THE HONOURABLE JUSTICE WALTER R.E. GOODFELLOW

NOTES
(Revised May 26, 2010)

AN INTRODUCTION TO CHAMBERS PRACTICE

NOVA SCOTIA BARRISTERS' SOCIETY

An Introduction To Chambers Practice

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A. WHAT IS CHAMBERS?

For the purpose of the Civil Procedure Rules "Chambers" means the Judge who is presiding and available for a set period of time, usually one week, to deal with motions/applications and matters that do not represent the actual trial. "Chambers" up to approximately 1960 referred to lawyers' offices. Often brass plaques reciting "Coffin, Blois and Hicks Chambers", closed 12:00 p.m. to 1:30 p.m.

In other Provinces it is called Motion and Motions Court, often with divisions of Motions Court, ie. corporate.

JUDGE'S OFFICE:

Rarely do Justices meet lawyers in their offices as there is a tendency to exercise caution and do everything in open Court, on record. Nevertheless, occasionally a Judge will refer to counsel meeting her/him in Chambers.

DRESS REQUIREMENT:

At one time a dark suit was a pre-requisite. All barristers should remember that they are professionals and dress accordingly. "I DO NOT HEAR YOU". Do any of you recognize what that means when the Justice makes such a statement? My first familiarity with this occurred when Chief Justice Cowan in Chambers made that statement and counsel who was wearing a brown sports jacket and brown shoes didn't comprehend what was taking place but found out from the clerk when Cowan, C.J. adjourned chambers that due to the fact that he was improperly attired, his motion was adjourned. I had two occasions in Chambers to make that call but in each case I added that I would hear counsel at the end of Chambers. Underlying my remarks to you today is the philosophy of avoiding problems and clearly if you dress inappropriately you are inviting a non-productive, unnecessary result. For example, a female barrister just a few years ago was

inappropriately dressed in Ontario and she ended up being before the discipline committee of the Law Society of Upper Canada and obviously you want to avoid the issue of standard of dress ever arising.

JUDGE'S ATTIRE:

Usually a suit or director's suit. Judge's gown for trials and appeals.

HALIFAX:

Chambers run from Friday at 4:30 p.m. to the following Friday at 4:30 p.m. and that is the time when there is a shift change. Actual sitting time is normally Monday through Friday, usually 9:30 a.m. to 12:30 p.m. and 2:00 p.m. to 4:30 p.m. In the 1960's Chambers were two days per week starting at 11:00 a.m. and one day per week in County Court starting at 10:00 a.m.

Monday to Friday, motions and applications of less than ½ hour; Tuesday to Thursday, Special Time Chambers either at 11:00 a.m. or 2:00 p.m. Complex Chambers matters are set down for whatever time period they are estimated to take.

Appearance Day is Friday at 12:00 noon.

CRIMINAL CHAMBERS:

Criminal Chambers called "Crownside" every Thursday in Halifax at 9:00 a.m. The 9:00 a.m. starting time is to accommodate counsel so that they can get to Provincial Court by 9:30 a.m. / 10:00 a.m.

SUMMARY:

You have Chambers for motions and applications and a separate division for Special Time Chambers and Complex Chambers. Normal

Chambers is ½ hour or less [previous Rule 1 hour] – a quick example of what would take less than ½ hour is a motion to finalize an adoption, a motion in a foreclosure action, a motion for an order to comply with a demand for particulars or, for example, to extend the time for service on an originating notice.

In the context of this practice review, Chambers encompasses everything that takes place in a courtroom other than the trial. This means all motions, applications, hearings, et cetera, usually instituted by a Notice of Motion, draft Order, supporting Affidavit and supporting brief [CPR 23.11]. Form 5.03, Notice of Application in Chambers is at page 5676; Form 5.04, Notice of Contest (Chambers Application) at page 5678; Form 5.07, Notice of Application in Court at page 5679; Form 5.08, Notice of Contest (Application in Court) at 5683.

PRACTICE REGARDING *EX PARTE* APPLICATIONS:

My own practice and that of many Judges is to review and, if appropriate, sign an *ex parte* order and advise counsel as it does not make sense to have counsel drive in from out of the city just to pick up an order, such is an unproductive use of time. I would instruct my judicial assistant to call counsel and ask whether they wanted to pick-up the order or have it mailed out.

Adherence to legal ethics is an absolute at all times and is specifically called for on *ex parte* applications and I will deal with this further, later in my remarks.

PRIORITY:

There is, by tradition, one application in Chambers that proceeds to the top of the order irrespective of seniority. In other words, you could have an Articled Clerk make application for *HABEAS CORPUS,* that is, for freedom of a person who it is alleged is wrongfully being detained and

traditionally that application would be heard before the application of the most senior Queen's Counsel at the Bar present. This is now for the first time recognized specifically in the Rules [see CPR 7.13(1)]. Relate experience where client prematurely released from prison and two years later apprehended under warrant. My application by way of writ of *habeas corpus* was at the head of the docket.

B. IS THE MOTION/APPLICATION REALLY NECESSARY?

Always act on the assumption that the Chambers Judge is going to ask her/himself and counsel the question – "Is this Application or Motion really necessary?"

This means that you must be prepared to answer that question and, in preparing to answer that question, you should in many cases be able to avoid the application. Time is money, and the resources of the members of the public for legal fees and the Court's resources are very limited. You are professionals and it is incumbent upon you to reduce, wherever possible, the emotional and financial strain on your client and the judicial system.

The last thing you want, particularly starting out as a young lawyer, is to go into Chambers on a motion that the Court considers was unnecessary or unreasonable. This tends to brand you as a less than professional barrister and can seriously impair your credibility. If you are truly a professional, you will do absolutely nothing that can possibly impair your integrity and credibility.

Returning to the question, "Is this application/motion really necessary?", to be more specific, you have a duty to try and resolve whatever you are attempting to achieve by consultation and negotiation.

Let us use an example. The Plaintiff was involved in a serious motor vehicle accident claiming every conceivable type of damages. You are the solicitor for the defendant. You have gone to Discovery of the Plaintiff and received certain undertakings which, for some reason, have not been provided nor has a satisfactory, if any, reason been given for the non-compliance or at least delay in complying. In other words, SILENCE. Obviously, if you are acting for the plaintiff, you never want to put yourself in that position but, surprisingly, that kind of situation occurs far too frequently.

The solicitor for the defendant compounds the situation by simply dropping a Notice for Chambers for a pre-determined time without the professional courtesy (warning) of contacting opposing counsel; first, to indicate that unless there is compliance, your client will have no alternative but to proceed with the motion and, if there is still non-compliance, a follow-up inquiry of the plaintiff's solicitor as to whether or not the specific date or dates you have in mind for the application are convenient to opposing counsel. If you follow where the circumstances permit, the foregoing minimum two-letter approach, you put yourself in the position of taking the high road and avoiding being labeled as being unreasonable which, failing all else, can have an impact on the question of costs.

Contents of Letters

Avoid being abrasive, lecturing, stick to the facts. If you are plaintiff's counsel in this motion, your obligation is to provide an explanation, if there is one, and to respond in a timely fashion. If the specific date(s) is not one that you can meet, then you should say so and spell out the reasons, **plus having been extended the courtesy of an inquiry as to your availability**, you owe the professional courtesy of responding outlining several options as to your availability. It never ceases to amaze me, where a lawyer has extended the professional courtesy of checking opposing counsel's availability, to have a fellow barrister who simply responds, "with respect to your suggestion of Wednesday, the 27th for Chambers, I am unavailable that day - Yours very truly". It is this kind of conduct that can have an impact, not only on your credibility, but on the costs issue of the Chambers Motion.

CPR 23.04(3) for the first time mandates the courtesy of seeking the other lawyer's convenience.

Your response should be what you would say if you were in Chambers. If there is an explanation, do not keep it in reserve or a secret. There is no value in conducting yourself in such a manner.

THE REQUIREMENT OF EXTENDING THE PROFESSIONAL COURTESY OF CONTACTING THE OPPOSING COUNSEL FIRST IS NOW ENSHRINED IN CPR 23 "CHAMBERS MOTION" SPECIFICALLY, CPR 23.04(3) AT PAGE 1232 AND CPR 23.05 "MOTIONS SET BY COURT (½ DAY OR LESS)(MORE THAN ½ DAY)" SPECIFICALLY 23.05(2). PLEASE READ. CPR 23.05(2)

LIMITING CONTENT OF CORRESPONDENCE:

While I am at it, I want to pass on a practice suggestion that when you are dealing with a matter that is possibly heading for Chambers, in your correspondence leading up to that possibility you should limit the contents of your correspondence to the issue of compliance with what you are to seek, if you have to go into Chambers. **Have an eye to the probability of you having to use your letter as an exhibit**. In other words, do not make a 'without prejudice' offer in the third paragraph of a letter inquiring whether counsel are available on a specific date or dates for the Chambers Motion. Bear in mind in the situation where you are likely to go to Chambers to the possibility of having to utilize your correspondence as an exhibit to an affidavit and avoid the arguments about 'without prejudice' correspondence, the letter constituting party privilege, negotiations or whatever. A tangent that is avoidable and should be avoided.

