting a settlement conference is prohibited from disclosing to the trial judge or to any other person what positions were taken or what admissions or concessions were made at the settlement conference.

Pursuant to Rule 50.10(3), all discussions, statements or representations made at or in preparation for a settlement conference and any record thereof are "without prejudice" and "privileged and confidential" and may not be used or referred to in a subsequent proceeding. Pursuant to Rule 50.11, a judge conducting a settlement conference is not a compellable or competent witness in any proceeding and is immune from legal action.

Legal briefs are used in settlement conferences much in the same way as pre-trial conference briefs. Unless otherwise directed, a party must, at least 4 days before the date of the settlement conference, file such a brief with the Clerk, including copies thereof for the opposite party (Rule 50.12). Rule 50 also sets out the content of a settlement conference brief.

Pursuant to Rule 50.12, a settlement conference brief must include:

a) a concise summary of the facts;
b) a concise statement of the issues in the proceeding;
c) a concise statement of the law to be relied upon by the party;
d) a concise summary of the agreed upon facts and admissions;
e) a list of witnesses and a summary of the evidence of each witness; and
f) the relevant portions only of transcripts, experts' reports and other evidence that may be adduced at the trial or hearing.

Pursuant to Rule 50.13, solicitors who attend a settlement conference must be, among other things, prepared to discuss and deal with all matters and issues properly arising during the settlement conference (Rule 50.13). If a settlement conference cannot be conducted properly because a party is not prepared, there can be cost consequences. In particular, a judge may order that the party pay the reasonable expenses of the other party or parties (Rule 50.15).

13. Informal Preparation for Trial

Once all of the formal requirements leading to trial have been completed, it is necessary for you to prepare for the presentation of your evidence and arguments. I suggest the following:

- review and outline all evidence necessary to establish or refute issues
- select all documents to be used as exhibits
- organize in order in which to be introduced
- establish agreement with other solicitor if possible
- prepare separate copies for your witnesses
- prepare separate copies for your use - "working set"
- in appropriate cases, have separate set of copies for use of the court
- give special consideration for documents which are difficult to copy or reproduce
- review transcripts of discovery evidence
- review your pre-trial brief and that of other parties and prepare rebuttal argument
- if necessary, prepare copies of decisions for the court
- prepare questions for your witnesses
- prepare cross-examination of opposing witness
- interview each witness in preparation for giving evidence
- explain procedure including time and place of trial

- review in detail evidence to be given
- review documents to be referred to in evidence and provide copies
- if witness gave evidence on discovery, give copy of transcript to review.

After completing the above steps you should be ready for trial. Good luck!

Trial procedure

Chapter 11

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Trial procedure

1. Rule

Rule 54 sets out general provisions relating to the procedure to be followed at trial. This rule is not intended to be exhaustive, but rather to deal with the basic mechanics relating to presentation of evidence and the means by which the court can obtain assistance as, for example, through the use of court experts. Trial procedure in the broader sense can only be obtained from experience and by reading textbooks and papers on the subject. This is something anyone intending to practice litigation should do.

2. Attendance at Trial

It goes without saying if you wish to proceed with the trial you must attend on the date set in order to present your evidence and argument. If, for some reason, a party fails to attend, the judge may proceed in that party's absence. Rule 54.01 sets out what the judge may do in such circumstances. Essentially, the judge may dismiss the claim or counterclaim of the party not attending and proceed to deal with the issues presented by the party in attendance. If neither party attends, then both claims and counterclaims may be dismissed.

Rule 54.01(3) provides a judgment obtained against a party who does not attend may be set aside. To succeed on such application it is necessary to explain to the judge's satisfaction the reason for the failure to attend. If failure to attend was the fault of the party applying to set the action aside, that party must also satisfy the court there is a triable issue.

3. Attendance of Witnesses

The attendance of witnesses is governed by Rules 55.03, 55.04 and 55.05.

Rule 55.03 concerns compelling the attendance of a witness at trial. Needless to say, this rule is not to be applied in the case of a willing and cooperative witness. The attendance of a witness is compelled by serving a Summons to Witness which may require the witness to produce at trial everything in his possession, custody or control relating to matters in question.

