

The Law Society of Upper Canada

LICENSING
 **Process**

EXAMINATION 2
STUDY 01
MATERIALS 2

BARRISTER

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Appendices

Rules of Professional Conduct

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Professional Responsibility

Regulating the legal professions

1. The Law Society of Upper Canada

The Law Society of Upper Canada was established in 1797 as a self-governing or self-regulating body. The mandate of the Law Society is to govern the Ontario legal and paralegal professions in the “public interest.” Only individuals who are competent and who comply with the Law Society’s ethical code, expressed through relevant rules and by-laws, are permitted by the Law Society to practise law and/or provide legal services to the public.

To support its mandate, the Law Society’s primary functions can be sorted into four main areas: (1) convocation and management; (2) education, licensing, and professional development; (3) professional regulation; and (4) support to paralegals, lawyers, and the public.

1.1 Convocation and management

As a self-governing body, the Law Society is run by a board of directors (*benchers*) elected by licensees of the Law Society. Benchers meet each month in a gathering called *Convocation* to deal with matters related to governing the legal and paralegal professions. Benchers may be lawyers, paralegals, or members of the public. Benchers also participate in special committees established by Convocation and hearing panels to decide on cases concerning the conduct and competence of lawyers and paralegals.

The head of the Law Society, the *Treasurer*, presides over Convocation and is elected by benchers entitled to vote in Convocation. The Chief Executive Officer (CEO), an employee of the Law Society, oversees the staff and the daily operations of the organization.

1.2 Education, licensing, and professional development

The Professional Development and Competence (PD&C) division of the Law Society provides education, practice resources, and support to lawyers and paralegals. To further the Law Society’s mandate, PD&C’s goal is to ensure that competent professionals serve the public. PD&C’s responsibilities include the Licensing Process, Continuing Professional Development (CPD), and the provision of practice resources to lawyers and paralegals via the Great Library and the Practice Management Helpline (PMH). PD&C also oversees remedial programs aimed at identifying and correcting problems with

competence, which include both spot audits and practice reviews.

1.3 Professional regulation

The Professional Regulation division fulfills the Law Society’s obligation to govern lawyers and paralegals by resolving complaints (the Complaints Resolution department), investigating more serious complaints against lawyers or paralegals (the Investigations department), and conducting hearings to determine whether a paralegal or lawyer has engaged in unethical conduct that may result in disciplinary action (the Discipline department). Professional Regulation also provides trustee services and operates the Unclaimed Trust Fund.

1.4 Support to lawyers, paralegals, and the public

The Client Service Centre (CSC) is the face and voice of the Law Society. The CSC is made up of the Call Centre, which is the intake point for most inquiries the Law Society receives, and the administrative areas that handle lawyer and paralegal fees and annual filings, as well as any incoming complaints.

Communication and Public Affairs produces informative publications, deals with media inquiries, and manages the Law Society website. The Law Society’s Equity Initiatives division provides resources regarding equity and diversity issues and provides model policies and programs to assist lawyers and paralegals to prevent discrimination and harassment.

2. Regulating the legal professions in the public interest

A profession requires extensive training and the study and mastery of specialized knowledge. Recognized professions are regulated by a governing body that oversees licensing, outlines ethical conduct, and holds the profession to its established standards.

Practising law or providing legal services to the public is a privilege and a responsibility. Lawyers are required to comply with the code of ethical behaviour set out by the *Rules of Professional Conduct (Rules)*, and those who fail to meet their responsibilities are subject to the Law Society’s complaints, investigation, and discipline process where the question of whether they should maintain the privilege to practise may be reviewed.

2.1 Terminology

For purposes of these materials, the phrase

- *lawyer* refers to a lawyer licensed by the Law Society;
- *legal practitioner* refers to a lawyer or paralegal licensed by the Law Society or a lawyer from another Canadian jurisdiction or both;
- *legal profession* refers to the occupation of practising law as a lawyer;
- *legal professions* refers to the occupations of providing legal services as a licensed paralegal and of practising law as a lawyer;
- *licensee* refers to either a lawyer or a paralegal licensed by the Law Society or both; and
- *paralegal* refers to a paralegal licensed by the Law Society.

Certain aspects outlined in these chapters are mandatory and others are not. The terms *shall* or *must* are used in those instances where compliance is mandated by either the by-laws made under the *Law Society Act (Act)* or the *Rules*. The term *should* and the phrase *should consider* indicate a recommendation. These terms refer to those practices or policies that are considered by the Law Society to be a reasonable goal for maintaining or enhancing practice management or client service. The term *may* and the phrase *may consider* convey discretion. Lawyers may or may not pursue these suggested policies or practices depending upon their particular circumstances, areas of practice, or clientele.

2.2 The Rules of Professional Conduct

Under the *Act*, the Law Society of Upper Canada has the right to make rules and regulations to govern the professional conduct of Ontario's lawyers and paralegals. Through their elected benchers, Ontario lawyers and paralegals determine what conduct is acceptable and what conduct is prohibited. The *Act* also gives the Law Society the ability to discipline those who do not adhere to the rules. Regulations include the by-laws under the *Act* and the *Rules*, which were adopted to govern the professional conduct of Ontario lawyers. There are six *Rules*, listed below:

- **Rule 1: Citation and Interpretation** defines the terms used in the *Rules* and provides some general standards for the legal profession, including the obligation to advise a client of any French language rights.
- **Rule 2: Relationship to Clients** discusses issues that relate to the lawyer-client relationship. These include competence, quality of service, confidentiality, conflicts of interest, withdrawal from representation, and preservation of client

property. It also covers fees and billing issues and contains rules on fee splitting and referral fees.

- **Rule 3: The Practice of Law** covers topics related to running a law practice and includes the offering, marketing, and advertising of legal services, and responsibilities related to interprovincial law firms.
- **Rule 4: Relationship to the Administration of Justice** outlines how the lawyer should conduct himself or herself when acting as advocate and includes the lawyer's duties to the tribunal, agreements on guilty pleas, interviewing or communicating with witnesses giving testimony, the relationship with jurors, the lawyer as witness, the lawyer as mediator, and the security of court facilities.
- **Rule 5: Relationship to Students, Employees, And Others** outlines the lawyer's responsibilities regarding the supervision of non-licensed employees, articling students, harassment, and discrimination.
- **Rule 6: Relationship to the Society and Other Lawyers** deals with the lawyer's general duties of integrity, civility, courtesy, and good faith and outlines how lawyers must treat others. It includes the lawyer's obligations when engaging in outside interests, making public appearances or statements, or holding public office and also addresses undertakings. Rule 6 discusses the lawyer's duty to prevent unauthorized practice; to respond to the Society; and to report misconduct, criminal charges, or convictions. It also covers the obligations of the suspended lawyer and outlines the Law Society's disciplinary authority.

The *Rules* cannot cover every situation; they should be interpreted and applied with common sense and in a manner consistent with the public interest and the integrity of the legal profession. There may be circumstances where a lawyer's personal sense of what is right may conflict with what is outlined in the *Rules*; however, a lawyer is obliged to conform to the *Rules* regardless of whether the lawyer agrees with them. When faced with an ethical problem or question to be resolved, the Law Society recommends that the lawyer consider taking the steps outlined below:

- (1) Identify the various ethical issues raised by the particular situation.
- (2) Consider any governing law that may be relevant to the problem.
- (3) Look to the specific rule in the *Rules*.
- (4) Apply the situation to the rule to determine the lawyer's responsibilities and whether it is mandatory (i.e., you "shall" do something) or permissive (i.e., you "may" do something).
- (5) Consider how to balance any competing duties.

- (6) If you are uncertain of how to proceed, check the Practice Resources section of the Law Society's website, consult with a senior lawyer, or contact the Law Society's Practice Management Helpline for guidance.
- (7) Keep a detailed written record of what steps you considered and took.