Avoidance is the best way to address a prospective problem. If in the motion the only issue is compliance, it becomes totally unproductive, unprofessional, a waste of time and creating or leaving yourself open to tangents or side issues.

Before going to Chambers, put yourself in a position, wherever possible, of having a clear track record of endeavoring to resolve the matter

without the unnecessary motion, by exhibiting professionalism and professional courtesy. Do not allow opposing counsel to raise any issue of non-compliance by your client. This is particularly important where you application deals with disclosure, demand for documents, fulfilling undertakings, et cetera. If you have the slightest matter of disclosure outstanding on your client's behalf, comply with that and avoid providing a smoke screen to opposing counsel.

The Court is not impressed, and I am sure in time your peers and clients, with an approach that is one of declaring war every time any problem arises in relation to your file vis-a-vis opposing counsel. Using strong language of demand "deadline", "threats to seek solicitor and client costs", et cetera, wear pretty thin if you utilize them time and time again. Save the heavy ammunition for the rare and exceptional case. No one pays much attention to a person who cries wolf at every opportunity.

SUMMARY:

If you make every reasonable effort to avoid the motion, then you will avoid the unproductive circumstances that we have to deal with from time to time in Chambers, such as:

Example 1 - Solicitor A undertakes to send documents by the 14th of March. On the 15th of March, Solicitor B files a Notice of Application for ½ hour Chambers for a date selected without consultation and seeks in the Application compliance with the undertaking. Solicitor A had already sent on the 14th, by mail, a letter explaining why only some of the material was available and indicating all reasonable steps to secure the balance and estimating its availability within a week to ten days. Solicitor B, still at war, wants costs (because the response is a day late) and they both end up in Chambers before the Chambers Judge. It is very easy to guess the impression that Solicitor B creates. Just think of how much time Solicitor B has wasted and if he is at all professional, she/he cannot possibly bill the client for this totally unproductive, unprofessional waste, compounding a

discourtesy much like the retaliation penalty in hockey where the original infraction tends to pale in comparison.

Do you ever really want to put yourself in the position of Solicitor B?

Example 2 - Solicitor on the other side misses the deadline but indicates by letter that her spouse is ill. She is a single practitioner, and undertakes to have the documents to you within a week and indicates the spouse is undergoing an operation on the day you want to schedule the application. If you develop a reputation of going to war at all times then you'll likely find the solicitor in this case will send the Judge a copy of her letter to you and you must ask yourself do you really want to show up in Chambers seeking an Order for costs in such a situation? What do you think your chances are of success? More than likely you will be chastised by the Judge for such an unproductive exercise and, increasingly, at the very least, denied costs and you run the strong risk of a costs award against you.

You see how you have created a real waste of time by not following professional practice of inquiring of the availability and the problem with respect to disclosure?

Why put yourself in the position of being unprofessional in the eyes of the Court, your peers, your client and the further risk of an Order of costs against your client? Why risk the possibility of an Order of costs against you personally? The foregoing scenarios are less likely to occur due to the specific requirements of CPR 23.05 (2).

Two examples of where solicitors have proceeded to technically apply the time limits required for filing of defence are in the two decisions of Justice Kelly, **Thomas** v. **Keddy Motor Inns** (1993), 117 N.S.R. (2d) 420. The plaintiff's solicitor was dealing with defendant's solicitor who advised that he had prepared a draft defence and forwarded it to his clients. The plaintiff's solicitor acknowledged this communication and said she was looking forward to receiving the defence. A measure of time passed

without any further communication so the plaintiff's solicitor proceeded to judgment. On an application to set aside the default judgment it should come as no surprise that Justice Kelly did exactly that. He held the plaintiff's solicitor should have communicated a new deadline and having failed to do so costs for the application were awarded against her client. Similarly in **Scandsea Canada Ltd.** v. **Emberley Transport Limited** (2000), 178 N.S.R. (2d) 134 where Justice Kelly made reference to legal ethics and professional conduct and in setting aside the default judgment awarded costs of the application in the amount of $750.00.

In both of these cases the applications could have been avoided by the simple expediency of the solicitor for the plaintiff advising and giving notice of intention to enter judgment by a reasonable deadline. Not only did their clients in both cases end up with an award of costs against them but presumably there was a loss to someone of the solicitor's time in dealing with an unnecessary application and it certainly didn't help one's professional reputation to be held in professional error and in particular finding yourself so designated in a reported decision. I would assume that none of you ever want to end up in that position.

C. LEGAL ETHICS AND PROFESSIONAL CONDUCT HANDBOOK

Chapter 14 – Duties to the Court:

Read Chapter 14 in its entirety. When you are admitted to the Bar, the motion for admittance by the presenter, usually the President of the Nova Scotia Barristers' Society, is as follows:

"I move that (name) be admitted a Barrister and Solicitor of this Honourable Court."

On admission, you become an Officer of the Court and, as such, you are expected to fulfill ethical and professional duties to the Court.

Of particular relevance to Chambers Practice are:

Guiding Principles

A lawyer has a duty not to
(g) knowingly assert something for which there is no reasonable basis in evidence or the admissibility of which must first be established.

Commentary - Disclosure to Court and Counsel

Read 14.1

Errors or omissions

Read 14.2

Ex-Parte Proceedings

14.11 When opposing interests are not represented, for example in ex parte or uncontested matters, or in other situation where the full proof and argument inherent in the adversary system cannot obtain, the lawyer has a duty to take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the court is not misled.

Undertakings

14.14 A lawyer has a duty to strictly and scrupulously carry out any undertaking given to the court in the course of litigation.

With respect to CPR 14.11, that which caused most difficulty is "comprehensive". All-too-often counsel will fail to mention a feature that should be considered by the Chambers judge. For example, if there was an arrangement whereby counsel were going to give the notices in writing and you in fact had a telephone conference because opposing counsel for whatever reason could not reduce the matter to writing in a timely fashion, then you must bring to the attention of the Court that although there was a breach of the understanding to communicate in writing, there was in fact communication.

With respect to CPR 14.14 be very careful in respect to the undertakings that you make as a lawyer. ONLY give an undertaking on a matter over which you have complete control. For example, you can personally undertake to file your brief within two weeks where you have a document or affidavit in your file, you can personally undertake to the Judge to see that that document from your file will be filed with the Court.

However, do not give an undertaking, for example, at discovery – that you undertake to provide your client's documentation, ie. corporate annual returns by a certain date. You should simply give the undertaking as "I undertake to direct my client to provide his corporate annual returns for the past three years by the 15th of June". When you give such an undertaking you should always take the initiative and responsibility of keeping the other side posted as to any difficulties that arise in your client fulfilling your client's undertaking.

Any undertaking to the Judge, you should build your credibility and leave the Judge in no doubt that you have complied with your undertaking. For example, if it is to file a document – when you file it, do it with accompanying correspondence saying to the prothonotary "I enclosed document "X" which I undertook to Justice Smith to file" and send a copy of that letter to Justice Smith.

D. PRACTICE MEMORANDA

Drafting and acceptance of the new Civil Procedure Rules that came into effect January 1, 2009 represent a monumental effort of a lot people and, in particular, Justices Davison, Moir and Murphy. The new Rules reflect their philosophy that the Rules must be "user-friendly" and as a result you will find that the Rules are much more extensive in providing guidance, the pre-requisites of the Rule and, in many cases, examples of where it is meant to apply. As a result the present intention is not to have any Practice Memoranda except with respect to foreclosure practice and disclosure of electronic information.

Practice Memorandum No. 2, setting out what constitutes an urgent matter or possible emergency Chambers applications, et cetera, is still of some assistance and you should have it handy for the foreseeable future. With respect to the time Chambers is held outside of Halifax, I suspect that Practice Memorandum No. 2 is rapidly getting out of date and the only sure course of action is to contact the Prothonotary in a specific district when you are planning a Chambers motion/application in that district.

E. TIME LIMITS

CHAMBERS PRACTICE - NOTICE:

1) Proof of Service

Service is so fundamental that the first matter to be addressed in a Chambers application is proof of service. It never ceases to amaze me how ill-prepared counsel are for the most obvious of questions - "Do you have an Affidavit or Proof of Service?" The more professional barristers generally follow the practice of filing the Affidavit of Service, confirmation of the acceptance of service or compliance to whatever service has been affected as soon as they have the documentation, ie. Affidavit of Service from their process server. I always felt more comfortable when I practiced law to have the original Proof of Service filed **immediately** in the Court file. But, of course, I kept a photostatic copy just in the case the original was mislaid, which sometimes does happen. In addition, a good practice is to also recite the particulars of service in your Chambers memorandum. Counsel are justifiably embarrassed when in the courtroom for the first time they are forced to check to make sure that service has been in accordance with the Rules.

There is now a detailed Rule setting out the prerequisites of establishing proof of personal service.

Proof of personal service

31.05(1) A party who causes a document to be personally served must obtain an affidavit of service that proves all material facts of the service.