A Summons to Witness is in Form 55A. Upon request, the Office of the Clerk for a particular judicial district will supply a Form 55A which is signed and sealed but otherwise blank. It is to be completed by the party serving the Summons and then served personally on the witness, together with the appropriate attendance money prescribed in Tariff "D" of Rule 59.

A Summons to Witness has effect until the conclusion of the trial for which it was served. If a witness fails to attend, the trial judge may issue a warrant causing the witness to be apprehended and brought before the court. Reference should be had to the rule for full detail of the procedures.

It should be noted that there is a separate procedure provided by Rule 55.04 to compel the attendance of a witness in custody. In such case an order to produce a witness in custody in Form 55C must be obtained and served on the Sheriff, jailer or other officer having custody of the person.

4. Setting Aside Summons to Witness

It sometimes happens a witness may not want to attend trial because he can give no relevant evidence or because to attend would create hardship. Rule 55.06 covers such eventualities and provides a witness may apply to the court to have the Summons to Witness or Notice to attend set aside or varied. The rule is rarely utilized as there would be no purpose in requiring the attendance of a witness unless to give relevant evidence.

If the reason not to attend is because of hardship, the court has the discretion to require the evidence to be taken by other means (e.g. by affidavit under Rule 55.02 or by evidence taken prior to trial under Rule 53).

5. Adjournment

Under Rule 54.02 the court may postpone or adjourn a trial "upon such terms as may be just". Very often one of the terms may be that the party requesting the adjournment pay the costs of the other party. Such costs are commonly referred to as "costs thrown away" as they relate to work the party would have done or incurred in preparation for trial and may now be required to do over again. Such costs will normally cover those that will have to be duplicated as a result of the adjournment, including expenses for witnesses. However, as with all costs, such are within the discretion of the trial judge.

6. Order of Presentation

Rule 54.07 sets out the order of presentation of evidence and should be reviewed. The plaintiff proceeds first to call evidence, and at the conclusion of the plaintiff's case the defendant will present evidence. At the conclusion of the defendant's case, a plaintiff may call further evidence in reply. This does not mean the plaintiff may reopen his case, but allows the plaintiff the opportunity to address issues which arose during the evidence of the defence and which the plaintiff could not have addressed in direct evidence. The traditional rules of evidence largely govern what evidence may be called in reply. Once all of the evidence has been called, the plaintiff may make his closing address, followed by that of the defendant and rebuttal by the plaintiff if necessary.

In certain circumstances the initial burden of proof is on the defendant. If so, the defendant must proceed first to call evidence. This is provided for by Rule 54.07(2). In the case of two or more defendants, the trial judge will direct the order of presentation. This is provided for by Rule 54.07(3).

7. Exhibits

The marking of exhibits is governed by Rule 54.04. Exhibits are numbered consecutively in the order in which they are introduced as evidence at trial. Following trial they are retained by the Clerk until released on consent of the parties or after the disposal of appeals. For full detail in this regard you should have reference to the Rules.

If the parties can consent, it is useful to identify and mark exhibits in advance of trial. This can be done by simple agreement or during the course of a pre-trial conference when the exhibits can be actually marked as such by the court reporter.

It is advisable to have sufficient copies of exhibits so that, in addition to the copies officially marked, there are copies for the witness and any other parties participating in the trial. Frequently it is necessary for the witness to refer to the original exhibit, in which case a duplicate copy should be available for the trial judge in order that he may follow the evidence.

8. Evidence at Trial

The common law rules of evidence and the provisions of the *Evidence Act* are supplemented by Rule 55 which essentially provides for the presentation of evidence and provides for certain controls. For example, Rule 55.01(1) provides that witnesses may be orally examined, etc.

It is not the purpose of this paper to discuss more than the Rules. A general knowledge of the common law rules of evidence and the *Evidence Act* is required in order to properly participate in a trial.