The *Rules* were created to ensure a high standard of behaviour for the protection and benefit of the public. Failure to comply with the *Rules* may prejudice a client's rights, demean the profession, and result in discipline by the Law Society.

2.3 Competence and professional development

The Law Society has developed various initiatives to assist lawyers and paralegals to maintain the competence required to serve the public. CPD seminars and materials provide lawyers and paralegals information on the law and practice management techniques and are offered in various formats. The PMH, a confidential telephone service, can assist lawyers and paralegals to properly apply Law Society rules and by-laws and offers practice management advice.

To monitor the competence of lawyers and paralegals, the Law Society operates the Spot Audit and Practice Review programs, both of which are remedial in nature. Spot audits assess compliance with the financial record keeping requirements outlined in By-Law 9, made under the *Act*, and auditors can provide guidance on the best practices for organizing and maintaining required records. Practice Review conducts focused practice reviews and practice management reviews, both of which evaluate the systems that a lawyer, paralegal, or firm has in place to allow each to serve the public effectively.

2.4 Complaints, investigations, and discipline

Complaints about a lawyer or paralegal must be sent to the Law Society in writing and are first reviewed to ensure that the issues outlined are within the Law Society's jurisdiction. If a complaint deals with an issue that can be resolved informally, Complaints Resolution will deal with the complaint. Serious allegations of misconduct, incapacity, or incompetence that are likely to result in discipline against the lawyer or paralegal are referred to Investigations.

Investigations may suggest the matter be resolved through some form of alternative dispute resolution (ADR) or may recommend that the lawyer or paralegal be referred to the Proceedings Authorization Committee

(PAC) for disciplinary action. The PAC is made up of benchers who may authorize a hearing before a *hearing panel*, which is similar to but less formal than a court proceeding.

The hearing panel may decide to discipline the lawyer or paralegal by suspending or revoking his or her licence or ordering him or her to

- participate in CPD or professional training;
- restrict his or her practice to certain areas;
- provide legal services only under the supervision of another lawyer or paralegal;
- cooperate in a practice review;
- not maintain a trust account;
- refund to a client all or a portion of fees; and/or
- start or continue treatment or counselling.

Lawyers and paralegals may appeal any decision of the hearing panel to an *appeal panel* and may appeal the decision of an appeal panel to the Divisional Court. Hearing panels are also involved in "good character" hearings for lawyer and paralegal candidates enrolled in the Law Society's Licensing Process.

If the Law Society receives a complaint against a lawyer, the lawyer will be notified and given an opportunity to respond. Failure to respond promptly to any communication from the Law Society is a breach of the *Rules* and is also grounds for discipline. Lawyers should communicate and cooperate fully with any representative of the Law Society who contacts the lawyer regarding a complaint so that the issue can be resolved as quickly as possible. Most complaints are resolved without a formal discipline hearing. If the lawyer is disciplined, the hearing panel's decision will become part of the lawyer's record with the Law Society and will be made public.

2.5 Suspensions — administrative and disciplinary

When a lawyer or paralegal has acted contrary to the Law Society's rules and regulations or to the by-laws made under the *Act*, the Law Society may discipline that individual. Such discipline may include

- delivering a verbal or written reprimand;
- placing temporary or permanent restrictions on the individual's licence (e.g., via an undertaking);
- suspending the individual's licence;
- permitting the individual to give up his or her licence; and
- revoking the individual's licence.

Lawyers and paralegals suspended for failing to meet the required standard of conduct have been suspended for

disciplinary reasons. When a lawyer or paralegal is suspended as a result of discipline, the suspension may be for a defined period of time, or it may be indefinite and dependent on him or her completing other tasks prescribed by the Law Society's hearing panel. Lawyers and paralegals may also be suspended by the Law Society for *administrative* reasons. Administrative suspensions are automatic, and there is no hearing. They occur if the lawyer or paralegal fails to meet his or her administrative obligations to the Law Society, including the requirements to

- pay annual fees to the Law Society;
- pay the necessary professional insurance premiums or file the necessary forms with the professional liability carrier;
- complete and report on annual CPD hours; and
- file annual reports to the Law Society.

The specifics of these requirements are contained in By-Laws 5–6.1 and 8, made under the *Act*.

Unlike disciplinary suspensions, administrative suspensions are automatically lifted as soon as the suspended individual meets his or her administrative obligation to the Law Society. The lawyer or paralegal may also be required to pay an additional fee to have his or her licence reinstated.

While under suspension for any reason, the lawyer is prohibited from practising law or providing legal services or holding himself or herself out as someone who is entitled to do so. The suspended lawyer also has specific obligations to disclose his or her suspended status to prospective, existing, and former clients and to engage another lawyer to complete certain tasks related to any existing client's file. There are additional obligations if the lawyer is holding client funds or property in trust. These obligations are outlined in rr. 6.07(3)–(5) of the *Rules* and By-Laws 7.1 and 9, made under the *Act*.

1. Standards of the legal profession — r. 1.03(1) and commentary

Though a lack of professionalism is easily recognized, it is often unclear what is required to be “professional.” The professional lawyer practises law effectively with a positive attitude and approach to the work required. That lawyer takes responsibility for his or her actions, behaves appropriately in all situations, and is a role model for colleagues. Under the *Rules of Professional Conduct (Rules)*, lawyers have a duty to be professional by upholding the standards and reputation of the legal profession. To fulfill this duty, lawyers must act with integrity, civility, courtesy, and good faith. Lawyers must also respect the diversity of the communities in which they practise law. These elements of professionalism are outlined further below.

2. Integrity and civility — r. 6.01(1) and commentary

Lawyers have a duty to practise law and fulfill their professional responsibilities to others with honour and integrity. A client who doubts the trustworthiness of a lawyer cannot fully benefit from that lawyer-client relationship regardless of the lawyer’s competence. A lawyer who practises law without civility disrespects the legal process and all those who participate in that process. Because a lawyer’s failure to act with integrity or civility may undermine public confidence in the legal profession and the justice system, lawyers must serve the public in a manner that inspires confidence and respect. A lawyer must act with integrity when dealing with all others. Where possible, even the appearance of impropriety should be avoided.

3. Courtesy and good faith — r. 6.03(1) and commentary

Further to the duty to act with civility and integrity, lawyers must show courtesy and good faith to all persons with whom they may interact while practising law. This includes clients, opposing parties, fellow lawyers, paralegals, support staff, tribunal officers, other employees of the judicial system, and representatives of the Law Society of Upper Canada. This obligation applies regardless of where the lawyer may be appearing, the degree of formality, and at what stage of the process the matter may be. A lawyer who is ill-mannered or acts in bad faith does a disservice to the client and may impair

the lawyer’s ability to perform the tasks required to complete the client’s matter.

4. Lawyers and the Ontario Human Rights Code — r. 1.03

Because of the role the legal profession fulfills in the administration of justice, lawyers have a special responsibility to recognize the diversity of the public they serve. Lawyers must protect the dignity of individuals and must comply with the human rights laws of Ontario. The Ontario *Human Rights Code (Code)* gives every person equal rights and opportunities relating to matters such as jobs, housing, and services. The purpose of the *Code* is to prevent discrimination and harassment on the grounds of

- race, colour, or creed;
- citizenship, ancestry, place of origin, or ethnic origin;
- gender;
- maternity or parental status;
- sexual orientation;
- age;
- record of offences;
- marital or family status; and
- disability.

Individuals have the right to be free from discrimination or harassment when they use facilities or receive goods or services, such as legal services. Lawyers shall not engage in the harassment or discrimination of a colleague, a staff member, a client, or any other person. Lawyers must ensure that no person is denied service or receives inferior service due to discrimination or harassment and that their employment practices adhere to the *Code*. A lawyer’s obligations regarding harassment and discrimination are outlined in both the *Rules* and the *Code*. Lawyers should review and become familiar with both to ensure they are meeting their legal and ethical obligations to others.