(2) The affidavit of service must contain all of the following:

(a) the name of the person swearing or affirming the affidavit and of the community where the person resides;

(b) a statement that the person personally delivered a certified copy of the notice to the person to be notified;

(c) a reference to an attached certified copy of the notice;

(d) the hour, date, and place of delivery;

(e) the name of the person to whom delivery was made;

(f) how the person swearing or affirming the affidavit identified the person as the one to whom delivery is to be made.

(3) The affidavit may be in Form 31.05.

AFFIDAVIT OF SERVICE - CHECKLIST

It is my recommendation that you reproduce CPR 31.05 on a separate piece of paper with this heading and provide a copy to your process server, articled clerks, associates and partners. The Court having spelled out in precise detail the pre-requisites of an affidavit of service, you should at all times fully comply with CPR 31.05.

All too often counsel will appear in Chambers without an affidavit of personal service that complies with the prerequisites of the Rule and, in addition, with some frequency, the affidavit of service will fail to establish the prerequisite notice requirement. With respect to notice, you should make sure you comply with the following:

Time

94.02 (3) A document delivered after four-thirty on an afternoon is considered to be delivered on the next weekday when the office of the prothonotary is open.

2) **Service**

CPR 31.02 - Notifying Party of Proceeding

The new Civil Procedure Rules have taken a novel approach in that within the Rules there is now expressed in extensive terms and headings as to how the object of the Rule may (shall) be achieved. So important is service that I have reproduced below the entire CPR 31.03 entitled "person to whom personal service is made".

The new Civil Procedure Rules have been in effect since January 1, 2009. How many of you have read CPR 31 in its entirety?

31.03 - Person to whom personal service is made

(1) Personal service must be effected as follows:

(a) **individual** - to an individual, by handing the document to the individual unless the party is a child or a person who is not capable of managing their affairs;

(b) **person not capable of managing affairs** - to a person who is not capable of managing their affairs, by handing it to the person's guardian under the Incompetent Persons Act, the person's litigation guardian, or a person as directed by a judge;

(c) **child** - to a child, by handing it to a parent or guardian with whom the child resides, a person exercising care and control over the child, or a person as directed by a judge;

(d) **corporation registered under the Corporations Registration Act** - to a corporation registered under the Corporations Registration Act, by handing it to the recognized agent or, in the absence of the agent, as provided in the service of documents provisions of that legislation;

(e) **partnership registered under the Partnerships and Business Names Registration Act** - to a partnership registered under the Partnerships and Business Names Registration Act, by handing it to the recognized agent or, in the absence of the agent, as provided in the service of documents provisions of that legislation;

(f) **unregistered corporation, unregistered partnership, or society operating in Nova Scotia** - to an unregistered corporation, an unregistered partnership, or a society operating in Nova Scotia, by handing it to a director, officer, or apparent manager;

(g) **unregistered corporation or society not operating in Nova Scotia** - to an unregistered corporation or a society not operating in Nova Scotia, in accordance with the law of the place of incorporation for notifying the corporation or society of an originating civil process against it;

(h) **municipality** - to a municipality, by handing the document to the municipal clerk, solicitor, mayor, warden, chief executive officer, chief financial officer, or similar officer of a municipality;

(i) **board or commission** - to a board or commission, by handing it to a member or officer of the board or commission;

(j) **Her Majesty the Queen in the Right of Nova Scotia** - to Her Majesty the Queen in the Right of Nova Scotia, in accordance with the Proceedings Against the Crown Act;

(k) **Her Majesty the Queen in the Right of Canada** - Her Majesty the Queen in the Right of Canada, in accordance with the Crown Liability and Proceedings Act (Canada).

(l) **another province or territory of Canada** - to Her Majesty the Queen in the Right of another province or to a territory of Canada, by following the provisions of the Crown or territorial proceedings legislation in the province or territory for service of an originating civil process, or for other notification of an originating civil process against the Crown in the right of the province or against the territorial government;

(m) **any other state** - to any other state, by following the domestic law for service or delivery of an originating civil process, or of notification of an originating civil process, against the state;

(n) **generally** - alternatively, by following the directions of a judge for effecting personal service.

(2) For the purpose of Section 49 of the Judicature Act, provincial legislation that provides a method for service of an originating process in conflict with Rule 31.03(1) is modified by that Rule, and legislation that provides an additional method is not modified.

When I first practiced law it was an absolute requirement to apply for leave to effect service outside Nova Scotia. That was changed with the introduction of the Cowan Civil Procedure Rules of 1972 so that you may effect service anywhere without notice if it is provided for in an agreement (CPR 31.08) and, in any event, you may effect service on a person who is anywhere in Canada without leave (CPR 31.09). Same applies to the United Kingdom and the many other countries that have ratified the Hague Convention on service. See also CPR 31.09.

Just before retirement I was requested to sign an Order for Judgment where personal service had been effected in Cuba. Unfortunately, for service in Cuba leave to serve is required and counsel therefore were left with considerable delay and additional expense because counsel did not properly check out the manner of service.

DELIVERY (SERVICE) OF ANY COMMUNICATION TO THE COURT:

This has been a real problem area and one that the Court has found failure to comply incomprehensible. In my day of practice I would not consider, other than possibly an *ex parte* application, having any communication WHATSOEVER with the Court without providing a copy to the other side. Failure to do so was a fast road to diminishing, if not extinguishing, your credibility and I am pleased to note in the new Civil Procedure Rules specific direction requiring the delivery of a copy to the other party on filing (CPR 31.15) and I suggest to you in the strongest language the requirement of providing opposing party (counsel) of what you file, professionally extends to ANY COMMUNICATION be it facsimile, electronically, mail, et cetera, et cetera.

Moreover, do not leave the Court in doubt that you have provided a copy to the opposing party or counsel. All too often we receive correspondence with no indication that it has been copied to opposing counsel or the other party and my own instructions are to inquire immediately if the other side has been provided with the professional requirement of receipt of a copy and requiring written proof which is certainly an unproductive and should be a non-billing exercise for your client.

F.) TIME – HOW CALCULATED?

Time

94.02 (1) The period of days in a Rule that permits or requires something to be done in a number of days does not include any of the following:

(a) the day the period begins;

(b) a Saturday and Sunday in the period;

(c) a weekday the office of the prothonotary is closed during the period;

(d) the day on which a thing is required, or first permitted, to be done.

(2) a document delivered on a Saturday, a Sunday, or a weekday that the office of the prothonotary is closed is considered to be delivered on the next weekday when the office of the prothonotary is open.

(3) A document delivered after four-thirty on an afternoon is considered to be delivered on the next weekday when the office of the prothonotary is open.

(4) A day is the period between midnight and the instant before midnight marking the beginning of the next day.

(5) For the purpose of Section 3 of the Time Definition Act, a year is the 365 days from midnight of a day on the Gregorian calendar to the instant before midnight marking the beginning of the same numbered day, in the same month, in the following year, except a year that starts on the twenty-ninth day of February ends at the instant before midnight on the twenty-eighth of February in the following calendar year.

G.) EXPANDED PROTHONOTARY'S AUTHORITY

The new Rules provide greater direction and authority to the Prothonotary; note, specifically CPR 22.12 (3):

> **Motion by prothonotary**
>
> 22.12 (3) The prothonotary may file a "Notice of Prothonotary's Motion" signed by the prothonotary to make a motion in chambers, appearance day chambers, or court.

H. THE CHAMBERS MOTION

1) Notice

It is essential that you familiarize yourself with CPR 22 (General Provisions for Motions), CPR 23 (Chambers Motions) and CPR 24 (Appearance Day Motion).

Part 22 of the CPR's sets out forms and you should be reviewing forms 5.02, 5.03, 5.04, 5.07, 5.08, 23.03, 24.03 (Appearance Day Notice). Again, it is essential to comply with the directions given and with respect to recital of authorities I am going to deal with a brief example which does not fully comply with the CPR requirements but gives you what I would like to see as a clear authority direction.

Guidance – Contents of Notice:

Assume a dispute in a house transaction as to whether or not certain items were chattels or fixtures.

Inadequate pleading is to simply insert "declaration that the items in dispute are fixtures". Preferred pleading would be:

1) "relief under the Civil Procedure Rules and in particular, CPR 1.03, CPR 5.14, and CPR 52.02.

2) a declaration pursuant to the Vendor and Purchasers Act and in particular, s. 4 for return of the fixtures claimed and costs incidental to their installation on return.

3) costs.

If you get into the practice of spelling out the authorizing provisions for the relief you seek, then the probability is you will do a comprehensive

job and not overlook anything. In addition, it conveys that you have done so to the Court and it provides a roadmap for the Court in reviewing the file. Remember that the Chambers Judge has anywhere from a dozen to forty plus files to review for Tuesdays, Wednesdays and Thursdays and there is a limited amount of time for you to communicate. You should make every effort to go directly to the authority. You will note that I included a claim for costs. This is not technically necessary. CPR 38.07 (1):

> **Claiming a remedy in an action or application, including declaratory judgment**
>
> **38.07 (1)** A statement of claim, an *ex parte* application, and a notice of application must state the remedy the party seeks from the court, except that a claim for costs is presumed.