Rule 55.01 provides for the following procedures in calling evidence:

a) Witnesses may be examined, cross-examined and re-examined under oath. As you are aware, evidence may also be introduced by affidavit or as provided for in Rule 53.

b) The judge is to exercise control over the questioning of witnesses in order to prevent undue harassment or embarrassment and may disallow any question that is vexatious or irrelevant. In other words, the evidence must be adduced in a firm but orderly manner and must be relevant.

c) The trial judge may direct a witness to be recalled for further examination. This, of course, is discretionary and will usually only be used where the witness is requested to be recalled by counsel for one of the parties or by the trial judge for the purpose of clarifying other evidence of importance.

d) In the case of an evasive witness the trial judge may allow the party calling the witness to examine him by means of leading questions. This is essentially an adverse witness rule as provided for under section 17 of the *Evidence Act*.

e) In the case of witnesses who do not understand one of the official languages, or in the case of a deaf or mute person, the person calling the witness shall provide a competent and independent interpreter.

9. Calling Adverse Party as Witness

A separate procedure is provided under rule 55.05 to call as a witness an adverse party or an officer, director, partner or sole proprietor of an adverse party. In this case, it is necessary to serve a Notice to Attend in Form 55D on the solicitor for the adverse party. This is to be done 10 days before trial.

Under Rule 55.05(3) a party who calls an adverse witness under this rule may cross-examine him following which he may be re-examined by the opposite party. This procedure enables a party to obtain evidence which might not otherwise be available because the witness would not be called by the opposite party, or because of the inability of the party wishing to call the witness to gain access or cooperation.

Under Rule 55.05(2) a party may call as a witness an adverse party or an officer, director, partner or sole proprietor of an adverse party who is in attendance at trial. This has the same advantage as under Rule 55.05(1) if you know that the person will be in attendance at trial.

Rule 55.05(5) provides that if the adverse witness refuses or neglects to attend at trial, or to remain in attendance, or refuses to be sworn or to answer any proper questions put to him, or to produce documents he is required to produce, the court may pronounce judgment in favour of the party calling that witness or may adjourn the trial or make such other order as may be just. It can be seen that this is a strenuous sanction in the event the adverse witness refuses to cooperate.

10. Exclusion of Witnesses

Inasmuch as trials are public, witnesses, like anyone else, have the right to be present. However, Rule 54.06 provides that upon the request of a party, the court **shall** exclude witnesses from the courtroom until called to give evidence.

Generally speaking, the only time exclusion of witnesses will be requested is where there is a serious question as to the credibility and it is not desirable that one witness hear the evidence of another for fear the witness' evidence will be influenced.

Not every witness can be excluded on request and the three exceptions are found in Rule 54.06(2). A party to an action cannot be excluded even on an issue of credibility, but the court may require the party or witness not excluded to give evidence before the excluded witnesses are called. (*Canadian Imperial Bank of Commerce v. Robertson and Lam* (1983), 47 N.B.R. (2d) 385).

The purpose of this provision is so a party or a witness remaining in the courtroom may not then give evidence after having had the advantage of hearing the excluded witnesses.

A further precaution is provided for in Rule 54.06(3) which prohibits excluded witnesses who have already testified from communicating with excluded witnesses who have not testified.

11. Opening and Closing Statements

Although opening statements are provided for by Rule 54.07, it is not common practice and indeed, rarely necessary. A judge has the advantage of reviewing the trial record containing all relevant pleadings and orders relating to the issues to be determined. The judge also has the advantage of reviewing pre-trial briefs which must be filed in advance of trial. These materials, if adequately prepared, should provide the judge with sufficient information to alleviate the need for what was traditionally known as an opening statement.

Although opening statements are not necessary, there may be items that should be brought to the attention of the judge at the commencement of trial. For example, if a plaintiff intends to abandon a particular issue, the judge should know this in advance. Also, it may be necessary to update particulars of damages claimed in the pleadings. If so, it is good to have this clarified at the outset of trial. Another example is in the case of complicated evidence which makes it essential to explain to the judge the order in which it will be called and the purpose so the judge can anticipate what is to come. But, apart from these few examples, an opening statement serves little or no purpose and most judges do not wish to hear one. On occasion, a judge may ask for an explanation or clarification before evidence is given.

Closing statements fall into a different category than opening statements inasmuch as they really constitute argument following the introduction of all the evidence. Closing statements are therefore generally necessary and an important part of trial procedure. Notwithstanding what a party may anticipate in terms of evidence, and what is contained in the pre-trial brief, the fact remains the evidence is never really known with certainty until it has been heard.

