(A) INTRODUCTION

This paper surveys the jurisprudence which has developed in respect of applications brought pursuant to Civil Procedure Rule 13.01 (summary judgment applications) and Civil Procedure Rule 12.06 (applications to set aside default judgments). One might question why these two seemingly disparate applications would be canvassed in one paper. The answer lies in the possible outcome of such applications in that either can result in a complete determination of the issues between the parties or at a minimum can result in a final adjudication of liability, leaving only damages to be assessed. Because of this possible result the applicable jurisprudence places similar requirements on parties seeking either summary judgment or an order setting aside a default judgment. The common requirement in both applications is the necessity of establishing that there does not exist a bona fide defence or a substantial issue between the parties which ought to be tried. A review of the reported cases reveals that the commonality in these applications of the necessity of proving the lack of a meritorious defence has arisen as a result of the court's concern that a party with a bona fide defence should not be deprived of its opportunity to place that defence before a court and have the matter adjudicated on its merits.

Each application will be dealt with separately beginning first with summary judgment applications.

(B) SUMMARY JUDGMENT

Civil Procedure Rule 13.01 reads as follows:

> Where a defendant has filed a Defence or appeared in the hearing under an Originating Notice, the plaintiff may, on the ground that the defendant has no defence to a claim in the Originating Notice or any part thereof except the amount of any damages claimed, apply to the Court for judgment against the defendant.

Civil Procedure Rule 13.02 provides the presiding chambers judge with a number of options in determining a summary judgment application. Judgment on the claim (13.02(b)) and judgment with damages to be assessed (13.02(e)) are the options most frequently exercised.

The Appeal Division of the Nova Scotia Supreme Court established the test to be applied in applications for summary judgment in its 1976 Decision of Carl B. Potter Limited v. Anil Canada Limited et al (1976), 15 NSR (2d) 408. In that decision, Justice Cooper cited the 1932 Saskatchewan Court of Appeal decision of Royal Bank of Canada v. Malouf, [1932] 2 WWR 526 wherein Martin, J.A. had succinctly set out the competing duties which a summary judgment application places upon the plaintiff and the defendant, at page 529 as follows:

> It is well settled that the provisions of Rule 127 are not to be used to strike out a defence, unless it is very clear that the defendant has no substantial defence to submit to the Court; but when a judge is satisfied that not only is there no defence but no fairly arguable point to be presented on behalf of the defendant, it is his duty to give effect to the Rule and to allow the plaintiff to enter judgment for his

> claim [authorities omitted]...Moreover, in order to resist an application under the Rule, it is not sufficient for the defendant to say he has a good defence on the merits; the defence must be disclosed and sufficient facts must appear to show that there is no bona fide defence, or at least, as stated by Jessel, MR. in *Anglo-Italian Bank v. Wells* supra, 'a fairly arguable point to be argued on behalf of the defendant...' (emphasis added)[1]

In the 1977 Court of Appeal decision of Bank of Nova Scotia v. Dumbroski (1977), 23 NSR (2d) 532, Justice MacDonald at page 537 restated the obligations which a summary judgment application places upon the party moving for judgment and as well upon the party resisting judgment:

> Rule 13 has its antecedents in Order 14 of the English Supreme Court Rules. As stated in the Supreme Court Practice (1976), Volume 1, page 136, the purpose of 0.14 is to enable the plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence, or raise an issue against the claim which ought to be tried ...(authorities omitted)...The defendant is bound to show that he has some reasonable ground of defence to the action. (emphasis added).

These authorities clearly establish requirements which must be met by the plaintiff and defendant in a summary judgment application. These requirements will be dealt with in turn.

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[1] The test set out in the Royal Bank of Canada v. Malouf decision, *supra*, as adopted by the Appeal Division in the Carl B. Potter Limited v. Anil Canada et al, *supra*, have been consistently followed. See Bank of Nova Scotia v. Dumbroski (1977) 23 NSR (2d) 532 (NSSCAD), Lunenburg County Press Limited v. Deamond (1977), 18 NSR (2d) 689 (NSSCAD) and Montreal Trust Co. of Canada v. Quad-Ram Development Group et al (1994), 136 NSR (2d) 333 and others.