Why do I strongly recommend that you include a claim for costs?

It never hurts to spell out the full relief sought and it is particularly appropriate with the increasing number of self-represented. Some Judges are reluctant (wrongly) to award costs if no notice of intent to seek costs is indicated. In continuing a policy of avoidance by mentioning costs, you avoid the possibility of a delay, particularly where there is a self-represented party who says she/he did not realize anything about costs and when things haven't gone well, then wants to consult a lawyer on that issue. A delay and expense that is avoidable.

2) **Affidavits - Affidavit of Solicitor**

It is my understanding that you will likely have all or a portion of one of these sessions dealing with the important subject of Affidavits and certainly you would be wise to review the thorough guidance given by

Justice Davison in **Waverley (Village Commissioners)** v. **Nova Scotia (Minister of Municipal Affairs** (1993), 123 N.S.R. (2nd) 46. In my view Justice Davison's remarks represent mandatory reading. I limit myself to providing you some caution with respect to the growing utilization of a solicitor's personal affidavit. The occasions when such is appropriate are very limited and I have provided you with a copy of **Veinot** v. **Dohaney** (2000), 189 N.S.R. (2d) at 263.

As to the requirements of filing affidavits and documents by the respondent in an application, see CPR 37.08(2) and (4).

Filing of documents by the opposing party/respondent see CPR 27.08 (2) and (4).

A new rule which will take some time to develop its boundary is CPR 5.11 (No Supplementary Affidavits):

No supplementary affidavits

5.11 (1) A party to an application may only file an affidavit within the deadlines under this Rule or set by a judge giving directions, unless a judge hearing the application permits an affidavit to be filed later.

(2) On a motion to allow a later affidavit, the judge must consider all of the following:

(a) the prejudice that would be caused to the party who offers the affidavit, if the application proceeds without that affidavit;

(b) the prejudice that would be caused to other parties by allowing the affidavit to be filed, including the prejudice of an adjournment if that would be a result;

(c) the prejudice caused to the public if applications are frequently adjourned when it is too late to make the best use of the time of counsel, the judge, or court staff.

(3) A judge who allows a late affidavit may order the party filing the affidavit to indemnify each other party for expenses resulting from the filing, including expenses resulting from any adjournment.

COMMENT: I note that 5.11 uses the terminology "may". The new Rule, in my view, is an attempt to control the volume of affidavits that we have seen in the past, many of which are unnecessary and at the same time not to preclude a party putting before the Court what is clearly relevant. Another attempt to provide some control over the volume of affidavits is the new provision in 5.12

Expense of cross-examination

5.12 The party who files an affidavit must pay the expense of presenting the witness for cross-examination, unless the parties agree, or a judge orders, otherwise.

I confess that I have not had any experience with this Rule and I am not quite sure how it is going to be applied. I do hope that in basic situations where the original affidavit may contain an error or undertakes

to advise on a particular point that the supplementary affidavit will be viewed as an addendum to the initial affidavit and not require the expense of a formal application, but it remains for the Court to define and interpret this Rule as time passes.

3) **Application**

As 5.01(1) sets out the Scope of Rule 5:

> **Scope of Rule 5**
>
> 5.01(1) As provided in these Rules, an application is an original proceeding and a motion is an interlocutory step in a proceeding.

CPR 5.02 outlines the requirements of an *ex parte* application in Chambers and CPR 5.03 outlines the requirements of an application in Chambers on notice.

CPR 5.01 – an application is an original proceeding and corresponds with our former interlocutory application now the application in Chambers on notice, CPR 5.03. A motion corresponds with our former Originating Notice (Application Inter Partes). The main significance, or difference is retained as previously if you are issuing an application in an original proceeding, it had to be **issued** by the Court before service and an Originating Notice (Application Inter Partes) being a notice in **an existing proceeding could be served before it was filed and issued**.

CPR 22 - GENERAL PROVISIONS FOR MOTIONS:

This Rule indicates that a motion is an interlocutory step in a proceeding and not an original proceeding. It is a Rule that you must

familiarize yourself with. The purpose of our session today is not a session on the new Rules, but rather a session dealing with Chambers practice. Of necessity, you must have the fundamental Rules committed to your knowledge. Irrespective of how much experience you gain, you cannot underestimate the need to follow the discipline of reviewing all the relevant Rules before entering the Courthouse. This Rule, as I have noted, deals with interlocutory steps in an existing proceeding and it provides specific procedures for various types of motions, chambers, appearance day, urgencies, prothonotary, et cetera, et cetera.

It sets out specific directions when such a motion is made and is sought to be an ex parte motion (C.P.R. 22.03) and in C.P.R. 22.03(2) it provides you with examples of circumstances of sufficient gravity to justify an ex parte motion. You must bring yourself within such a circumstance, or be satisfied that you can convince the motions judge such that the circumstances you are advancing are of sufficient gravity, i.e. of the nature of gravity of the examples given. There are limitations on such a motion, including CPR 22.08, which sets out that you may only rely upon the affidavit filed on the ex parte motion, an affidavit filed by another party and ones that meet the requirements of the balance of C.P.R. 22.08.

Be aware that there is a growing practice among Judges recognizing the fundamental preference of dealing with matters on notice to direct an *ex parte* application be at least as a matter of courtesy sent to the opposing party, particularly when the opposing party has had counsel dealing with the very matter which forms the substance of your *ex parte* application. Recognizing this, many counsel proceeding on an *ex parte* basis send out notice even if it is not technically required nor can it be given in compliance with the notice time requirements.

If you give a notice of motion, you **must attend** unless in accordance with CPR 22.18, all parties consent to the motion being withdrawn or adjourned or a judge gives permission to withdraw or adjourn the hearing of the motion. The latter, on a formal basis, requires a motion for

permission to withdraw or adjourn under CPR 28, emergency motion. If you find yourself in a position where the opposing counsel is not prepared to consent to your motion being adjourned or withdrawn, you should consider setting out the reasons for such, in writing, to the Chambers Judge, in advance of the date set and, of course, copied to opposing counsel and, quite possibly, the Chambers Judge, if her/his schedule permits, would arrange for a telephone conference to address the matter rather than require the formal attendance. Note, however, that unless permission is given you must attend to withdraw or adjourn the hearing of a motion.

Note: CPR 22 provides general procedures for all motions and there is CPR 23 that deals specifically with chambers motions and CPR 24 that deals with appearance day motions; however, the general provisions basically apply to all motions. CPR 22 relates essentially to the old interlocutory notice (inter partes).

CPR 23 - CHAMBERS MOTION:

This Civil Procedure Rule provides guidance with respect to the motion to a judge outside the trial of an action or hearing an application, judicial review, or appeal. It appears to be a very comprehensive Rule and one that you would be well-advised to review frequently. It thoroughly expands and provides specific procedures beyond the general provisions referred to in CPR 22. Today we will deal only with two aspects, chambers motions and appearance day motions, being the most common motions.

The Rules provides that a party may start a motion in chambers by filing a notice of motion along with a draft order and CPR 23.03 sets out the prerequisites of the "Notice of Motion". This Rule provides, in essence, **a checklist** that you should review in every single motion being filed in chambers before dating and signing the Notice of Motion. This is a clear example of the attempt to make the new Rules user friendly. For the purpose of our exercise today, I draw specific attention to the requirement that you indicate whether the Motion will require a half-hour or less in

chambers, more than a half-hour but less than a half-day, or more than a half-day. The Rule contains specific provision with respect to each of these time limitations CPR 23.04, Motion set by a party, one half-hour or less, CPR 23.05, Motion set by court, one half-day or less, and for more than a half-day. A major feature is the time requirement for notice in each circumstance. A hearing that is scheduled for a half-hour permits the party to select the time and date where the court regularly holds chambers; however, CPR 23.05 provides the court will provide to the party making a request a written notice of the time and date for the hearing.

CPR 23.11 specifically spells out the deadlines applicable to chambers motions.

Deadlines applicable to chambers motion

23.11 (1) Documents for a motion on notice in chambers must be filed or delivered no later than the deadlines in the following chart:

Document	½ Hour or Less	½ Day or Less	More than ½ Day
notice of motion and draft order	5 days before hearing	10 days before hearing	15 days before hearing
supporting affidavit	5 days before hearing	10 days before hearing	15 days before hearing
supporting brief	5 days before hearing	10 days before hearing	15 days before hearing
response affidavit	2 days before hearing	5 days before hearing	10 days before hearing
response brief	2 days before hearing	5 days before hearing	10 days before hearing
rebuttal affidavit	1 day before hearing	3 days before hearing	5 days before hearing
notice that cross examination is required	reschedule	1 day after affidavit is delivered	3 days after affidavit is delivered, except 24 hours for a rebuttal affidavit
cross examination transcript	not applicable	3 days before hearing, except one day for cross-examination on rebuttal affidavit	3 days before the hearing

(2) A party who certifies on a notice of motion that no party will oppose the motion may file a notice of motion, draft order, supporting affidavit, and supporting brief two days before the motion is to be heard.