It is at this stage that it becomes important for the parties to put their arguments in the context of the evidence and have the opportunity to be challenged by one another and by the trial judge. Closing statements will therefore cover not only the legal issues and law relevant to the case, but the evidence as it relates to those issues. The closing statement will also include arguments with respect to the relief sought and the disposition of costs.

12. Omission to Prove a Fact or Document

There was a time when, after a party closed his case, it was not possible to introduce any further facts or documents. Sometimes this would work an injustice because of a mistake or oversight on part of counsel. In order to overcome this injustice, Rule 54.09 provides that "where through accident or mistake or other cause, any party omits or fails to prove some fact or document material to his case" the court may proceed, and at a later stage in the proceedings allow the fact or document to be proved.

However, depending upon the circumstances, it may not be possible to reopen a case under Rule 54.09 where a judgment has been given but not entered. (*Irving Oil Ltd. v. Foulem et al.* (1988), 86 N.B.R. (2d) 166 (C.A.); *Tepper v. Valley Equipment Ltd.* (1996), 182 N.B.R. (2d) 66 (Q.B.), aff'd at (1997), 186 N.B.R. (2d) 365 (C.A.)).

It is best, of course, not to get yourself into a position where you must take advantage of Rule 54.09, but it is of comfort to know that such a rule exists as none of us is perfect and, in the heat of the trial, can often overlook something of importance. It would not be fair that a client suffer from such an oversight.

Rule 79: Simplified procedure

Chapter 12

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Rule 79

1. Simplified Procedure

Rule 79 came into force on September 1, 2006. The Rule was implemented in order to shorten and simplify the litigation process for most claims under $50,000.00.

Given that Rule 79 represents a relatively new procedure, there is not yet much jurisprudence with respect to same. While speaking at a Continuing Legal Education presentation after the Rule was implemented in 2006, the Honourable Chief Justice Drapeau and Honourable Justice Russell noted that New Brunswick courts are likely to find Ontario case law persuasive.[i]

2. Where Rule 79 Does Not Apply

Rule 79 does not apply to Family Division proceedings, class actions or proceedings under any Act other than the *Judicature Act*, R.S.N.B. 1973, c. J-2.

Ontario courts have held that the simplified procedure only applies until judgment is obtained. In *Canadian Imperial Bank of Commerce v. Glackin* (1999), 36 C.P.C. (4th) 255 (Ont. Gen. Div.), the Court held that enforcement proceedings are subject to the ordinary procedure of the Court, even where judgment was obtained using the simplified procedure.

3. Where Rule 79 is Mandatory

Unless ordered otherwise, the Rule 79 procedure is mandatory where the amount of money claimed (if any) or the fair market value of any interest in real or personal property (as at the date the action is commenced) is $50,000.00 or less, exclusive of interest and costs (Rule 79.05(1)). Unless ordered otherwise, if there are multiple plaintiffs, the simplified procedure is to be used if each claim, considered separately, meets these requirements. Similarly, if there are multiple defendants, the simplified procedure is to be used if the claim against each defendant, considered separately, meets these requirements. Accordingly, a plaintiff can potentially advance claims against multiple defendants, notwithstanding that such claims collectively exceed the limit of the simplified procedure rule. In *Baker v. Chrysler Canada Ltd.* (1998), 38 O.R. (3d) 729 (Ct. Jus. (Gen. Div.)), the Court held that the claims of fifty different plaintiffs (which were individually under what was then the limit of $25,000.00) with a preponderance of identical features could be dealt with by one judge expeditiously and economically and, as such, should proceed using the simplified procedure.

4. Where Rule 79 is Optional

An action commenced under Rule 79 continues to proceed under the Rule unless a party objects because the opposing party's claim is not for money or property valued at $50,000.00 or less, and the opposing party does not abandon, in his or her pleading, the claims or parts thereof to the extent that they do not satisfy this criteria.

Pursuant to Rule 79.05(4), the simplified procedure may, at the option of the plaintiff, be used in actions in which the procedure is not otherwise mandatory, provided that the above-mentioned condition is satisfied.