B(i) The Applicant's Burden

As stated in the Bank of Nova Scotia et al v. Dumbroski, *supra*, decision, a plaintiff in order to obtain summary judgment must prove the claim clearly. This requirement was considered by Ohearn, CCJ in Mastercharge v. Price (1977), 42 NSR (2d) 244 wherein His Honor stated at page 250:

> The practice is the plaintiff cannot require the defendant to come into court and verify his defence by affidavit until the plaintiff himself has verified his cause of action by an affidavit of merit by someone who can prove the facts. Normally, this cannot be done by the plaintiff's solicitor.

Certain causes of action lend themselves more readily to successful summary judgment applications than others; for example, actions on promissory notes, actions for foreclosure and sale and actions on outstanding accounts. (See ABN Bank Canada v. NsC Diesel Power Inc. (1991), 101 NSR (2d) 361.) Likewise, other causes of action do not lend themselves easily to being established by way of affidavit on summary judgment applications. For example, cases which involve allegations of fraud or which turn on the credibility of certain witnesses are unlikely to succeed on a summary judgment application. (See Burchell et al v. Vincent et al (1993), 121 NSR (2d) 37.)

The plaintiff in preparing the affidavit to be filed in support of such a summary judgment application must be mindful of the obligation to establish the claim and establish that there is no

fairly arguable defence to be raised by the defendant. This requires a plaintiff to set forth facts in the affidavit which consider and prove to be unfounded those allegations contained in the statement of defence.

B(ii) The Response to the Summary Judgment Application

When a plaintiff, upon application for summary judgment, establishes a clear claim the burden then shifts to the defendant to establish, by way of affidavit, the existence of a fairly arguable defence. This onus, which is placed upon a defendant responding to a summary judgment application, was well-described in Featherstonhaug v. Featherstonhaug, [1939] 2 DLR 262 wherein Robertson, CJO on behalf of the Ontario Court of Appeal stated at page 268:

> The defendant is to show the nature of his defence and to disclose such facts as may be deemed sufficient to enable him to defend, and it is upon his success or failing in doing so that the fate of the motion must turn. In a sense, the usual Rule is reserved for this special purpose, and the burden of proof, such as it is, lies upon the defendant and not upon the plaintiff. (emphasis added)

The defendant must by way of affidavit not only allege that there is in fact a defence but depose sufficient facts to establish that there is a fairly arguable point to be raised in defence of the plaintiff's action. It is not sufficient to simply list those defences set out in the pleadings without offering any factual basis in respect thereof. (See Royal Bank of Canada v. Riggers (1993), 122 NSR (2d) 435.) The defendant does not have to prove the defence by way of affidavit but simply disclose sufficient facts to support the position that a fairly arguable issue that should be dealt with

at trial can be raised. (See Montreal Trust Company of Canada v. Squad Ram Development Group Limited et al, *supra.*)

B(iii) Obligations of the Chambers Judge

As stated by Justice Martin in the Royal Bank of Canada v. Malouf decision, *supra*, it is the duty of the chambers judge to give effect to the Summary Judgment Rule when the chambers judge is satisfied that not only is there no defence but no fairly arguable point presented on behalf of the defendant. This statement of the chambers judge's duty is tempered by the recurring statement in summary judgment jurisprudence that summary judgment is a remedy which ought not be lightly granted as it will deprive a litigant of the right to have a bona fide case disposed of after a full trial. (See Lunenburg County Press v. Deamon, *supra* .)

Where contentious issues of fact or law are placed before a chambers judge on a summary judgment application, the application ought to be rejected and the matter set over for trial. It is not the place of the chambers judge to determine on a summary judgment application the likelihood of success of the defence were the case to be argued on its merits. (See Webber et al v. Canadian Surety Company (1992), 112 NSR (2d) 284.)

In Webber et al v. Canadian Surety, *supra*, Justice Saunders referred to the New Brunswick Court of Appeal decision of Irving Oil Limited v. Jost A. Likely Limited (1982), 42 NBR 624 wherein Stratten, J.A. on behalf of the New Brunswick Court reviewed the law relating to the

chambers judge's authority to determine factual and legal disputes upon summary judgment applications:

> We are all of the view that on an application of this nature the power to direct the judgment be summarily signed should be exercised with great caution and with the most scrupulous discretion. The plaintiff must make out a case which is so clear that there is no reason for doubt as to what the judgment of the court should be if the matter proceeded to trial. Upon such a motion it is not the function of the judge....to determine matters either of law or fact which are in serious controversy. That function should be reserved to the trial tribunal. The authorities are clear that where there exists any real difficulty as to a matter of law or any serious conflict as to a matter of fact then summary judgment should not be granted. (authorities omitted) (emphasis added)