4.1 Discrimination — r. 5.04 and commentary

Discrimination is unfair treatment by another based on any of the grounds prohibited by the *Code*, such as race, gender, creed, sexual orientation, etc. It is the impact of the behaviour and not the intention behind it that determines whether the behaviour is discriminatory.

Lawyers shall not discriminate based on any of the *Code's* grounds with respect to the employment of others or in dealings with clients, other licensees, or any other person.

For example, discrimination would include a lawyer's refusal to accept clients of a particular sexual orientation. It would also include conduct that may result in an adverse effect that is discriminatory, even though that was not the lawyer's intent (i.e., *adverse effect discrimination*). If the conduct adversely affects a group or individual protected by the *Code*, the lawyer may have a duty to accommodate. Depending on the situation, a failure to accommodate may amount to discrimination.

4.2 Harassment — r. 5.03 and commentary

A form of discrimination is *harassment*. Harassment means comments or actions that are unwelcome or that should be known to be unwelcome because they are discriminatory or offensive. Harassment is a "course of conduct"; it is a pattern of behaviour where more than one incident has occurred. However, even one incident may constitute harassment in cases of *sexual harassment*. Sexual harassment is defined as an incident or series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature when

- such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the recipient(s) of the conduct;
- giving in to such conduct is a condition for the supply of legal services by the lawyer, whether this condition was spoken or unspoken by the lawyer;
- giving in to such conduct is a condition of employment by the lawyer, whether this condition was explicit or implied by the lawyer;
- giving in to or rejecting such conduct affects the lawyer's employment decisions regarding the employee (which may include assigning file work to the employee, matters of promotion, raises in salary, job security, and employee benefits, among other things);
- such conduct is intended to or results in interference with an employee's work performance; or
- such conduct creates an uncomfortable, unfriendly, or unpleasant work environment.

Examples of behaviour considered as sexual harassment includes, but is not limited to,

- sexist jokes that cause embarrassment or offence, that are told or carried out after the speaker has been advised that they are embarrassing or offensive, or that are clearly embarrassing or offensive in nature;

- the display of sexually offensive material;
- the use of sexually degrading words to describe a person;
- the use of derogatory or degrading remarks directed at one's sex or sexual orientation;
- the use of sexually suggestive or obscene comments or gestures;
- unwelcome inquiries or comments about one's sex life;
- unwelcome sexual flirtations, advances, or propositions;
- leering;
- persistent unwanted contact or attention after the end of a consensual relationship;
- requests for sexual favours;
- unwanted touching;
- verbal abuse or threats; and
- sexual assault.

Sexual harassment can occur in the form of behaviour by men towards women, by men towards other men, by women towards other women, or by women towards men.

5. Model policies, discrimination, and harassment counsel

The Law Society's Equity Initiatives Department has developed a series of best practices and model policies to guide lawyers in promoting equity and diversity in all areas of their practice. Model policies cover practices relating to employment and the provision of services to clients. They include guides to developing business policies that address

- preventing and responding to workplace harassment and discrimination;
- promoting equity in the workplace;
- parental and pregnancy leaves and benefits;
- accommodation in the workplace and flexible work arrangements; and
- issues relating to creed and religious beliefs, to gender and sexual orientation, and to individuals with disabilities.

Equity Initiatives has also developed a professional development program to design and deliver education and training to licensees regarding the equity and diversity issues outlined above. Lawyers may contact the Law Society to discuss available training sessions, which may be offered as seminars, workshops, or informal meetings. Full information regarding these initiatives is available in the Equity and Diversity section of the Law Society's website at www.lsuc.on.ca.

The Law Society also provides the services of the Discrimination and Harassment Counsel (DHC) to anyone who may have experienced discrimination by a lawyer or paralegal, or within a firm. This service is funded by the Law Society but is completely independent of the Law Society. The service is free to the Ontario public, lawyers, and paralegals and is strictly confidential.

The DHC can provide advice and support and will review options with the individual using the service, which may include

- filing a complaint with the Law Society;
- filing a complaint with the Ontario Human Rights Commission; and
- allowing the DHC to mediate a resolution, if all parties agree.

More information is available on the DHC website at www.dhcounsel.on.ca/

Chapter 3

Who is the client

One of the lawyer's most important duties is the duty of service to his or her client. The duty of service includes the lawyer's responsibility to be competent, to maintain client confidentiality, to avoid conflicts of interest, and to continue to represent the client unless there is good cause to withdraw. Other responsibilities within the duty to serve the client relate to fees and billing clients and to handling clients' money and other property. Because most of the duties outlined in the *Rules of Professional Conduct (Rules)* are those that are owed to the client, a lawyer must always know who the client is.

1. Determining who is the client

Lawyers often have difficulty clearly distinguishing which organization, individual, or group of individuals is their client. The need to "identify the client" may vary depending on the context. For example, a lawyer

- must determine whether a lawyer-client relationship exists between the lawyer and the individual to determine to whom the lawyer owes client-related duties and from whom the lawyer will take instructions;
- must comply with the requirements of By-Law 7.1, made under the *Law Society Act*, by obtaining basic information about the client and by verifying the identity of the client (through the review of independent identity documents) when handling or instructing the client on the transfer of funds,
- should set out the client's name in an engagement letter or retainer agreement to identify who retained the lawyer to provide legal services; and
- should send a non-engagement letter that identifies to whom the lawyer will not be providing legal services (i.e., identifies who is not a client).

The lawyer must recognize when an individual or organization becomes a *prospective client* or *client*. A *prospective client* is a party that is likely to become a client. The prospective client contacts the lawyer or firm for the purpose of seeking legal services and may reveal confidential information necessary for the lawyer to determine if he or she may act (e.g., to ensure no conflict of interest exists) or for the prospective client to evaluate whether he or she would like to retain the lawyer or firm.

Regardless of whether the lawyer or firm is retained by the prospective client after this initial contact, the *lawyer-client relationship* is established when the prospective client has first contact with the lawyer or firm. The lawyer and the firm have the duty to protect the

prospective client's confidential information and to avoid potential conflicts of interest that involve the prospective client. Both of these duties arise as soon as the prospective client has first contact with the lawyer or firm and continue indefinitely.

Once a lawyer agrees to act for a prospective client, the prospective client becomes a *client*. A retainer or an agreement for legal services may be created either formally or informally. Once the lawyer has agreed to provide legal services, the *lawyer-client retainer* has been established, and the lawyer has the additional duty to provide legal services competently, as discussed later in these materials.

Even when it is apparent what organization, individual, or group of individuals is the client, situations may arise during the retainer that create confusion as to who has proper authority to provide the lawyer with instructions on the client's matter. This may occur when the client brings a friend or family member who is not involved in the matter to meetings with the lawyer, when a third party pays for the lawyer's services, or when the lawyer represents more than one client in the same matter. The friend, family member, or third party may try to instruct or ask the lawyer to reveal information about the client. To ensure no misunderstanding about the involvement or authority of the third party as it relates to the client's matter, the lawyer should meet with the client privately to obtain direction as to how the lawyer should deal with the third party. The lawyer should also confirm in writing the client's directions concerning the third party and any subsequent changes to those directions.

If the third party is also a client (i.e., a joint retainer client) or if the third party is authorized to give instructions on behalf of the client, the lawyer may take instructions or reveal information. If not, the lawyer must confirm with the client whom the lawyer may speak with regarding the client's matter. The following are situations where it may be difficult to identify the client or to identify the party authorized to instruct the lawyer on the client's behalf.

1.1 Joint clients — rr. 2.04(6)–(10) and commentaries

A *joint retainer* is where the lawyer has been retained to represent two or more clients in the same matter. As with any retainer, the lawyer must clearly determine the clients to whom legal services will be provided to ensure

that the lawyer can fulfill his or her duties to those clients. Before a lawyer may accept joint clients, the lawyer must ensure that there are no conflicts of interest and must advise each party of all of the following:

- The lawyer has been asked to act for both or all parties.
- No information received about the matter from one joint client can be treated as confidential where the other joint clients are concerned (i.e., information provided by one joint client about the joint matter may not be withheld from the other joint clients).
- If a conflict develops between the joint clients that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

A lawyer may represent the clients jointly if all parties give consent in writing after being informed of the above. If there are differing degrees of knowledge, vulnerability, or authority among the clients, the lawyer should consider suggesting that they obtain independent legal advice before agreeing to the joint retainer.