A Notice of Action with Statement of Claim Attached or the Notice of Action and the Statement of Claim must clearly indicate that an action is commenced under Rule 79 (Rule 79.05(5)).

Pursuant to Rule 79.05(8)(a), an action which was not commenced under Rule 79, or which was commenced under Rule 79 but continued under the ordinary procedure, is continued under the Rule if:

a) the consent of all of the parties is filed; or

b) no consent is filed but the plaintiff's pleading is amended so that it reflects a claim for money or property valued at $50,000.00 or less, and all other claims, counterclaims, cross-claims and third or subsequent party claims comply with Rule 79.

Pursuant to Rule 79.05(10), a party who abandons a claim or part thereof to the extent that it is in excess of $50,000.00 is prohibited from bringing the same claim in another proceeding.

5. Procedure to Trial

Except where otherwise provided by Rule 79 or an order of the Court, the rules applicable to an ordinary action apply equally to an action under Rule 79. The Court may, by order, vary the procedure to be used in a given action under Rule 79 (Rule 79.03).

The most striking feature introduced by Rule 79 is arguably the prohibition on examinations for discovery. Pursuant to Rule 79.07, unless ordered otherwise, no examination for discovery is permitted in an action under Rule 79. Unlike the equivalent Ontario rule, Rule 79 suggests that a New Brunswick court, at least in theory, has discretion to order otherwise where it is appropriate to do so.

Pursuant to Rule 79.06(1), unless the court orders otherwise, a party to an action under Rule 79 must, within 30 days after the close of pleadings, serve on every other party: (a) an Affidavit of Documents and (b) copies of the documents listed in Schedule "A" to the Affidavit of Documents.

Pursuant to Rule 79.06(4), a party to an action under Rule 79 must, within 90 days after the close of pleadings, serve on every other party an "affidavit of witness" from each person who may be called to testify as a witness at trial and a report from any expert who may be called to testify as an expert witness at trial. Pursuant to Rule 79.06(5), a party may, within 60 days after the expiration of this period, serve on every other party any "supplementary" affidavits of witnesses or expert reports.

Pursuant to Rule 79.06(6), unless ordered otherwise, at the trial of the action, a party may not call as a witness a person whose affidavit of witness or expert report has not been served in accordance with Rule 79.

Pursuant to Rule 79.06(7), a party requiring the attendance at trial of an expert or the deponent of an affidavit of witness must, within 30 days after the expiration of the period in which to serve supplemental affidavits of witnesses and expert reports, serve on every other party a Notice Requiring Attendance.

Pursuant to Rule 79.10(2), affidavits of witnesses and expert reports may, at the discretion of any party, be used at trial without the need to call the deponent or the expert unless a party has served a Notice Requiring Attendance and without proof of signature or qualifications of the expert.

Pursuant to Rule 79.10(3), except with leave of the court, direct examination at trial is confined to matters covered in the affidavits of witnesses and expert reports. Otherwise, a trial of a matter under Rule 79 proceeds in the ordinary manner.

Pursuant to Rule 79.08(1), the parties must, within 5 months after the close of pleadings, in a meeting or telephone call, consider whether: (a) all documents relating to any matter at issue have been disclosed, (b) settlement of any or all issues is possible, and (c) the parties agree to a settlement conference.

Pursuant to Rule 79.09, at the first Motions Day following 7 months after the close of pleadings, the plaintiff must set the action down for trial.

6. Costs

Pursuant to Rule 79.11(1), Scales 2 to 5 of Tariff 'A' of Rule 59 do not apply to the fixing of costs of an action under Rule 79. This maintains costs at a low level, limiting successful litigants to claims under Scale 1 of Tariff 'A', for example, $1,575 on a $20,000.00 claim, $2,925 on a $50,000.00 claim, or $4,425 on a $100,000.00 claim.

The cost consequences of Rule 79 require that plaintiffs consider whether an action should proceed under Rule 79 from the onset. Regardless of the outcome of an action, if Rule 79 applies as the result of amendment of the pleadings, the party whose pleadings are amended must pay costs incurred by the opposite party up to the date of the amendment that would not have been incurred had the claim originally complied with Rule 79, unless the court orders otherwise (Rule 79.12(1)).