(C) SETTING ASIDE DEFAULT JUDGMENTS

Civil Procedure Rule 12.01 provides that a plaintiff is entitled to default judgment when a defendant fails to file a defence to an originating notice within ten days of the service thereof or within such period of time as is agreed upon or ordered by the Court. Civil Procedure Rule 51.05(1)(d) authorizes the Prothonotary to make and enter an order applied for under 12.01 or 12.02. Civil Procedure Rule 12.06 provides a means by which a default judgment can be set aside. This Rule reads as follows:

> The Court may, on such terms as it thinks just, set aside or vary any default judgment entered in pursuance of Rule 12.

The test to be applied by the chambers judge upon application made by defendant's counsel to set aside a default judgment under Rule 12.06 is found in the seminal case of Ives v. Dewar (1948) 23 MPR 218 wherein Parker, J. (at page 221) speaking for the Nova Scotia Supreme *en banco* stated:

> Before the interlocutory judgment should have been set aside..., it was necessary for the appellant to show by affidavit, facts which would indicate clearly that he had a good defence to the action on the merits; not necessarily a defence that would succeed at the trial because the action was not being tried on that application, but facts which would at least show beyond question that there was a substantial between the parties to be tried. He must also show by affidavit why his defence was not filed and delivered within the time limited by the Rules. The reasons thus disclosed are material matters which the judge or the Court should consider in determining whether

> the application to set aside the judgment should be granted or refused.[2]

The obligations which arise on the party seeking to set aside default judgment and upon the party resisting such an application are set out below.

C(i) The Defendant's Burden

In Keltic Collecting Limited v. Brophy (1987), 81 NSR (2d) 48, the Nova Scotia Court of Appeal restated the burden is upon an applicant seeking to set aside a default judgment. At page 49 of the decision Justice Chipman stated:

> He pointed out that an applicant who wishes to have default judgment set aside must show by affidavit two things: (1) facts which would indicate clearly that he has a good defence on the merits and (2) an explanation why the defence was not filed within the time limited by the **Rules**.

Each of these requirements will be considered separately.

[2] This case has been consistently followed by Courts in Nova Scotia. See for example Lloyd v. Manufacturers Life Insurance Company (1989), 90 NSR (2d) 339, ABN Bank of Canada v. NsCDiesel Power Inc. (1991), 101 NSR (2d) 361 and Fleet v. Techsus (1992), 111 NSR (2d) 293.

C(i)(a) A Good Defence on the Merits

An affidavit filed by a defendant should be filed by the defendant and not by the defendant's solicitor. Further, the affidavit must recite facts in support of the allegations contained in the statement of defence. The allegations contained in the proposed statement of defence will not of themselves be sufficient to set aside a default judgment. There must be placed before the Court facts upon which a defence is based. (See Note Dame Refrigeration v. Crimson Tide Fisheries (1988), 72 Nfld&PEIR 120 (NFLDSC).)

In deposing those facts which form the basis of a defence it is not incumbent upon the defendant to prove that the defence will be successful at trial. It will be sufficient for the defendant to put forward sufficient facts which if established at trial would amount to a valid defence of the claim (see Brown v. Toronto-Dominion Bank (1984), 65 NSR (2d) 88. However, a chambers judge will consider whether or not the facts as set forth in the defendants' affidavits do in fact support the alleged defences and thus establish that there are in fact issues to be tried. Thus, although the chambers judge must not attempt to determine if the defence will be successful at trial, the chambers judge must review the facts to ensure that a defence is in fact raised. In reviewing this portion of the test to set aside a default judgment, Justice Hallett in the 1991 Appeal Court decision of ABN Bank Canada v. NsC Diesel Power Inc., *supra*, said at page 374: "A defence without

merit should be recognized for what it is.". Accordingly, an applicant must make every effort to place before the court sufficient facts to satisfy the court that there is merit to the alleged defence.

It appears that the degree of specificity required of a defendant in an affidavit to set aside default judgment will be commensurate with the specificity contained in the statement of claim. Thus in circumstances where certain provisions in a statement of claim were vague the Nova Scotia Court of Appeal accepted that an affidavit setting out a general denial of wrongdoing was sufficient to answer the vague allegation contained in the statement of claim. (See Marissink v. Kold-Bak Inc. et al (1993), 125 NSR (2d) 203.)