Regardless of whether the lawyer receives the clients' consent to act in a joint retainer, the lawyer must not do so where it is likely that the clients will disagree on an issue or where the clients' interests or rights may diverge during the retainer. If a conflict arises after establishing the joint retainer and that conflict cannot be resolved, the lawyer must not continue to act. The lawyer must immediately advise the joint clients that the lawyer must withdraw from representing them, unless the joint clients previously agreed that the lawyer may continue to act for one or some of the clients in the event of such a conflict.

When a lawyer accepts more than one client in a matter, the lawyer must also be clear as to who will be providing the lawyer with instructions regarding the matter. To ensure there is no misunderstanding, the lawyer should discuss whether one, some, or all of the joint retainer clients will give instructions. This should be confirmed in writing either in the retainer agreement or retainer letter.

1.2 Authorized representatives — r. 2.02(6) and commentary

Establishing who the client is and who will provide instructions may be difficult where a client representative is involved. If asked to provide legal services to an individual who lacks legal capacity to give instructions or enter into binding relationships, the lawyer must determine who the individual's lawfully authorized representative is (e.g., a litigation guardian, an attorney acting under a power of attorney, or a trustee acting on behalf of a beneficiary). The lawyer must then confirm with that representative whether the lawyer is retained to act for the individual lacking capacity, for the

representative, or for both. The lawyer must be clear as to which individual will be providing instructions on the client's matter and should confirm this in writing.

If the lawyer is acting for both the individual and the individual's authorized representative in the same matter, the lawyer must comply with the *Rules* regarding joint retainers, as previously outlined. Whether or not a lawfully authorized representative has been appointed for a client under a disability, the lawyer must comply with the *Rules* regarding clients under a disability.

1.3 Client is an organization — r. 2.02(1.1) and commentary

When acting for an organization, the lawyer should determine which officers, directors, shareholders, employees, or agents of the organization may properly give instructions on the organization's behalf. This should be confirmed in writing via a retainer agreement or engagement letter. To ensure no misunderstanding, any subsequent changes to those authorized to give instructions should also be confirmed in writing. The lawyer should confirm with the agents (i.e., those properly authorized to instruct on the organization's behalf) that the lawyer acts for the organization and not for the individuals who act as its instructing agents.

If the lawyer is retained to act for both an organization and any officer, director, shareholder, employee, or agent of the organization in the same matter, the lawyer must determine whether a conflict exists that would prevent the lawyer from acting for both the corporation and the individual. If not, the lawyer may act for both but must also comply with the joint retainer rule.

1.4 Limited scope clients – rr. 2.02(6.1)–(6.3) and commentary and commentary r. 2.01(1)

A *limited scope retainer* is where the lawyer is retained by a client to provide limited legal service in relation to the client's matter (e.g., prepare a demand letter or provide a second opinion), including limited legal representation for only part of the client's matter (e.g., to negotiate a settlement), by agreement with the client. Prior to agreeing to assist the client in a limited scope retainer, the lawyer must advise the client honestly and candidly about the nature, extent, and scope of the services that he or she can provide and whether those services can be provided within the financial means of the client. The lawyer must also document the limited terms of engagement. Limited scope retainer clients are still owed the same duties of competence, confidentiality, and avoidance of potential conflicts of interest. Thus, when acting in a limited scope retainer, the lawyer must

ensure that the client and any related parties are included in the lawyer's conflicts checking system.

1.5 Firm clients — r. 1.02 and commentary

The *Rules* define client as including “a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work.” This means that the clients of a lawyer's partner or associate in the same firm are also the lawyer's clients, and vice versa. The duties owed to one client of the firm are owed to all clients of the firm. The lawyer must avoid conflicts that exist or may arise regarding other clients of the firm, and every lawyer at the firm owes the duty of confidentiality to all other clients of the firm.

Each time the firm deals with a prospective client or is retained by a new client, every lawyer and staff member of the firm should be notified of the clients and of the related and instructing parties in that matter. Proper file and office management systems, especially firm-wide conflicts checking systems, should be used to ensure there is no unintended breach of duty owed to a firm client.

1.6 Phantom clients

The term *phantom client* refers to an individual who believes that he or she is represented by a lawyer and that his or her rights are being protected by that lawyer, even though he or she did not formally retain or even meet with the lawyer. Phantom clients arise when a lawyer does not make it clear that the lawyer has not been retained to provide legal services. The lawyer is unaware that the individual believes that he or she is a client to whom certain duties must be fulfilled and that these duties exist. These may include the duty to maintain confidentiality and to avoid acting where any conflicts of interest are concerned.

Because the lawyer-client relationship may be established when a prospective client first contacts a lawyer or a law firm for legal services, there is a risk of acquiring phantom clients at any time. To avoid the danger of acquiring a phantom client, lawyers should be careful when dealing with individuals who

- consult with the lawyer on a matter but do not clearly indicate whether they want to hire the lawyer or pursue the matter;
- are third parties that accompany the lawyer's client and are present during the client's consultation with the lawyer (e.g., a friend, family member, or business associate);
- are third parties who know of the lawyer through the client and on whose behalf the client may be retaining the lawyer but who have never met with

the lawyer (e.g., a friend, family member, or business associate); and

- speak to the lawyer casually or socially about a limited issue outside of the lawyer's office.

To avoid the problem of phantom clients, lawyers should clearly establish when they have or have not been retained to provide legal services. Lawyers should clearly communicate what role they will fulfill for the client and should

- confirm in writing whether they will act for a client who has consulted with them and refer to any limitation periods (i.e., in a retainer agreement and engagement or non-engagement letter);
- inform third parties who attend meetings with a client that they do not represent them and represent the client only;
- discourage clients from requesting legal advice for third parties or from relaying information that the lawyer has provided to the client; and
- avoid discussing legal matters outside the working environment or any working relationships.

In addition to the risk of a third party misunderstanding the nature of his or her relationship with the lawyer (i.e., the third party believes that he or she is an individual client or in a joint retainer with the actual client), third-party involvement may give rise to a conflict of interest. The lawyer must be alert to avoid all conflicts, regardless of their source, as discussed in detail elsewhere in these materials.

1.7 Unrepresented parties — r. 2.04(14) and commentary

Lawyers have a special obligation when representing a client in a matter where another party is not represented. The lawyer must

- urge the unrepresented person to obtain independent legal representation;
- ensure that the unrepresented person understands that his or her interests will not be protected by the lawyer; and
- make it clear to the unrepresented person that the lawyer is acting only in the interests of his or her client and that any comments may be biased towards his or her client.

If an unrepresented person requests that the lawyer also advise or act on his or her behalf in the same matter, the lawyer is prohibited from representing parties on more than one side of a dispute. Even where the parties' interests seem to be aligned, the lawyer must evaluate whether representing both would pose a potential or actual conflict of interest, and if the lawyer is permitted to act for the unrepresented party and the existing client in the same matter, the lawyer must comply with the

provisions of the joint retainer rule, as previously outlined. When dealing with an unrepresented party who refuses to obtain his or her own legal representation, the lawyer should confirm this in a letter to the unrepresented party.

2. Client identification and verification requirements – By-Law 7.1, Part III

By-Law 7.1 outlines client identification and verification requirements for lawyers. These requirements were created to enhance the protection of the public by assisting lawyers to prevent money laundering and potentially fraudulent or criminal activities. For purposes of these requirements, *identification* refers to the basic information the lawyer needs to obtain from his or her client and relevant third parties when retained to provide legal services, such as the client's or third party's name and address. For purposes of the by-law, a third party refers to an individual or organization that directs or instructs the client, or has the authority to direct or instruct the client. *Verification* refers to the additional steps the lawyer must take to confirm the identity of the client and any third parties, in circumstances as outlined below. The by-law requires that lawyers keep a record of any identifying information obtained and copies of verification documents, and mandates the retention periods for both. It is the lawyer's responsibility to first determine if client or third party identification is required, to ascertain if identity verification is also mandatory, and to obtain and retain relevant information and documents related to these matters.