CPR 24 - APPEARANCE DAY MOTION:

When the old Civil Procedure Rules came into being around 1972 under the leadership of the late Chief Justice Gordon S. Cowan. Chief Justice Cowan had already introduced what has now become appearance day. Initially, Chief Justice Cowan instituted notices to solicitors on record that the writ of summons, which was the document used then to initiate an action, had been issued and nothing had transpired for a period of at least three years. This meant that there were thousands of files still listed as active and Chief Justice Cowan set about to clean out this backlog and the prothonotary gave notice to counsel on record that unless they justified the continuation of the action that the court would, on a predetermined date of which they had notice, strike the action permitting the closing of the file. It took several years to clean up the backlog and during this period of time appearance day began to take on a wider boundary, i.e. on the rare occasion that counsel failed to respond to correspondence from the prothonotary or the court scheduler, a notice would be given to counsel requiring their attendance to explain their failure to respond.

In the recent years, the prothonotary has utilized appearance day to update court files for a myriad of reasons most noticably progressively to address what is now outlined specifically in CPR 24, appearance day motion, and in particular, CPR 24.02(2). Appearance day is of such significance that I have attached a copy of the Rule and I would ask that you would take a quick read of CPR 24.02(2) and (3) which will certainly give you a flavour of what transpires in appearance day. Briefly go through these two sections to show how detailed the guidance is in the new Rules.

One thing that you should bear in mind is that when the prothonotary issues a notice of writes to you as counsel, she is acting on behalf of the court and your failure to respond in a timely fashion is a professional discourtesy and an expression of lack of respect for the court which could result in unpleasant consequences for counsel. Approximately a year ago, the frequency with which solicitors were not responding to the prothonotary resulted in several justices developing the practice that if there was no response and the solicitor failed to attend on the appointed day, in some cases a formal order was issued and served on the solicitor by the sheriff requiring that solicitor's attendance to explain such failure to respond. Some justices took a somewhat softer approach and simply wrote to counsel directing them to attend but my preference was and is to issue a formal order because there is no justification to repeatedly ignore correspondence/notice from the court. **Our Prothonotary, Annette Boucher, Q.C., when she writes or communicates with counsel is speaking for the Court.**

24.01 Scope of Rule 24

(1) The court provides a time and date when parties to a proceeding in which documents are filed at the Law Courts in Halifax may appear, or be required by the prothonotary or a judge to appear, before a judge for a motion made quickly and without an affidavit.

(2) The court may provide a time for appearance day motions on issues involving the scheduling of trials and another time for all other appearance day motions.

(3) A party to a proceeding in which documents are filed elsewhere may seek to have the same kinds of issues dealt with quickly or without an affidavit in accordance with Rule 25.03, of Rule 25 - Motion by Appointment, or Rule 26 - Conference.

(4) A party may make a motion on appearance day, in accordance with this Rule.

24.02 When appearance day motion appropriate

(1) A party may make a motion on appearance day, if a Rule permits or all of the following circumstances exist:

(a) the motion is brought to determine a procedural issue in dispute between parties or to compel compliance with a Rule;

(b) no relevant fact can reasonably be contested;

(c) the motion can be heard and determined quickly;

(d) no judge has been assigned to preside at the trial or hearing of the proceeding.

(2) The following are examples of a procedural issue in dispute between parties that is usually suitable to a motion on appearance day:

(a) a disagreement about how much time will be required for the hearing of a motion in chambers or an application;

(b) a disagreement about whether a date assignment conference should be allowed on the ground that the other party is lagging in making disclosure or conducting a discovery;

(c) an objection to setting trial dates following a request for a date assignment conference;

(d) an objection to the time, date, or place selected for a discovery, or for a motion or application in chambers, unless a motion by teleconference is more appropriate than a motion on appearance day;

(e) a dispute about the method of recording, exclusion of witnesses, or order of witnesses at a discovery;

(f) a dispute about the need for, or terms of, the variation;

(g) appointment of a case management judge.

(3) The following are examples of a non-compliance with a Rule that may lead to a motion on appearance day to compel compliance with the Rule:

(a) not disclosing relevant documents or electronic information;

(b) not performing a discovery undertaking;

(c) failing to give an answer to interrogatories;

(d) failing to adhere to a deadline set by a Rule.

24.03 Appearance day notice

(1) party may make a motion for an order on appearance day by filing an appearance day notice.

(2) The appearance day notice must contain the standard heading, be entitled "Appearance Day Notice", be signed by the party or counsel, and include all of the following:

(a) the name of the moving party;

(b) a concise description of the proposed order;

(c) the time and date when, and place where, the moving party will appear before a judge presiding in appearance day chambers;

(d) a representation that the motion can be heard and determined quickly;

(e) a concise statement of the reason for the motion;

(f) notice that a party may make representations to the judge of any fact that is not reasonably in contention, affidavits and testimony are not provided, and the judge may act on the representations;

(g) notice of the other party's right to be present and to provide representations briefly;

(h) a statement that a responding party who resides or has a place of business, or whose counsel resides or has a place of business, more than fifty kilometers from the Law Courts may make arrangements through the prothonotary to attend by telephone, or other teleconference;

(i) a warning that an order may be made although the other party does not attend.

(3) The appearance day notice may be in Form 24.03.

24.04 - Deadline

The appearance day notice must be filed no less than five days before the day of the hearing.

24.05 - Evidence

(1) A party may make representations to the judge on appearance day of a fact that could not reasonably be in contention.

(2) The representations may be made in the appearance day notice and in oral submissions to the judge when the motion is heard.

(3) The judge may act on the representations.

In my view, a major change with respect to appearance day is that appearances will now be more often initiated by solicitors than the prothonotary or that the prothonotary will in such circumstances by way of example, CPR 4.22, CPR 5.18, CPR 7.29, introducing a motion for dismissal for an action, application, judicial review, notice of appeal, et cetera, is five years old and no trial or hearing dates have been set. If you look at CPR 4.41 which deals with the contents of CPR 24.2(c) such objection will now most often come directly from a solicitor rather than the prothonotary.

DRAFT ORDER:

You would be wise to review in its entirety CPR 78. The new Rules reinforce the practice that is not always followed but should have been; namely, filing a draft order with the motion. Of particular concern of the Court in the past has been the form of the order. All too often law firms

had precedents that did not comply with the previous CPR 51 and a number of us began in the last year or so to refuse orders that did not fully comply with the then CPR 51 now CPR 78.05. You should make absolutely certain that your draft order and any final order complies with CPR 78.05. I do not find form 78.05 at page 5765 particularly helpful and you would be wise to develop a precedent that clearly and unequivocally complies with CPR 78.05. (Discussion)

I recommend that when you return to your law firm that you do not blindly follow the precedents on the computer in your firm. The majority of orders presented to the Court are not, in my experience, providing full compliance with CPR 78 and this despite the fact the Supreme Court has put a reminder in the Society Record at least twice pointing out the requirements of CPR 78 (formerly, CPR 51). If I had my way, I would adopt a Court policy refusing orders that do not comply with the simple instructions in CPR 78. They are there for a purpose, they provide a clear indication of who the Judge is that granted the order. Judges initial most orders. Personally, I both initial and use a stamp with my name. However, if there is no indication who the Judge is on the order, the majority of initials by Judges are indecipherable and neither staff, lawyers, clients or members of the public have the slightest idea who granted the order and if you ever have an amendment or further reference to it, you just simply create work. Do not conduct yourself in a sloppy manner and overall courtesy requires that you use the formality of a Judge's name and that you do not create work for staff.

Most Judges make a real effort to see that in decisions or orders prepared by the Court the proper name and initials of counsel is utilized and, indeed, most of us always try to address counsel in the court room by their name. This is simple institutional, professional courtesy.

"**CONSENTED TO AS TO FORM**?" What does this mean? I am pleased to say from my own personal observation that counsel are moving away from the frequency of putting these words on the end of the Order.

If you intend to consent to an order, for example, you reach agreement and undertake to provide disclosure of a document by a defined time period and you intend that be the result, you consent to the order unequivocally. Quite rightly a party is generally held to his or her consent. The only time you will utilize the terminology "consented to as to form" is when there are circumstances, for example, you have received a decision or ruling from the Court, the substance of which you do not agree with and perhaps are considering an appeal. Nevertheless you will sign the order "consented to as to form" where you are satisfied the terminology in the order accurately reflects the determination but you still do not consent or agree that the substantive effect of the order is correct. It should be clear that the use of the terminology "consented to as to form" is to be used on very limited occasions.

If you get into a dispute with another solicitor as to the use of this terminology you do not normally go to war. Simply spell out your position in a letter and get on with it; i.e., "Dear Mr. Jones: Received the order changed to read 'consented to as to form' and I will proceed to take out the order bearing in mind that we in fact reached unequivocal agreement that your client will comply with the provisions of this order." There's always a way to avoid unnecessary, unproductive process.

MEMORANDUM TO CHAMBERS JUSTICE:

Before dealing with the memorandum to Chamber Judge, I bring to your attention the Chambers application document cover sheet. My understanding is that it has not been updated and we should take a quick look at it. Until the Court provides an updated one, you might want to change the time frames and references to Chambers motion *inter partes*, et cetera.