C(i)(b) Reasons for Delay in Filing a Defence

This particular component of an application to set aside default judgment may require a solicitor's affidavit. If default judgment was entered against a party prior to retaining a solicitor and the application is made immediately upon counsel being retained then an affidavit should be deposed and filed by the plaintiff. However, if default judgment was entered subsequent to counsel being retained then counsel should consider filing an affidavit to explain the reasons for his or her delay in filing the defence. If default judgment is entered against a defendant prior to counsel being retained, it may not be satisfactory for the defendant's counsel to file an affidavit reciting the reason(s) as to why the defence was not filed in time. (See Notre Dame Refrigeration v. Crimson Tide, *supra*).

Mr. Justice Saunders recently considered the burden upon the defendant with respect to this component of the default judgment test in his 1992 decision of Anwyll-Fogo Architects v. Hage (1992), 116 NSR (2d) 370 wherein at page 375 of the decision His Lordship stated:

> The applicant must do more than say 'I'm sorry, I forgot'. It is not enough to simply give a reason. The applicant must demonstrate a reasonable excuse such that it would persuade me that justice between the parties would best be served setting aside default judgment.

Thus, the chambers judge in considering an application to set aside default judgment will not be satisfied simply with the giving of a reason why the defence was not filed but will assess the reasonableness of the reason provided. In assessing the reasonableness of the defendant's conduct in not filing a defence, the Courts will be mindful of the defendant's prior exposure to litigation, whether or not the defendant had engaged legal counsel at the time default was entered. A court will not consider it a reasonable excuse if a defendant simply says that he was heavily committed with business matters and thus failed to defend an action. (See Anwyll-Fogo Architects v. Hage, *supra.*)

In assessing the reasonableness of the excuse for failing to file a defence the court will consider whether or not the defendant's affidavit established a genuine intention to defend the action. In the 1992 decision of Szczesniak v. Firecan Inc. (1992), 115 NSR 2d) 292, Justice

MacAdam in setting aside a default judgment, stressed the fact that the defendant had established the intent to prepare and file a defence. A finding that the defendant intended to defend the action brought against it was in part the reason why Justice Roscoe set aside default judgment in Lewis-Choi Company Limited v. Western Glove Work Limited (1990), 98 NSR (2d) 218. In the recent decision of Pick O'Sea Fisheries Limited v. National Utility Service (Canada) (1995), 140 NSR (2d) 295 (case currently under appeal), Justice Saunders refused to set aside a default judgment partly as a result of his conclusion that the defendant had determined not to defend the plaintiff's action prior to making the default judgment application.

The significance of whether or not the defendant has established an intention to defend the plaintiff's claim arises as part of the Court's concern that the refusal to set aside default judgment not result in prejudice to a defendant. For example in the Pick O'Sea decision , it was the corollary of the judge's conclusion that the defendant did not intend to defend the action that the defendant could then not be prejudiced by the entering of the default judgment. At page 298, Justice Saunders stated as follows:

> It is difficult to see how the plaintiff was possibly prejudiced as it had already made it clear to the plaintiff that it was not going to file a defence in this jurisdiction.

In the Szczesniak v. Firecan Inc. decision, *supra*, Justice MacAdam concluded that as the defendant had intended to prepare and file a defence the defendant would thus be prejudiced by a

rejection of the application to set aside default. The corollary of this conclusion by Justice MacAdam was that the plaintiff would thus not be prejudiced by a granting of an application to set aside a default judgment since the plaintiff would simply be put to the same burden of establishing its claim with which it was faced prior to the entering of the default judgment. On this point, Justice MacAdam said at page 296 of his decision:

> In the instant case, and in view of the intent of the defendant to prepare and file a defence, the plaintiff has not been prejudiced other than with the necessity of now establishing his right or entitlement to the relief he obtained by default judgment.

The Nova Scotia Court of Appeal stressed the significance of the absence of prejudice to the plaintiff in an application to set aside default judgment in the 1989 decision of Lloyd v. Manufacturers Life Insurance Company, *supra*. That case involved an appeal from the decision of Justice Hallett wherein His Lordship had allowed an application to set aside default judgment. In the course of rendering his decision, Justice Hallett had stated :

> The Court never hesitates to set aside a judgment or take some action that is fair to the parties, whether they be a grade 6 defendant or a national company where there is not any real prejudice to the plaintiff. I am sure that a plaintiff has an easier road when you have a default judgment but it is simply not just that the judgment stand.