2.1 When identification required

When retained to provide legal services, the by-law requires the lawyer to identify his or her client(s) and any third party. However, there are exceptions, which are outlined in the by-law. If the exceptions do not apply, the lawyer must identify the client(s) and any relevant third parties as required by the by-law.

2.2 Identifying information

When required to identify the client(s) and/or third party, the lawyer must obtain and keep a record of certain information. The required information differs depending on whether the client or third party is an individual or an organization. If the client or any third party is an individual, the lawyer must obtain and keep a record of the individual's name, home address and phone number, business address and phone number (if applicable), and the individual's occupation(s).

If the client(s) and/or third party is an organization, the lawyer must obtain and keep a record of the organization's full name and business address and phone

number (if any). In addition, the lawyer must also obtain and keep a record of the name, position, and contact information of all individuals authorized to provide instructions on behalf of the organization. If the organization is not a financial institution, government body, or public company, the lawyer must also obtain information regarding the type of business or activities of the organization, the organization's incorporation or business number, and where it was issued, if applicable.

2.3 When verification of identity required

To comply with the by-law, a lawyer must verify the identity of his or her client(s) and any third party for whom the client acts if the lawyer acts for or gives instructions on behalf of the client or third party regarding the receipt, payment, or transfer of funds. However, there are exceptions for certain licensees, certain funds, and certain clients or third parties, which are outlined in the by-law.

If none of the exemptions apply, the lawyer must verify the identity of the client(s) and any third party in the manner and time frame required by the by-law. The period for verifying identity differs on whether the client or third party is an individual or an organization.

If the client is an individual, the lawyer must verify his or her identity before or when the lawyer engages or gives instructions in respect of the receipt, payment, or transfer of funds. If acting for an organization, the lawyer has 60 days to verify its identity, beginning from the time the lawyer engages in or gives instructions or acts on behalf of the organization to receive, pay, or transfer funds. However, the lawyer must verify the identity of the individual providing instructions on behalf of the corporation before or when the lawyer engages in the funds transfer activity.

2.4 Verifying identity

The lawyer may use whatever he or she reasonably considers reliable, independent source documents, data, or information to verify identity. The type of source documentation will differ depending on the nature of the client and the specific situation, and the by-law lists examples of source documents.

To verify the identity of an individual, a lawyer must look at reliable, independent source documents, but has the discretion to determine what source documents he or she wishes and is legally entitled to use for this purpose. Examples provided in the by-law include a government-issued driver's licence, passport, or birth certificate that is valid and has not expired. The lawyer may review as many independent source documents as is necessary to confirm an individual's identity.

To verify the identity of an organization that is a corporation or an organization created or registered under federal or provincial law, the lawyer may obtain written confirmation of its existence from a government registry. This confirmation should also include the name and address of the organization and, where applicable, the names of its directors. In this regard, the lawyer could obtain a certificate of corporate status, a corporate profile report, and/or an annual filing of the corporation.

If the organization is a trust, partnership, or an association, the lawyer will need to obtain some sort of formal record that confirms its existence as an organization. This could include a copy of the trust, partnership agreement, or articles of association. It might also include the Harmonized Sales Tax registration information or information relating to the organization's business licence.

If the lawyer is required to verify the identity of an organization, the lawyer must also take two additional steps: the lawyer must verify the identity of the individuals who provide instructions with respect to the matter on behalf of the organization and must make reasonable efforts to obtain

- the name and occupation(s) of each director of the organization unless the organization is a securities dealer; and
- the name, address, and occupation(s) of each person who owns 25% or more of the organization or of the shares of the organization.

The by-law also contains special provisions for verifying identity when the client or a relevant third party cannot meet with the lawyer in person. If the client or third party is within Canada, the lawyer may accept the attestation of a commissioner of oaths or a person designated in s. 23(9) of By-Law 7.1 regarding the verification of identity. An attestation means that the commissioner of oaths or designated person looking at the document will have to provide the lawyer with a legible photocopy of the

document that they have signed and on which they have included their name, profession, and address and have identified the type and number of the identification document provided by the client. If the client or third party is outside of Canada, the lawyer may use an agent for verification of identity as long as the agent has agreed in advance in writing to the specific steps to be taken on the lawyer's behalf to verify identity and to provide the lawyer with the information the agent obtains.

2.5 Client identification and verification records

When a lawyer determines that he or she must identify the client(s) or a third party, the lawyer must retain a record of the identifying information obtained and copies of documents received. In these situations, the lawyer must obtain a copy of every document used for verification, including a copy of every document used by an agent who has undertaken to verify the identity of a client or third party outside of Canada on behalf of the lawyer. The records must be kept for the longer of

- the duration of the professional relationship with the client and for as long as is necessary and so long as is necessary to provide service to the client; and
- six years following the completion of the work for which the lawyer was retained.

2.6 Withdrawal obligations

The by-law also outlines circumstances where the lawyer may be obligated to withdraw during the course of identifying or verifying the identity of a client or third party. If the lawyer knows or ought to know that he or she is or would be assisting the client in something illegal or dishonest, the lawyer has a duty to refuse to act for the client in that matter. The duty applies whether the lawyer's suspicions are aroused during the identification and verification process or at any time during the retainer. Withdrawal from representation is discussed later in these materials.

Most clients enlist the help of a legal representative because they do not have the knowledge or skill to deal with the legal system on their own. As a member of the legal profession, a lawyer is perceived as knowledgeable, skilled, and capable in the practice of law. A client who retains a lawyer is entitled to assume that the lawyer is able to adequately dispense with the client's legal matter in the way that the client desires.

A lawyer who is incompetent fails to serve the client, discredits the legal profession, and taints the reputation of the justice system in the eyes of the public. In addition to damaging the lawyer's own reputation and business, incompetence may also impact those of the lawyer's partners and associates. Therefore, it is important that lawyers understand, meet, and maintain the standards for competence set out in s. 41 of the *Law Society Act* and the *Rules of Professional Conduct (Rules)*.

1. Required standard of competence — rr. 2.01(1)–(2) and commentaries

A lawyer shall perform the services undertaken on a client's behalf to the standards of a competent lawyer. A lawyer should not take on a client matter if the lawyer does not feel competent to handle the matter or cannot become competent to handle the matter without undue delay, risk, or cost to the client. If a lawyer is or later discovers that he or she is not competent to complete a task for the client, the lawyer should either refuse to act for the client or should obtain the client's consent to retain, consult, or collaborate with a lawyer who is competent to complete that task.

2. The competent lawyer — r. 2.01(1)

A *competent* lawyer is one who has and applies the relevant skills, attributes, and values appropriate to each matter undertaken on a client's behalf. Though the *Rules* do not require a standard of perfection, they do require the lawyer to meet minimum standards relating to six areas of competence: knowledge, skills, judgment, client service and communication, practice management, and professional development. Under the *Rules*, a lawyer who fails to meet the minimum standards of professional competence may be subject to disciplinary action.

2.1 Knowledge

To practise competently, the lawyer must know both the general legal principles and procedures and the substantive law and procedures for any particular area of

law. If the lawyer cannot learn the legal principles and rules of procedure relating to an unfamiliar area of law without undue delay or additional expense to the client, the lawyer should refuse to represent the client in that matter. The competent lawyer is aware of the limits of his or her knowledge and will consider this when deciding whether to accept a client's matter.