From a practical point of view, please try and list your direct phone number because it is the practice of a number of Judges to have staff or even her/himself contact you in advance to raise an inquiry as to what

might well be a deficiency. It cuts down the time requirement and avoids embarrassment in open court. If the application is filed in the name of a particular solicitor and you end up being asked to make the attendance at Chambers, the first thing you should do is call the Chambers Coordinator, Helve Koppel at 424-2900 and advise her that you are appearing on the application. If the application is called on the basis of seniority and you are junior, you should always indicate to the Court that you defer to senior counsel.

CPR 23.10 which is the Rule dealing with chambers motions generally provides:

> **Briefs**
>
> 23.10 A party moving, or opposing, a motion must deliver a brief to the judge hearing the motion.

You will also note that in the table that CPR 23.11 sets out specific time lines for Chambers briefs and you might make note of CPR 23.11(2) where you certify on the notice of motion no opposition to the motion, your supporting brief may be filed two days before the motion is to be heard. Similarly, on an *ex parte* motion the brief must be filed no later than two days before the motion is to be heard (CPR 23.14), although we often have emergencies where this Rule simply cannot be complied with. However, where it is possible, you must comply with this Rule. In fact the new Rule, CPR 40.03, requires two copies of the brief. My experience to date suggests that this is not environmentally sound nor practical as it simply introduces a great deal of weight and volume to files and initial storage. Nevertheless, it is the Rule and we will see how it develops. [See CPR 40.02]

From a practical point, remember the Judge has a huge volume of files to review, therefore you should avoid supercilious verbiage. One way of approaching the preparation of a brief is to review the Rules, statutory authority and case law. Focus upon bringing yourself within the requirements necessary for you to obtain the relief sought. Put yourself in the position of the Judge - what will the Judge ask and likely require before going your way and granting you the relief you seek? A Chambers memorandum or brief does not have to be a formal factum. It can and often takes the form of a very short one or two page letter. As I indicated earlier, it is often a good idea to start your brief with reference to the requirement of notice and proof of service. Simply recite that the affidavit of service on file discloses that X was served as required.

CPR 33 - COUNSEL / CHANGE OF COUNSEL:

This has been such a difficult area and one which has tried the patience of the Court.

One of the areas of the greatest concern to the court and administration in the prothonotary's office was the confusion surrounding the former CPR 44, change of solicitor. I say confusion because some solicitors chose to interpret the Rule in a fashion that virtually permitted them to file a document on behalf of a party and then virtually immediately write a letter saying that although I filed the defence document, I want to advise that I was engaged solely for that purpose and I am not continuing to act for party X. Also, during the course of an action, we would often have a letter sent by a solicitor to the prothonotary saying this is to advise that for now and the immediate future I am not longer acting for party X. There are many variation of the foregoing. This presented a real inconvenience and unnecessary expense in time and effort by solicitors, the court and the administrative staff. The new CPR 33 is in very clear language once you become counsel of record you can be removed only in accordance with CPR 33. CPR 33.02 sets out how you become a counsel

of record, that simply categorizes the circumstances and there is no material change from the practice in the past. [Read CPR 33.02]

It is stating the obvious that at all times there must be a counsel of record for a represented party. Litigation is expensive and time-consuming enough without having to ascertain to whom documents must be delivered or served and where during the course of that litigation.

You cease to be counsel of record only by virtue of compliance with CPR 33.03 (review).

You see that the requirement of having a counsel on record is imperative and note the obligations on a party who discharges counsel, CPR 33.05 (review) and, further, the obligation on new counsel where there is a change of counsel, CPR 33.06 (review).

I mentioned earlier that there was often an attempt by solicitor to act in a limited manner for a party and that this caused immense difficulties. There is now authority for counsel to act for a limited purpose, but this is only on behalf of a party who otherwise acts on their own, CPR 33.09. This exception is, for the obvious reason, that where you have a self-rep, if the solicitor is involved for any portion it is to be encouraged and generally turns out to be most helpful.

Often when a change of solicitor takes place, the solicitor feels no obligation to fulfill any outstanding obligations to the court; however, the obligation to do so is now firmly set out in CPR 33.10 (review).

TIMING OF WITHDRAWAL AS COUNSEL:

There will be occasions when you feel compelled to withdraw as counsel. Often this is related to the failure of a client to provide the necessary retainer for services and disbursements. If you find yourself in a position acting for a party on the undertaking of that party to provide the

retainer, I would recommend that you try and have the relationship with your client **confirmed and fulfilled as early as possible**. You want to avoid, if at all possible, being required to make your application to withdraw as counsel of record, CPR 33.11, in close proximity to any events such as an outstanding Chambers application (motion), discovery or at the worst case scenario, on the eve of trial. You run the risk of a late application to withdraw possibly being dismissed or, if granted, additional upon payment of costs or other terms to be fulfilled by your client and in a worst case scenario, by you the solicitor personally.

23.06 - File Notice of Motion When Date Obtained:

(1) A party who obtains a date for a motion in chambers must file the notice of motion no more than one day after the court delivers to the party a written notice of the date.

(2) The prothonotary may cancel the date if a notice of motion is not filed after one day.

You should also take note for extraordinary circumstances that may arise in that the court has jurisdiction to vary the time requirements set out in any Rule but obviously you must have extraordinary situation and bring yourself clearly within CPR 2.03.

I. NON-COMPLIANCE

CONTEMPT OR?:

It has been my experience in practice and since I have been on the Supreme Court that contempt applications are rarely very productive. All too often they evolve from a situation where while the party against whom a contempt Order is sought has failed to act properly, there invariably is something that the applicant missed or failed to do on time. In addition, a contempt proceeding is invariably a pouring of gasoline on a fire. It has its place, but in my experience counsel try to utilize it far too extensively when an alternate procedure can be far more effective.

Here I am raising a procedure of two dates, see **Dorey** v. **Nova Scotia (Registrar of Motor Vehicles)**, [2000] N.S.J. No. 227 and **Flewelling** v. **Scotian Island Property Limited**, [2009] N.S.J. 94.

Where you have non-compliance, particularly if it is egregious, the use of two dates ensures the high probability that you will be able to have your opponents action dismissed or defence struck and leave that party with no come-back for having brought such a course of action upon himself/herself.

The Court of Appeal approved of the use of two dates in **Werry** v. **van de Wiel**, [2005] N.S.J. No. 401. In that case there was a lengthy history of what I described in one of the earlier applications as "the van de Wiel's playing games", I in fact sent the van de Wiels a copy of the decision in **Dorey**. On the final date the Chambers Judge struck the defence and granted summary judgment based on the van de Wiel's willfully and deliberately ignoring their responsibilities in connection with the action, the latest example of which was the failure to attend on discoveries on May 19, 2004.

Take, for example, where there has been a failure to answer undertakings or as in **Dorey** v. **Nova Scotia (Registrar of Motor Vehicles)**, above, the failure to attend at a discovery, the Order provides for whatever is outstanding, ie. fulfillment of the undertakings by a date which provides a liberal amount of time and in the same Order it provides that the failure to fully comply by that date sets a date recited in the Order for dismissal / striking of the other party's claim. It puts the default person in a position of requiring compliance and, failing compliance, one final opportunity to justify the non-compliance and failing such it brings an end to issues of liability and either a determination or moving on to the conclusion of assessment of damages. Using the two date procedure will, in my view, highly increase the probability of the Court of Appeal approving of and dismissing any appeal from the final Order.

J. PRACTICE - PROFESSIONALISM - SUGGESTIONS

1. **Punctuality.** Be on time. Indeed, if you have a contested motion, be there early so as to be available for last minute discussion with opposing counsel which may result in resolution of narrowing the application.

2. **Be professional.** Be aware of the professional courtesies of the courtroom. Make a slight bow to the Judge when entering or leaving the courtroom and certainly if the Judge notices it, the Judge will attempt to return it. Wait for a break in the presentation before moving in or out of the court. If there is a lengthy presentation underway and you must leave, then do so quietly, bow slightly to the counsel addressing the court and depart with a minimal amount of interference. Refer to opposing counsel as "My Friend" or "My Learned Friend", if opposing counsel is a Queen's Counsel. While the other side is presenting argument, do nothing to distract the Court, do not shuffle papers or, worse, make gestures such as shaking your head, rolling your eyes. Address the Court properly and until there is a change, the present appropriate address in the courtroom of a Supreme Court Judge is "My Lord/My Lady" and before a Provincial Court Judge, "Your Honour".

3. Always speak directly to the Chambers Judge and not to opposing counsel. You are an advocate and not a debater.

4. Always introduce yourself to the court clerk and in my practice, even though I had been 30 years at the Bar, was to give the court clerk my card so the clerk had the correct spelling and my address.

5. When you rise for the first time always, always introduce yourself loudly and clearly. Not only is this the proper courtesy but it provides assistance to court staff by way of voice recognition, if by any chance there is a need to transcribe your remarks. If you are an Articled Clerk, then advise the Judge at the outset of your remarks.