Pursuant to Rule 79.12(3), the plaintiff cannot recover any costs at all unless:

- the action was proceeding under Rule 79 at the commencement of the trial, or
- the court is satisfied that it was reasonable for the plaintiff:
- to have commenced and continued the action under the ordinary procedure, or
- to have allowed the action to be continued under the ordinary procedure by not abandoning claims or parts of claims that do not comply with Rule 79.

In *Kincses v. 32262 B.C. Ltd.* (1998), 39 CPC (4th) 384 (Ont. Ct. Jus. (Gen. Div.)), the Court dismissed the plaintiff's claim for costs due to a failure to use the simplified procedure, stating at para. 11 that the purpose of the cost consequences of the simplified procedure rule is to:

- impose a continuing obligation on a party commencing an action under the ordinary procedure to make a realistic appraisal from time to time of the outcome of the action and to amend pursuant to Rule 16.03(1) [of the simplified procedure rule], if at any time prior to commencement of trial it appears unreasonable to continue the action under the ordinary procedure.

Pursuant to Rule 79.12(6), a successful plaintiff may be ordered to pay all or part of the defendant's costs in addition to the defendant's post-offer costs if the judgment amount did not exceed an offer to settle.

Pursuant to Rule 79.12(7), in an action which includes a claim for an interest in real or personal property, if the defendant objected to proceeding under Rule 79 on the ground that the fair market value of the interest exceeded $50,000 at the date of commencement of the action and the Court finds the value did not exceed that amount at that date, the defendant must pay such additional costs as the Court may order. The burden of proving that the fair market value of the interest in real property or personal property at the date of commencement of the action was $50,000.00 or less is on the plaintiff (Rule 79.12(8)).

In *Helsberg v. Allison*, [2000] O.J. No. 3618 (S.C.J.), aff'd. (2002), 159 O.A.C. 62 (C.A.), the Court dismissed the plaintiff's claim for costs on the ground that it was not reasonable to have commenced and continued the action under the ordinary procedure. In this case, the plaintiff sought to recover a sales commission in a breach of contract case, but pursued punitive damages for additional claims of fraud and unjust enrichment. The Court found that it was not reasonable for the plaintiff to expect more than his commission, placing the value of his claim well below the stipulated limit of the simplified procedure rule.

NOTES

i. A similar simplified procedure rule was incorporated into the Ontario Rules of Civil Procedure on a temporary basis as a "pilot project" in March 1996 and then on a permanent basis in January 2001.

THE LAW SOCIETY OF NEW BRUNSWICK

Rule 80

Chapter 13

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Rule 80

1. Certain Claims Not Exceeding $30,000.00

Rule 80 came into force on July 15, 2010. The Rule is intended to replace the procedure contemplated by the ***Small Claims Act***, S.N.B. 1997, c. S-9.1 and to eliminate the Small Claims Court of New Brunswick. There are not as yet any cases decided under this new Rule.

Previously, a party was entitled to use the small claims procedure in order to commence an action for debt or damages or for the recovery of personal property if the amount claimed and/or the value of the property in question did not exceed $6,000.00. A party is now entitled to use Rule 80 in order to commence an action for debt or damages or the recovery of possession of personal property if the amount claimed and/or the value of the personal property in question does not exceed $30,000.00, inclusive of interest to the date of judgment but exclusive of costs.

Rule 80 does not apply to a proceeding in the Family Division or to certain other specific causes of action, including an action involving title to land or an interest therein.

A person may not divide a cause of action into two or more actions for the purpose of bringing the actions under Rule 80. A party may abandon any part of a claim or counterclaim for debt or damages in order to bring it within the scope of the Rule. A party who abandons any part of a claim or counterclaim forfeits the amount abandoned.

2. Pleadings

A plaintiff commences an action under Rule 80 by filing an original Claim (Form 80A) and a copy for each defendant and each other plaintiff with the Clerk:

a) of the judicial district in which a defendant resides,
b) of the judicial district or one of the judicial districts in which the cause of action arose, or
c) of any judicial district if no defendant resides within the Province, together with the prescribed filing fee.