In addition to general legal knowledge, the lawyer must have adequate knowledge about the client's matter to be able to properly advise or represent the client. A competent lawyer accomplishes this by effectively

- investigating facts;
- identifying issues;
- ascertaining client objectives;
- considering possible options; and
- developing and advising clients on appropriate courses of action.

Depending on the matter and the client, the lawyer may be required to confirm information provided by the client or to learn additional facts that may not be within the client's knowledge. The competent lawyer will ensure that he or she has gathered, reviewed, and considered all necessary information before providing any opinion or advice as to a course of action that would most likely meet the client's goals. The lawyer must then take the necessary steps to meet the client's chosen course of action so that the lawyer can work to meet the client's goal. Though a matter may seem familiar, each client matter is unique.

2.2 Skills

To meet the client's objective, a lawyer may be required to use many skills, including

- legal research;
- analysis;
- application of the law to the relevant facts;
- writing and drafting;
- negotiation;
- mediation;
- arbitration;
- advocacy; and
- problem-solving.

By accepting a client's matter, a lawyer effectively affirms that he or she has the skills to properly complete the

tasks required for the matter. When deciding whether to represent a client, the competent lawyer will consider what tasks have to be completed and whether the lawyer has the skills to perform them.

2.3 Judgment

Lawyers must apply intellectual capacity, deliberation, and judgment to all functions. When representing clients or performing any professional service, the competent lawyer applies

- *intellectual capacity*: by using the lawyer's ability to understand (legal concepts, issues, and facts) and reason, and by applying these in a logical manner to the client's cause;
- *deliberation*: by giving careful thought and consideration to the matters the lawyer handles; and
- *judgment*: by using the lawyer's ability to make reasoned decisions when providing practical recommendations and advice to the client about his or her particular matter.

In "complying in letter and in spirit with the *Rules of Professional Conduct*," lawyers are also required to apply appropriate judgment to their own conduct. The competent lawyer knows the *Rules*, knows why each rule is important, and uses this knowledge and understanding to guide his or her conduct.

2.4 Client service and communication

Adequately serving the client's interest and properly communicating with the client is an important part of competence. Lawyers must represent clients in a conscientious, diligent, and cost-effective manner and must keep the client informed regarding his or her matter, through all stages of the matter and concerning all aspects of the matter. Lawyers should make use of the various tools and methods available that will allow them to communicate with the client in an efficient and timely manner and should discuss with the client any drawbacks or risks associated with a particular method for communication (e.g., when using email or a cellular phone).

Many of the client complaints made against lawyers result from the client's perception that the lawyer did not do what the client expected. Often, such complaints are an indication that the lawyer failed to manage the client's expectations about what tasks would be performed for the client, when they would be completed, and at what cost.

Lawyers should ensure they understand what the client expects, both at the beginning of and throughout the retainer, since client expectations may change as the

matter proceeds. If the client's expectations change or if it becomes impossible for the lawyer to meet the client's original expectations, the lawyer must discuss this with the client and obtain confirming or new instructions, as the case may be. Any new or different instructions should be obtained or confirmed in writing. The lawyer should also explain to the client under what circumstances the lawyer may not be able to follow the client's instructions (i.e., if the instructions would cause the lawyer to violate the *Rules*).

To avoid difficulties in the lawyer-client relationship, the lawyer should discuss with the client all aspects of the retainer. The competent lawyer ensures the client is informed of and agrees to the terms of the professional relationship and confirms these terms in a written retainer agreement or letter that addresses the

- specific legal services the client will receive from the lawyer;
- specific results the lawyer is likely to achieve for the client;
- costs associated with achieving those goals; and
- time required to complete the legal services and meet those goals.

2.5 Practice management

Another important part of competence is practice management. Lawyers should use available systems, technologies, or methods to make sure their practices operate in a manner that helps them serve clients well, in a timely manner, and at a reasonable cost. Competent practice management requires that the lawyer effectively manage his or her

- *staff* via workplace policies and business procedures;
- *time* via planning and reminder systems and time docketing systems;
- *finances* via billing procedures, money handling policies, and record keeping systems; and
- *client information* via filing, organizational, and storage systems, including conflicts checking systems.

2.6 Professional development — adapting to change

Lawyers must remain competent by ensuring that their knowledge of the law and applicable procedures is current and that they continue to have the required skill level to meet client needs. Lawyers must pursue professional development to ensure their abilities remain at the required level of competence while adapting to changing requirements, legislation, rules, standards, techniques, and practices. The competent lawyer

recognizes that maintaining and enhancing competence is an ongoing cycle of assessment, education or training, and reassessment. This obligation to maintain competence assists lawyers to better serve their clients and to avoid potential complaints and claims. Annual requirements for continuing professional development activities, which are effective January 2011, are outlined in By-Law 6.1 under the *Law Society Act*.

To adequately advise and serve the client, the lawyer must have all the information relevant to the client's matter. For the client to freely provide any information, whether relevant or not, the client must be satisfied that the lawyer will keep that information confidential and only use it for the client's benefit. A lawyer cannot effectively serve the client unless there is full and free communication between them. The lawyer's duty of confidentiality, and of loyalty, is essential for open communication between lawyer and client throughout the professional relationship.

1. Confidentiality versus privilege – r. 2.03(1) and commentary

Though the term *privilege* is often used to refer to a lawyer's duty of confidentiality, the duty of confidentiality must be distinguished from lawyer-client privilege. Privilege is an evidentiary rule of law that refers to the legal right of an individual to withhold information from an opposing party, a court, a tribunal, and investigations, including law enforcement officials.

The duty of confidentiality is an ethical one and is much broader. It covers all information obtained by a lawyer during the course of and for the purpose of the retainer, whether directly from the client or from some other source, and applies regardless of whether others may share the knowledge. The source of the information and its intended use are not relevant for determining whether information is confidential, though these are elements of privilege.

Privileged information, i.e., information or communications protected in law, is simply a subset of "all information concerning the business and affairs of the client acquired in the course of the professional relationship." All privileged information is also confidential information.

2. The duty of confidentiality – r. 2.03(1) and commentary

The duty of confidentiality requires lawyers to, at all times, hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship. Lawyers must keep all information they acquire about the client private whether the information seems private or is known to others.

However, the duty of confidentiality is not absolute. Lawyers must disclose confidential information if required by law and may disclose confidential information in the limited circumstances provided by the *Rules of Professional Conduct (Rules)*. To fulfill the obligation of confidentiality, lawyers must understand what information is confidential, when the duty of confidentiality begins, and to whom the duty of confidentiality is owed.

2.1 Information that must be protected

Lawyers must protect all information concerning the business and affairs of the client acquired during the professional relationship regardless of the source of that information. It includes information recorded in any form, such as paper or electronic documents, emails, or video or audio recordings. It also includes the client's papers and property. It includes information that may not seem relevant to the matter for which the lawyer was retained.

Unless the lawyer is authorized by the client to do so or the situation requires it, the lawyer should not reveal a client's identity or that the client consulted with or retained the lawyer. However, there are many situations where the lawyer is required to reveal the identity of a client to advance the client's matter, such as filing the necessary documents to bring or defend a claim.

2.2 When the duty arises and how long it endures

The duty to protect confidential information begins when the lawyer's professional relationship with the client begins. The lawyer-client relationship arises as soon as a prospective client first contacts the lawyer or firm and provides confidential information, even before the lawyer has consulted with a prospective client. In addition to the client, lawyers owe a duty of confidentiality to prospective clients, even if they are never retained.

The duty of confidentiality is perpetual. It continues after the professional relationship ends regardless of why the relationship ended or whether differences exist between the lawyer and the client. It continues unchanged even if the client or former client dies. A lawyer must protect client information at all times and for all time unless the client consents to the disclosure or the lawyer is otherwise permitted or required to disclose the information.

2.3 Duty to all clients, owed by all members of the firm

Lawyers owe the duty of confidentiality to every client without exception. The lawyer and all other members of a firm, including support staff, owe the duty of confidentiality to every client. This includes prospective clients, current clients, and former clients of the lawyer or firm. Lawyers must ensure their employees and anyone involved with the client's matter understand and abide by the duty of confidentiality set out in the *Rules*. The lawyer is ultimately responsible if someone employed by him or her discloses confidential information without authorization or cause.