6. Always be well prepared. Always review the file and avoid having to admit that you do not have a grasp on the file.

7. In a contested application or motion, check and make sure the Judge has all the documentation you are relying upon; ie., affidavits, brief, correspondence. The sheer volume of documentation filed for Chambers means that from time to time documents are mislaid or do not get to the Chambers Judge's office. Presumably what you have prepared is important and if the Judge has not read it or at least have a copy in front of her/him, you run the risk of not having a full and complete hearing. Well prepared counsel always have an extra copy of the documents they are relying upon to cover the contingency where the Judge may not have received one of them.

8. Seniority. You will see from the Chambers sheet that seniority is still a factor tempered by the reality of hourly charges. However, there are still certain traditions relating to seniority. One example, the front row in Chambers is reserved for Queen's Counsel and you should only use it if there are none present. If an Articled Clerk or a junior counsel, stay out of the front row unless and until the Judge asks you to move up to facilitate your presentation. In addition, particularly as young counsel, you will have a file that is filed in the name of senior counsel and when it is called, you will generally introduce yourself and indicate your willingness to defer to more senior counsel present.

9. Courtroom. The acoustics in our courtrooms leave much to be desired. It is not unusual to have some type of repairs to the heating, ventilation or whatever and even without such distractions, it is necessary for you to speak up and clearly. Bear in mind also that Judges tend to be older, having practiced for lengthy periods before appointment and there is a risk that the hearing capacity of the Judge may not be quite that high. In my day, it became a very serious problem with more than one Judge and, on occasion, you literally had to shout in order to have any certainty that the Judge fully heard all that you had to say.

10. Be focused. Do a chart or a list of all the factors that can possibly bring yourself within the authority, rule or statutory provision. Avoid irrelevant factors. Spell out those that are likely, by virtue of coming within the authority, to convince the Judge to provide you the relief you seek.

11. Brief - Keep it brief. Check your citations and where you are using a firm brief, check it out carefully because we have found a number of firm briefs and precedents to be either in error or inadequate.

12. Affidavits - Keep the affidavits to a manageable size and only advance evidence that is relevant. It may look good with a substantial volume of exhibits, computer printouts, et cetera, but window dressing is not beneficial if the material is not of substance for the motion, and not relevant. It is acting unprofessionally to clutter the record. Doing so diminishes your prospects of success.

13. Affidavits. Often you will have a serious time restriction that does not permit you to have the supporting affidavit sworn in time to be served with the Notice. You may serve an unsworn copy by giving the undertaking to have a sworn copy available at the hearing. Remember also that with respect to any affidavit in response, there is a time limit. See Rule 37.06(3).

14. Oral Evidence - Normally there is no oral evidence given in Chambers. It can only occur by leave of the Court. What you do have as a general rule is cross-examination on the affidavits and therefore you want to make doubly certain as to the information being accurate and relevant and not to swear your affidavit as a solicitor other than procedural aspects or you run the risk of being cross-examined.

15. Costs - There will be a separate session on costs but I want to highlight what I consider an error in most applications is where counsel include in the draft Order a specific amount for costs. Costs are in the

discretion of the Court, not only as to whether they will be granted but the terms and the amount. Generally speaking the better practice in any Chambers Motion is to simply indicate if you wish at the end of your presentation your desire to be heard on the issue of costs when the Court renders its decision. The draft order should include a provision for costs with the amount space blank.

16. Disbursements - Always be in a position to advise the Court of your disbursements so that if you are successful in getting costs, you do not lose out by being unable to advise the Court of your precise disbursements for the application.

17. Making and responding to an objection - Rarely do you have occasion to object whenever another counsel is addressing the Court in a Chambers matter. You will have, when there is examination of witnesses, the occasional opportunity to object and, in any event, whenever counsel raises an objection, counsel objecting should stand. The response when counsel makes an objection is that you take your seat and do not rise until the objection has been stated and you wish to answer.

18. Addressing the Court - the Court addresses you - Whenever you wish to address the Court, you do so from a standing position and whenever the Court addresses you, you immediately rise and remain standing until the Court has concluded whatever remarks it makes to you or are exchanged between you and the Court.

19. Compliance before complaint - If you are going to make a motion based upon the opposing party failing to meet some requirement, ie. failing to file a List of Documents, I would strongly recommend that you do not leave yourself open to the same criticism. At the very least, you give the opposing party an opportunity to cloud the issue of their non-compliance. As I said to you before, the best policy is to avoid being sidetracked, always enter the courtroom on the high ground.

20. Undertakings - Often in a Chambers Motion the Court will seek or counsel will provide an undertaking. It usually arises in situations such as counsel have received a fax confirming that the sworn copy of the affidavit is being sent by courier but it hasn't yet been received. The Court will often grant the order on the undertaking of counsel to file the sworn affidavit before the order is issued. This obviously saves an adjournment, unnecessary expense, et cetera but it occurs because you are an Officer of the Court and the Court is entitled to expect full and total compliance with any undertaking. I was taught by A.W. Cox, Q.C., my mentor, that in addition to this fundamental and obvious professional ethical requirement, I should always follow up by instead of filing the sworn affidavit went it was received, writing a letter to the Prothonotary, accompanying its filing stating that I was pleased to enclose the sworn copy of the affidavit being filed in accordance with my undertaking to Chief Justice Ilsley and I was taught to copy the Judge to whom I'd given the undertaking.

Unfortunately, this practice seems to have diminished but, from my personal perspective, I think it's a wise course to follow and the confirmation that you've lived up to your undertaking helps keep your credibility current.

Indexed as:

Veinot v. Dohaney

Between
Ronald C. Veinot, plaintiff, and
Barbara Wenaus Dohaney, defendant

[2000] N.S.J. No. 400

189 N.S.R. (2d) 263
101 A.C.W.S. (3d) 1181

Docket: S.H. No. 162934

Nova Scotia Supreme Court
Halifax, Nova Scotia

Goodfellow J.
(In Chambers)

Heard: November 17, 2000.
Judgment: December 13, 2000.

(11 paras.)

Mortgages — Mortgage actions — Foreclosure and sale, deficiency judgment — Practice.

This was an application by the mortgagee for a deficiency judgment. In a foreclosure action, the property was sold for a nominal amount. The mortgagee now sought the balance outstanding, including costs, after applying the sale proceeds to the expenses. His application was supported only by an affidavit from his solicitor, the fifth paragraph of which gave assurances that the mortgagee had no interest or connection with the purchaser of the property.

HELD: Application adjourned. The fifth paragraph of the affidavit was to be struck. The mortgagee was required to file his own affidavit of assurance. The affidavit was an assurance that the mortgagee had not retained directly or indirectly any interest in the land foreclosed.

Statutes, Regulations and Rules Cited:

Nova Scotia Civil Procedure Rules, Rule 38.01, 38.02, 38.10.

Counsel:

J. Scott Barnett, for the plaintiff.

GOODFELLOW J.:—

BACKGROUND

1 Ronald C. Veinot obtained an Order for Foreclosure and Sale of a property covered by a collateral mortgage executed by Barbara Wenaus Dohaney January the 15th, 1998. A public

auction was held the 31st of August, 2000 pursuant to the Order and one John Fancy secured the property by the highest bid in the amount of $1,650.00. This is an application by Ronald C. Veinot for a deficiency judgment in the amount of $28,476.33 representing the balance outstanding, including costs, after applying the sale proceeds to the expenses of sale. In support of the application is Ronald C. Veinot's solicitor's affidavit containing the following paragraph:

> 5. THAT I am informed by the Plaintiff, Ronald C. Veinot, and do verily believe that the purchaser at that sale herein was not a party related in interest to the Plaintiff.

CIVIL PROCEDURE RULES

Form of affidavits

> 38.01. (1) An affidavit used in a proceeding shall be,
>
> (a) entitled in the proceeding, except where there is more than one plaintiff or defendant or proceeding when it shall be sufficient to state the name of the first plaintiff, defendant and proceeding followed by the words "and others" or "and other proceedings", as the case may be;
>
> (b) expressed in the first person and state the name in full, place of residence and occupation of the deponent, and if he is a party, or the solicitor, agent or employee of a party it shall state that fact;
>
> (c) divided into paragraphs numbered consecutively, with each paragraph being confined as far as possible to a distinct portion of the subject, and any dates, sum, and other numbers may be expressed in figures; and
>
> (d) signed by the deponent with the jurat completed and signed by the person before whom it is sworn.

Contents of affidavit

38.02. (1) An affidavit used on an application may contain statements as to the belief of the deponent with the sources and grounds thereof.

(2) Unless the court otherwise orders, an affidavit used on a trial shall contain only such facts as the deponent is able of his own knowledge to prove.

Cross-examination of deponent of an affidavit

38.10 A deponent of an affidavit to be used on a trial or hearing may be examined, cross-examined and re-examined on,

> (a) an examination for discovery, in the same manner as a party and Rule 18 shall apply with any necessary modification;
>
> (b) a trial under rule 31.04;
>
> (c) a hearing under rule 37.09(1)(c).