The Clerk will not accept a Claim for filing if the amount claimed and/or the value of the personal property in question exceeds $30,000.00 and the plaintiff has not abandoned the excess. A plaintiff must, at his or her own expense, serve each defendant with a copy of the Claim and a blank Dispute Note (Form 80B). A claim must be served within six months after the date when it was filed, unless an extension is granted.

At any time before judgment is entered, a defendant may defend an action under Rule 80 by filing a Dispute Note and a sufficient number of copies for each plaintiff, together with the prescribed filing fee. If a Dispute Note is not filed within 30 days after the date when the defendant was served, the plaintiff may proceed and judgment may be entered without further notice.

Rule 80.09 contemplates a similar procedure for third and subsequent party claims.

The Clerk will not accept for filing a Dispute Note containing a counterclaim if the amount claimed and/or value of the personal property in question exceeds $30,000.00 and the defendant has not abandoned the excess.

A judge may order that an action under Rule 80 proceed in accordance with the rules applicable to an ordinary action or in accordance with Rule 79 in this circumstance.

A plaintiff who wishes to dispute a counterclaim must, within 10 days after the date when he or she received a copy thereof, file a Response to Counterclaim (Form 80C) and a copy for the defendant who filed the counterclaim and each other plaintiff.

Unlike the ordinary procedure of the Court, a party may amend his or her pleading without leave of the Court or the consent of the other party by filing and serving a copy thereof marked "amended" in which any additions are underlined and any other changes are identified. The amended document must be filed and served at least 20 days before the date scheduled for the hearing, unless ordered otherwise.

3. Judgment Where No Dispute Note Filed

If a defendant has been served with a Claim and a blank Dispute Note and has not filed a Dispute Note within 30 days after the date of service, the plaintiff may, without further notice, request judgment by filing a Request for Judgment (Form 80G) and proof of service of the Claim and blank Dispute Note on the defendant.

If a Request for Judgment is for debt, for the recovery of possession of personal property or for both, the Clerk will enter a Default Judgment (Form 80H). If a Request for Judgment is entirely or partly for damages, the Clerk will enter "interim judgment" by noting the interim judgment on the Claim and will then set a time and place for a hearing at which the plaintiff must prove the amount of damages suffered.

A defendant against whom default judgment or interim judgment is entered may file an Application (Form 80I) to have the judgment set aside. Such an application must be accompanied by a completed Dispute Note and an Affidavit to Set Aside Default Judgment or Interim Judgment (Form 80J) sworn to or affirmed by the defendant and must also provide the following information:

- **a)** whether the defendant received a copy of the Claim and, if a copy was received, the date of receipt;
- **b)** the date on which the defendant became aware of the judgment;
- **c)** the reasons for the failure to defend;
- **d)** the basis of any defence; and
- **e)** the defendant's mailing address, residential address, e-mail address, if any, and telephone number.

The Clerk (as opposed to a judge) disposes of the application for an order setting aside the default judgment or interim judgment and does so on the basis of the documentary evidence without hearing oral argument, unless, in his or her opinion, it is necessary to do so.

4. Procedure until Trial

Like the procedure under Rule 79 but unlike the ordinary procedure of the Court, the procedure under Rule 80 does not provide for an examination for discovery.

If an action under Rule 80 is defended, a judge may direct that the parties appear for a settlement conference.

After the close of pleadings and subject to any directions of the Court, the Clerk will set a time and place for the hearing of an action under Rule 80. At least 45 days before the date scheduled for the hearing, the Clerk will send a Notice of Hearing (Form 80L) to the parties or their respective solicitors or agents.

5. Evidence

At least 20 days before the date scheduled for the hearing, each party must:

a) file with the Clerk

- **i.** a list of the witnesses whom the party intends to call at the hearing, and
- **ii.** a copy of the documentary evidence on which the party intends to rely at the hearing, and

b) provide the other parties with copies of these documents.