In reviewing this statement Mr. Justice Matthews on behalf of the Appeal Court stated:

> The alternative would be to deny litigants action without an opportunity for a trial on the merits. We therefore, cannot conclude the decision of the chambers judge be set aside.

Clearly, then the defendant's affidavit should set out, where applicable, facts upon which a Court could conclude that the defendant intended to defend the action.

A defendant's affidavit setting out the intention to file a defence will be considered against the reality of the time period which has elapsed between the entering of the default judgment and the making of the application to set aside the default. Indeed, a lengthy delay in applying to set aside default judgment will in certain circumstances negate a defendant's statement of intention to file a defence. This particular issue was canvassed recently by the Nova Scotia Court of Appeal in the Marissink v. Kold-Pak et al decision, *supra*, where Justice Chipman at page 207 stated:

> The appellant refers, however, to Doyle v. Barrett (1989), 78 Nfld.&PEIR 280...where the Court pointed out at p. 282 that consideration should also be given to any delay in making the application to set aside the judgment. Such an application should be made as soon as possible after the judgment comes to the knowledge of the defendant. Mere delay will not bar the application unless irreparable injury has been done to the plaintiff or the delay has been wilful. See also Falls v. Jones (1990), 95 NSR (2d) 178... (emphasis added)

It will be difficult for a defendant to establish that a significant delay in bringing a default judgment application was not wilful. A 5-month delay has resulted in a rejection of such an application (See Anwyll-Fogo Architects v. Hage, *supra*.) As well, longer delays such as 16

months have consistently resulted in the rejection of applications to set aside default judgments. (Falls v. Jones (1990), 95 NSR (2d) 178 and Pinard et al v. Bushell et al (1975), 20 NSR (2d) 317). However, a lengthy delay is not always fatal to an application to set aside default. For example in Reeves Building Supplies Limited v. Coulson and Frances Cooperative Housing Limited (1979), 41 NSR (2d) 703 an action was commenced in July of 1976 and default judgment was entered shortly thereafter. The application to set aside default judgment was brought on in September of 1979. In this case, Sullivan, CCJ, as he then was, allowed the application to set aside default judgment as he was convinced the defendant had an arguable defence and as well a reasonable excuse for its failure to defend the action. This case turned upon a conclusion that the defendant was not properly served with the originating notice and statement of claim and thus did not have notice of the action or of the default judgment until September 1979 at which time the defendant brought an application to set aside the judgment.

The making of an application to set aside default judgment immediately upon the defendant becoming aware of the default judgment will in certain circumstances be seen as a reason for the chambers judge to set the default judgment aside. (See Szczesniak v. Firecan Inc., *supra.*)

As noted earlier, the defendant's counsel will have to consider filing an affidavit in support of an application to set aside default judgment when the default judgment was entered after retention of counsel. In preparing an affidavit in these circumstances, counsel consider the 1988 Court of Appeal decision of Atlantic Rentals Limited v. Marine Oil Services Limited (1988), 85

NSR (2d) 395 which considered an appeal from a refusal of a chambers judge to set aside a default judgment in a situation where default judgment had been entered against a defendant who had counsel. At page 397 Justice Matthews on behalf of the Appeal Court stated as follows:

> There is no question that appellant's counsel should have informed respondent's counsel within the ten-day time limit after service of the originating notice of his position and then requested an extension of time for the filing of the defence. He compounded these problems by filing a defective affidavit and in doing so placed his client in jeopardy. This laxness was clearly that of counsel not of the client.

Having made these observations His Lordship then went on to say as follows:

> While we cannot condone loose practice, the overriding principles are those set out in the cases cited. Should an applicant satisfy the criteria set out in Ives, in circumstances such as in the instant case then the court should not interpret the Rules in a rigid or restrictive manner which would defeat a litigant's actions without an opportunity for trial on its merits. This, in our opinion, would work an injustice.

In rendering his decision, Justice Matthews stated that counsel for the Appellant had brought to the Appeal Court's attention the 1985 decision of the Ontario Court of Appeal in Halton Community Credit Union Limited v. ICL Computers Limited & Cass (1985), 80 TAC 369; 1 CPC (2d) 24 where at page 27 the Ontario Court of Appeal had stated:

> ...It is a principle of very long-standing that the client is not to be placed irrevocably in jeopardy by reason of the neglect or inattention of his solicitor, if relief to the client can be given on terms to protect his innocent adversary as to costs thrown away and as to the security of the legal position he has gained. There may be cases where the plaintiff has so changed his position that this is impossible.