3. Disclosure, with client authority — r. 2.03(1) and commentary

A lawyer must not reveal confidential information unless the client authorizes the disclosure or the client's authority to disclose the information is implied by the circumstances of the retainer. For example, where a lawyer has been hired to act for a client in an application before a tribunal, the lawyer has the client's authority to disclose the information required by the prescribed application form. The client's authority is implied because the lawyer was retained to do all that was necessary to bring the application before the tribunal.

Even where the client's authority is implied (e.g., to disclose confidential information to a third-party expert to obtain his or her opinion), it may be prudent for the lawyer to confirm the disclosure in the retainer agreement with or engagement letter to the client. Where the client's authority was not previously implied and the client authorizes the disclosure of specific confidential information, the lawyer should confirm this by separate, subsequent document.

4. Disclosure, justified or permitted without client authority

There are situations where lawyers must or may reveal confidential client information without the client's authority. Lawyers must disclose confidential information when required by law (i.e., justified disclosure) and are permitted, but not required, to disclose information where it will allow them to prevent death or serious bodily harm, defend against certain allegations or claims, or establish or collect their fees. The conditions that must be satisfied in these situations are set out in the *Rules*.

4.1 Justified disclosure, legally required — r. 2.03(2)

The duty of confidentiality under the *Rules* does not supersede the law. Lawyers must disclose confidential

information if required by law. For example, a lawyer must disclose information if a judge presiding over a court of competent jurisdiction orders the lawyer to do so. However, the lawyer must provide no more information than he or she was ordered to reveal and, if appropriate, should consider and be prepared to raise the issue of privilege.

When faced with a subpoena, court order, or some other demand to divulge or allow access to confidential client information, lawyers should first determine whether there is a legal obligation to disclose any information. If unsure, he or she should seek legal advice from a lawyer experienced in the relevant area of law (e.g., criminal law if served with a police search warrant or tax law if faced with a demand for information from the Canada Revenue Agency) who may advise on privilege. Where a legal obligation to disclose confidential information does exist, the lawyer

- must comply with the statute, court order, or subpoena that compels the disclosure of confidential information (subject to the obligation to assert privilege on the client's behalf);
- must reveal only what is legally mandated by the statute, court order, or subpoena;
- if asked to disclose information that is privileged, must assert privilege on the client's behalf;
- if asked to disclose information that may be privileged, should consider seeking the advice of another lawyer or retaining another lawyer to make submissions to the court on the issue of privilege; and
- should advise the client of the legal obligation to disclose the information, what information must be revealed, and the justifying statute, court order, or subpoena.

Where the lawyer has confirmed that there is no legal obligation to disclose confidential information, he or she may not comply with the demand or request without client consent. The lawyer

- must decline to disclose the information;
- must inform the client of the request or demand for disclosure and advise the client on privilege and the legal consequences of disclosure;
- must obtain the client's consent and instructions to disclose or withhold information;
- should obtain these instructions in writing or confirm them in writing;
- if the client cannot be located or refuses to provide instructions regarding disclosure, should assert privilege on the client's behalf; and
- should note in the client file the request or demand for information and the client's response.

4.2 Permitted disclosure, to prevent serious harm — r. 2.03(3)

Lawyers may disclose confidential information if the disclosure is necessary to prevent death or serious bodily or psychological harm to an individual or a group of individuals. Before disclosing any information, the lawyer must have reasonable grounds for believing that there is an imminent risk of harm to an identified person or persons, including the client, and that the disclosure is required to and will prevent that harm from occurring. The lawyer may then choose to disclose the limited information that is needed to prevent the harm and, where feasible (i.e., if time permits and there is an appropriate venue), should obtain a court order allowing the disclosure. The rule is permissive and not mandatory.

For disclosure to be justified, the lawyer must use his or her judgment regarding each element of the rule. The lawyer must believe and not just suspect that the harm against specified person(s) will happen in the near future. The lawyer must also believe that the disclosure is necessary to prevent the harm. The rule does not permit disclosure for harm that has already occurred nor for situations where no particular individual(s) can be identified as being at risk. The rule does not permit disclosure to prevent illegal or criminal conduct unless that conduct involves death or serious bodily or psychological harm. The lawyer's belief must be based upon grounds that would cause any reasonable person to come to the same belief.

4.3 Permitted disclosure, to defend against allegations — r. 2.03(4)

Lawyers are permitted to disclose confidential information in circumstances where a claim is made against them or their employees and the confidential information must be revealed in order to defend against those allegations. In these situations, disclosure is only permitted if it is alleged that the lawyer or lawyer's associates or employees are

- guilty of a criminal offence involving a client's affairs;
- civilly liable with respect to a client matter involving a client's affairs; or
- guilty of malpractice or misconduct.

Disclosure is limited to what is required to respond to the allegations and no more.

4.4 Permitted disclosure, to establish or collect fees — r. 2.03(5)

Lawyers may disclose confidential information to establish or collect their fees as long as no more information is revealed than is required to do so. If the

documents necessary to allow a lawyer to enforce or collect payment contain confidential information, the lawyer must remove or block out that information before disclosing those documents.

5. Other obligations arising from confidential client information

There are cases where confidential information a lawyer receives during the relationship with the client triggers other obligations. Though these obligations are covered elsewhere in the *Rules* and in these materials, they are also subject to the confidentiality rule and have been included here.

5.1 "Whistle blowing" — commentary, r. 2.03(3), and rr. 2.02(5.1)–(5.2)

The lawyer's duty of confidentiality does not differ when the client is an organization, and it is unchanged whether the lawyer is retained as an outside legal representative or employed in-house by the organization. The duty of confidentiality is owed to the organization itself and not to any officer, employee, or agent communicating on behalf of the organization unless the lawyer has been retained to act in a joint retainer with the organization and the individual. In that event, the rules regarding joint retainers and confidentiality apply.

There are additional obligations when the organization is engaged or intends to engage in unethical activity, which the lawyer may discover after receiving confidential information. The lawyer must advise those responsible for the organization about the wrongful conduct and that the conduct must stop or be avoided. If the lawyer cannot convince the organization to abandon the wrongful conduct, the lawyer may be forced to withdraw from representation.

Unless permitted or justified by the *Rules* to do so, a lawyer must not disclose to the authorities or any outside party the corporate client's intended or actual misconduct regardless of whether the organization engages in, continues, or ceases the unethical activity.

5.2 Security of court facilities — r. 4.06(3) and commentary

If a lawyer receives information that leads the lawyer to reasonably believe that a dangerous situation is likely to develop at a court facility, the lawyer must notify the local police force. Because the lawyer is still bound by the confidentiality rule, the lawyer cannot disclose any confidential client information without the client's consent. However, the lawyer must disclose whatever information the lawyer can to prevent the dangerous situation from occurring. Where possible, the lawyer should suggest solutions, such as added security at the

court. To protect client confidentiality, a lawyer may consider providing this tip to the court facility anonymously or through another lawyer or agent.

Where possible, the lawyer should also notify other lawyers who are known to be involved in proceedings at the court facility where the dangerous situation is likely to develop. In addition to warning a colleague, such notice may allow him or her to suggest security measures that do not interfere with an accused's or party's right to a fair trial.

5.3 Duty to report misconduct — r. 6.01(3) and commentary

When a lawyer is retained by a client who has dealt with another lawyer or paralegal, professionally or personally, the lawyer may learn information about the other licensee from the client. If the lawyer discovers that another licensee was or is engaged in misconduct as outlined in this rule, the lawyer is required to report it to the Law Society of Upper Canada. However, in doing so the lawyer cannot breach client confidentiality. The lawyer must obtain the client's consent to provide details regarding the client or must report the misconduct to the Law Society in a way that does not require confidential client information.