No less than 4 days before the date scheduled for the hearing, a party may respond to the documents of the opposing parties by:

a) filing with the Clerk

- **i.** a supplementary list of the witnesses whom the party intends to call at the hearing, and
- **ii.** a copy of any supplementary documentary evidence on which the party intends to rely at the hearing, and

(b) providing the other parties with copies of these documents

Unless ordered otherwise, at the hearing of an action under Rule 80, a party may not call as a witness a person whose name is not on the list of witnesses filed with the Clerk and provided to the other parties, or rely on any documentary evidence which was not filed with the Clerk and provided to the other parties.

Pursuant to Rule 80.15, a party may call an expert witness at a hearing:

- **a)** if the party serves a summary of the expert's proposed evidence on the other parties at least 30 days before the date when the party intends to call the expert witness, or
- **b)** with leave of the Court.

Instead of calling an expert to give evidence, a party may introduce into evidence a report stating the expert's opinion:

- **a)** if the party serves a copy of the report on the other parties at least 30 days before the date when the party intends to introduce the report into evidence, or

b) with leave of the Court.

At least 14 days before the date scheduled for the hearing of an action under Rule 80, a party who receives another party's expert report may serve on the opposite party a notice requiring the expert to attend at the hearing in order to be cross-examined.

6. Conduct of Hearing

As with previous small claims procedures, a party may be represented not only by him or herself or a lawyer but also by an articled student-at-law at the hearing of an action under Rule 80. Unlike the ordinary procedure of the Court, a corporation may choose to be represented by an officer or employee at a hearing under Rule 80.

Unlike the previous small claims procedure pursuant to which a hearing was conducted before an appointed "adjudicator", an action under Rule 80 is heard by a judge. The judge will conduct the hearing as "informally" as possible while maintaining the "dignity and decorum" of the Court. The judge may relax the rules of evidence, provided that he or she does not admit into evidence any privileged information.

If evidence is presented by way of affidavit, the judge may adjourn the hearing in order to require that the party presenting the affidavit call the deponent to be examined orally.

7. Appeal

With leave from a judge of the Court of Appeal, a decision of the Court of Queen's Bench under Rule 80 may be appealed to the Court of Appeal but only on a question of law. In order to do so, an intended appellant must file a Request for Leave to Appeal (Form 80O) with the Registrar, together with the prescribed filing fee, within 30 days after the filing of the decision of the Court of Queen's Bench. The intended appellant must attach to this form any written argument and a copy of the documentary evidence on which he or she intends to rely. The Registrar will mail a copy of the Request for Leave to Appeal to each intended respondent. Within 30 days after the date when the Clerk mails the Request for Leave to Appeal, an intended respondent may file a written argument and a copy of the documentary evidence on which he or she intends to rely. A written argument may not exceed 20 pages unless otherwise ordered by the Chief Justice of the Court of Appeal.

A judge of the Court of Appeal will dispose of a Request for Leave to Appeal on the basis of the written arguments and any other relevant documents without hearing any oral argument, unless, in his or her opinion, it is appropriate to do so. If leave to appeal is granted, the Registrar will notify the parties by mail. Within 30 days after the date when the Registrar mails this notice, the appellant must file a Notice of Appeal (Form 80P) and order, at his or her own expense, the transcript of the evidence from the court stenographer.

When the transcript of the evidence is completed, the court stenographer will forward the original to the Registrar who will notify the parties by mail that the transcript is completed. If an appellant intends to rely on a further written argument other than that in support of his or her application for leave, he or she must file such further argument within 30 days after the date when the notice was mailed. If a respondent intends to rely on a further written argument, he or she must file such further argument within 30 days after the date when a copy of the appellant's further written argument was mailed.

If the appellant does not file a further written argument but the respondent still wishes to rely on a further written argument, the respondent must, within 60 days after the date when the notice was mailed by the Registrar, file such further argument.

When an appeal is ready for hearing, the Registrar will place it on the List of Cases to be heard by the Court of Appeal. At the hearing of an appeal, each party is afforded an hour within which to present his or her oral argument.

8. Motions and Costs

In a departure from previous small claims procedures, Rule 80 specifically contemplates that a party may bring a motion in an action under Rule 80.

Scales 2 to 5 of Tariff "A" of Rule 59 do not apply to the fixing or assessment of costs in an action under Rule 80.