Use of affidavit in subsequent applications

38.14 An affidavit that has been used and filed in a proceeding, may be used on any other application in the proceeding.

2

THE CANADIAN BAR ASSOCIATION CODE OF PROFESSIONAL CONDUCT, CHAPTER IX:

The lawyer as Witness

5. The lawyer who appears as an advocate should not submit the lawyer's own affidavit to or testify before a tribunal save as permitted by local rule or practice, or as to purely formal or uncontroverted matters. This also applies to the lawyer's partners and associates; generally speaking, they should not testify in such proceedings except as to merely formal matters. The lawyer should not express personal opinions or beliefs, or assert as fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer must not in effect become an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to someone else. Similarly, the lawyer who was a witness in the proceedings should not appear as advocate in any appeal from the decision in those proceedings. There are no restrictions upon the advocate's right to cross-examine another lawyer, and the lawyer who does appear as a witness should not expect to receive special treatment by reason of professional status.

3

IN LEGAL ETHICS AND PROFESSIONAL CONDUCT - NOVA SCOTIA HANDBOOK, CHAPTER 10 AT P. 43:

Constraints on lawyers giving evidence by affidavit

10.11 The lawyer has a duty to respect and comply with the rules of court for affidavits and not to give evidence, in a matter in which the lawyer is involved as counsel, by affidavit except only as to merely formal or uncontroverted matters.

4 Despite words of caution and directions from the court, plus a concerted effort by Dalhousie Law School Procedure classes the use of solicitor's affidavits dealing with substantive matters appears to be increasing.

5 This court has commented in Turner-Lienaux v. Civil Service Commission (N.S.) et al (1992), 111 N.S.R. (2d) 351, at p. 355:

[15] There is no absolute prohibition that a solicitor cannot file an affidavit, but it is limited. In the case of New Brunswick Milk Dealers Association v. New Brunswick Milk Marketing Board (1984), 56 N.B.R. (2d) 413; 146 A.P.R. 413, Stevenson, J., said at the bottom of p. 414 and the top of p. 415, beginning at para. 7:

It is bad practice for the solicitor for a party to make such an affidavit. We have been lax in this court in permitting solicitors who make affidavits not confined to procedural matters to argue cases on the basis of their own affidavits. The practice should be discouraged. A solicitor who make an affidavit swearing to facts going to the merits of a case or of a motion is in the same position as a solicitor who finds himself on the

witness stand - he should not be heard as both witness and counsel ...

6 Horne v. Industrial Estates Ltd. et al (1996), 152 N.S.R. (2d) 380, at p. 384:

> [22] The evidence in support is advanced by Mr. Mitchell's two affidavits. Nothing turns on the affidavits being those of the plaintiff's solicitor primarily because there is no objection. Nevertheless, the court cautions solicitors that a solicitor's affidavit normally should be used only for procedural, non-controversial facts, ie. date of receipt or sending of a letter, statutory compliance as to filing, etc. and not to facts that are the personal knowledge of the client.

7 Dalhousie Law School Civil Procedure R. Murphy and R. Thompson (1999), the authors state:

> When preparing affidavits, remember that affidavits are subject to cross-examination. For this reason, counsel should not rely upon his or her own affidavit in Chambers, for risk of becoming a witness and then forced either to withdraw as solicitor or to withdraw the affidavit. Counsel may file their own affidavit in respect of uncontested or purely procedural matters.

8 Finally, Justice F.B. William Kelly of our court in his lecture on Chambers Practice to the Civil Procedure class at Dalhousie Law School states:

> Affidavits dealing with substantive matters should be in the affidavit of the client and not the solicitor for a number of reasons. Firstly, it is the client who has the personal information and who will be making the statement under oath. That is the best evidence. The solicitor can only attest to the fact that he believes his client. Secondly, the solicitor places himself in a vulnerable position in that the opposing counsel can request and has the right to cross-examine the affiant. If this request is made and the request is to cross-examine on a substantive matter, the solicitor will probably have to withdraw from the proceeding because she becomes a witness. Although it is not always possible, affidavits of the solicitor for the most part should be confined to procedural matters.

9 For an example of substantial portions of a solicitor's affidavit that were struck, see MacDonald v. Workers' Compensation Board (1996) 145 N.S.R. (2d) 301.

CONCLUSION

10 The intent of paragraph 5 of the solicitor's affidavit is to provide some assurance to the court that the deficiency judgment sought represents what the market at auction after notice would bear brought and that the deficiency judgment sought from the difference between the sale price and the indebtedness, is appropriate. If the mortgagee was the true purchaser or beneficial purchaser, then as a mortgagee, he would not be entitled to both the property and a deficiency judgment based on the nominal successful bid value. The assurance that the mortgagee has no interest or connection with the purchaser of the property is one that ought to be given by the mortgagee and not by the solicitor. It is after all an assurance that the mortgagee has not retained directly or indirectly any interest in the land foreclosed.

11 In the circumstances, the court strikes paragraph 5 and requires the mortgagee to file his own affidavit of assurance. The application will stand adjourned until such is received. (Note: Affidavit of Ronald C. Veinot was received setting out that the purchaser at auction is not related to, associated with Mr. Veinot by family or business connection and that Ronald C. Veinot has no interest beyond pursuing the defendant for collection of his deficiency judgment).

GOODFELLOW J.

Part 6 - Motions

Rule 24 - Appearance Day Motion

Educational Notes (Skip educational note)

This Rule codifies current Appearance Day practices in Halifax under R.68.04 and Practice Memorandum 27, with some minor changes. No affidavit is required. The deadline for filing a notice has decreased to 5 days from 10 and the situations that may be addressed at Appearance Day are broader than those in R.68.04. Rule 24 also offers a similar method outside of Halifax through use of R.25.03 or R.26.

24.01 - Scope of Rule 24

24.01 Scope of Rule 24

(1) The court provides a time and date when parties to a proceeding in which documents are filed at the Law Courts in Halifax may appear, or be required by the prothonotary or a judge to appear, before a judge for a motion made quickly and without an affidavit.

(2) The court may provide a time for appearance day motions on issues involving the scheduling of trials and another time for all other appearance day motions.

(3) A party to a proceeding in which documents are filed elsewhere may seek to have the same kinds of issues dealt with quickly or without an affidavit in accordance with Rule 25.03, of Rule 25 - Motion by Appointment, or Rule 26 - Conference.

(4) A party may make a motion on appearance day, in accordance with this Rule.

24.02 - When appearance day motion appropriate

24.02 When appearance day motion appropriate

(1) A party may make a motion on appearance day, if a Rule permits or all of the following circumstances exist:

(a) the motion is brought to determine a procedural issue in dispute between parties or to compel compliance with a Rule;

(b) no relevant fact can reasonably be contested;

(c) the motion can be heard and determined quickly;

(d) no judge has been assigned to preside at the trial or hearing of the proceeding.

(2) The following are examples of a procedural issue in dispute between parties that is

usually suitable to a motion on appearance day:

(a) a disagreement about how much time will be required for the hearing of a motion in chambers or an application;

(b) a disagreement about whether a date assignment conference should be allowed on the ground that the other party is lagging in making disclosure or conducting a discovery;

(c) an objection to setting trial dates following a request for a date assignment conference;

(d) an objection to the time, date, or place selected for a discovery, or for a motion or application in chambers, unless a motion by teleconference is more appropriate than a motion on appearance day;

(e) a dispute about the method of recording, exclusion of witnesses, or order of witnesses at a discovery;

(f) a dispute about the need for, or terms of, the variation;

(g) appointment of a case management judge.

(3) The following are examples of a non-compliance with a Rule that may lead to a motion on appearance day to compel compliance with the Rule:

(a) not disclosing relevant documents or electronic information;

(b) not performing a discovery undertaking;

(c) failing to give an answer to interrogatories;

(d) failing to adhere to a deadline set by a Rule.

24.03 - Appearance day notice

24.03 Appearance day notice

(1) A party may make a motion for an order on appearance day by filing an appearance day notice.

(2) The appearance day notice must contain the standard heading, be entitled "Appearance Day Notice", be signed by the party or counsel, and include all of the following:

(a) the name of the moving party;

(b) a concise description of the proposed order;

(c) the time and date when, and place where, the moving party will appear before a judge presiding in appearance day chambers;

(d) a representation that the motion can be heard and determined quickly;

(e) a concise statement of the reason for the motion;

(f) notice that a party may make representations to the judge of any fact that is not reasonably in contention, affidavits and testimony are not provided, and the judge may act on the representations;

(g) notice of the other party's right to be present and to provide representations briefly;

(h) a statement that a responding party who resides or has a place of business, or whose counsel resides or has a place of business, more than fifty kilometers from the Law Courts may make arrangements through the prothonotary to attend by telephone, or other teleconference;

(i) a warning that an order may be made although the other party does not attend.

(3) The appearance day notice may be in Form 24.03.

Forms

24.04 - Deadline

24.04 Deadline

The appearance day notice must be filed no less than five days before the day of the hearing.

24.05 - Evidence

24.05 Evidence

(1) A party may make representations to the judge on appearance day of a fact that could not reasonably be in contention.

(2) The representations may be made in the appearance day notice and in oral submissions to the judge when the motion is heard.

(3) The judge may act on the representations.