In situations such as this counsel for the defendant should set out fully the circumstances which caused or resulted in the defence not being filed in time and thus clearly put before the court the fact that the failure to file the defence did not result from circumstances which ought to foreclose the defendant's right to defend that plaintiff's action.

The situation may arise wherein defendant's counsel believes, as a result of the conduct of plaintiff's counsel, that the plaintiff has acquiesced in the delay in filing a defence by entering into discussions with defendant's counsel or by taking steps in the proceeding which would indicate to plaintiff's counsel that strict compliance with the Civil Procedure Rules was not required. Such a case was considered in an application to set aside default judgment by Justice Kelly in the 1992 decision of Thomas v. Eddy Motors Inn et al (1992), 117 NSR (2d) 420. In this case, Justice Kelly held at page 424:

> Due to her earlier waiver of the time to file a defence, plaintiff's counsel should have issued a warning in these circumstances that she expected a defence to be filed by a specific date, a date which would provide defendant's counsel a reasonable opportunity to prepare and file a defence. Because of that failure, it is appropriate that I exercise my discretion under Rule 12.06 to set aside the default judgment. I also believe that counsel, in situations where they have had dealings with opposing counsel, should not proceed with an ex parte default

> application without giving notice to opposing counsel. (emphasis added)

Although it is unclear exactly what Justice Kelly meant by the word "dealings" this decision ought to be interpreted by plaintiff's counsel as requiring notice from the plaintiff's counsel as to intended date for entering default judgment once counsel for a defendant has made contact with plaintiff's . In situations where default has been entered without notice to counsel full particulars of counsel's interaction with opposing counsel should be set forth in counsel's affidavit.

The courts have also been critical of plaintiff's counsel for entering default judgment in a personal injury action where the plaintiff had been negotiating for a number of months with an adjuster. Justice Edwards in the unreported decision of Quinlan v. Neville (September 28, 1994) S.N. No. 100561 held that in light of the ongoing discussions between the plaintiff and the defendant's insurer the plaintiff ought to have known that counsel would be maintained by the insurer as soon as they were aware of the action. In this case, the defendant clearly established that it had the intention to defend throughout based upon the discussions between the plaintiff and the defendant.

C(ii) The Response to the Application to Set Aside Default Judgment

In affidavit materials filed to oppose such an application the plaintiff should attempt to establish that it made its intention to enter default very clear to either the defendant or its counsel by

a certain date or that there was no communication between the parties which would lead one to conclude that default would not be entered within the ten (10) day time frame anticipated in the Rules. (See Pick O'Sea Fisheries v. National Utility, *supra.*)

Plaintiff's counsel may also consider reviewing the documents on file at the Prothonotary's Office as well as the Registry of Deeds to determine if the defendant has been involved in other actions where it has retained counsel and taken steps in the litigation process such as the entering of defences or filing lists of documents. Such evidence would deprive a defendant of the "neophyte to litigation" defence and thus hold the defendant to a fairly high standard of conduct (See Anwyll-Fogo Architects v. Hage, *supra*, and ABN Bank v. NsC Diesel Power, *supra.*)

The majority of reported cases which deal with applications to set aside default judgments focus on the reasonableness of the delay requirement. Indeed, in a number of cases the chambers judge states that counsel for the plaintiff acknowledged that there are substantial issues for trial but opposed the application on the basis that the defendant's delay and failure to enter default judgment was not reasonable in all the circumstances. A plaintiff should, if possible, challenge the defendant's application on the basis that a defence to the action does not exist.[3] However, in doing so, the plaintiff may satisfy the court that there are contentious issues of act and law which ought to be tried

[3] Justice Hallett in the ABN Bank Canada v. NsC Diesel Power Inc. decision\, *supra*, stated that there will rarely be a legiti defence to a foreclosure action.

D CONCLUSION

Applications for summary judgments and applications to set aside default judgments can both result in a final determination of an action. Because of this possibility, care must be taken in the drafting of the affidavits in support or opposition to these applications. The jurisprudence which has developed with respect to each application enables counsel to understand clearly those facts which must be contained within these affidavits and assists counsel in critiquing affidavits filed by opposing counsel.