6. Prohibited use or disclosure of client information — commentary, r. 2.03(6)

A lawyer's duty of loyalty to a client prohibits the lawyer from using any client information for a purpose other than serving that client in accordance with the terms of the retainer. During the professional relationship and after the retainer has ended, lawyers must not use

information from one client to disadvantage that client, to serve another party, or for their own benefit.

6.1 Literary works — r. 2.03(6)

A lawyer who engages in literary works is prohibited from disclosing confidential client information unless that client or former client consents to the disclosure. This applies to writings and publications of any kind and in any medium, including a script, article, speech, online journal, or lawyer's autobiography or memoirs. The rule applies regardless of whether the professional relationship has ended and is not affected by the length of time since the retainer concluded.

6.2 Discussions in public — commentary, r. 2.03(1)

Lawyers should apply common sense where client information is concerned. Lawyers should never gossip about a client or discuss client matters where the discussion may be overheard or intercepted. Casual conversations regarding clients at social events or even with members of the same firm should be avoided. Lawyers should not discuss client matters over a cellular telephone in public. They should not leave client documents on a receptionist's desk in view of others. These "leaks" of information may have unintended results: the client may be identified or opposite parties may learn information that can be used against the client. Even in cases where the client cannot be identified, the respect of the public for the legal profession may be lessened as a result of overhearing a lawyer "talk shop" in public.

Chapter 6

Conflicts of interest

A *conflict of interest* or a *conflicting interest* is anything that may have a harmful effect on the lawyer's ability to fulfill the lawyer's obligations to the client. It is an interest, financial or otherwise, that

- is likely to adversely affect a lawyer's judgment on behalf of a client or prospective client;
- is likely to adversely affect a lawyer's loyalty to a client or prospective client; or
- a lawyer may be prompted to prefer over the interests of the client or prospective client

The competing interest that causes the conflict may be the lawyer's professional duty to another client, to a tribunal, or to another party. Or a conflict may arise because the lawyer is tempted to prefer his or her own interests. Because conflicts of interest may prejudice the client or impair the lawyer's ability to properly serve the client, lawyers have a duty to all clients to avoid actual and potential conflicts of interest. This duty extends to prospective clients, current clients, and former clients of the lawyer or law firm.

1. Recognizing conflicts of interests

To avoid a conflict or potential conflict of interest, the lawyer must first recognize circumstances that may present a conflicting interest or later give rise to one. Because a conflict of interest can result from competing or incompatible duties to various parties during the various stages of the professional relationship, it may be difficult for a lawyer to contemplate all possible sources of conflict at every possible turn. Many conflicts arise from the lawyer's duty to maintain confidentiality or the lawyer's duty of loyalty, but conflicting interests may also include the lawyer's personal or financial interests.

Because the duty of confidentiality is perpetual, so is the duty to avoid conflicts of interest that may arise from having confidential information. For example, a conflict may arise when the lawyer has information from one client that is relevant to another client's or prospective client's matter. The lawyer owes a duty to one client not to reveal the information but owes a duty to the other client or prospective client to disclose the information. Because the lawyer cannot fulfill both duties, the lawyer is in a conflict of interest.

However, not all conflicts arise because of the lawyer's duty to protect confidential information. Conflicts may arise because of the lawyer's self interest, financial, personal, or otherwise, or may result from the lawyer's

actual or perceived duty of loyalty. The lawyer must remain loyal to the client as long as the matter for which the lawyer was retained continues. Depending on the matter and the personality and expectations of the individual client, this duty of loyalty may endure long after the professional relationship has ended. Regardless of why a conflict has arisen, the lawyer must always consider his or her duty of loyalty. Because the duty of loyalty derives from the lawyer's fiduciary duty to put the client's interest before all others, it is broader and more pervasive and must be considered in all cases.

Because these arise from the lawyer's relationship with the client, a lawyer evaluating a conflict of interest must always consider the client. The duty to avoid conflicts of interest extends to all clients, including

- prospective clients who contacted the lawyer or law firm for purposes of obtaining legal advice;
- current clients who are represented by the lawyer or partners or associates of the law firm; and
- former clients who were represented by the lawyer or partners or associates of the law firm.

Where there are others who are involved or associated with the client in the client's matter, or other third parties, the lawyer's duty to avoid conflicts of interest may extend to those individuals as well. Third parties or persons involved or associated with clients may include the client's spouse, family members, business associates, or employees of any related companies. Because the interests of a third party may not be aligned with those of the client or could be affected by the outcome of the client's matter, the lawyer must be alert to and avoid any conflicts that exist or may arise from third-party involvement. For example, where the third party instructs the lawyer on the client's behalf or assists the client by translating the lawyer's advice, the lawyer must consider whether the third party has an interest in the client's matter. Where the third party's interests conflict with those of the lawyer's client, the lawyer should advise the client of this and decline to deal with the third party regarding the client's matter. If the client insists upon the third party's involvement, the lawyer may be forced to decline the retainer.

2. Avoiding conflicts of interest – rr. 2.04(1)–(3) and commentaries

Lawyers have a general duty to avoid being involved in a conflict of interest. A lawyer must not act or continue to

act in a matter where there is or is likely to be a conflicting interest. Where a conflict arises that cannot be resolved, this may mean that the lawyer is required to decline a retainer from a prospective client or withdraw from a client's ongoing matter. A lawyer must evaluate whether a conflict of interest exists or may develop for every client and every matter that he or she accepts, considering the duties to the client and any outside, personal, or financial interests that may compete with those duties. At each stage of the matter, from the first contact with a prospective client to after the retainer has ended, the lawyer must re-evaluate whether a conflict of interest has developed or may arise.

3. Dealing with a conflict of interest

Though a lawyer has the general duty to avoid actual and potential conflicts of interest, there are situations where the lawyer may be permitted to act or continue to act in a matter despite the conflict. Where the *Rules of Professional Conduct (Rules)* permit a lawyer to act or continue to act, the lawyer must obtain the client's informed consent to do so. Depending on the circumstances, in addition to client consent, the lawyer may also be required to

- obtain the informed consent of persons involved or associated with the client in a matter;
- suggest that the client receive independent legal advice;
- insist that the client receive independent legal advice; or
- urge the client to obtain independent legal representation.

However, it should be noted that even where the *Rules* permit the lawyer to obtain the client's informed consent to act, it may not be prudent for the lawyer to do so. There are also situations where the lawyer is prohibited from acting or continuing to act when a conflict exists or has developed and the lawyer may be forced to withdraw from representing the client.

3.1 Informed consent — r. 2.04(3) and commentary

The *Rules* outline situations where, even though a conflict of interest exists, the lawyer is permitted to obtain the *informed consent* of the client and other relevant persons, where applicable, to act or continue to act in a matter. To obtain informed consent, the lawyer must disclose all pertinent information regarding the conflict of interest to the prospective client or client and other relevant persons and then must obtain their consent to act or continue to act in the matter. Under r. 1.02, consent must be written or recorded in writing,

preferably in a retainer agreement signed by the client or in a confirmation letter to the client.

A situation may arise where it is impossible for a lawyer to make full disclosure to a prospective client to obtain his or her consent to act in a matter where there is a conflict. This may happen when the details regarding the conflict involve another client or former client and the lawyer is precluded from revealing the information because it is confidential. In this circumstance, the lawyer must advise the prospective client that there is a conflict of interest and that the lawyer cannot accept the retainer.

3.2 Independent legal advice, independent legal representation

There are situations where the client's informed and written consent is not sufficient to allow the lawyer to accept or continue with a matter. In some circumstances, the client must receive advice from an independent legal advisor regarding the matter or transaction before the lawyer may proceed. An independent legal advisor has no connection to the client's matter, associated parties, or lawyer. He or she is unbiased and objective and does not have a conflict of interest. An independent legal advisor is another lawyer or other legal representative who can provide the client with *independent legal advice*. In circumstances where the lawyer is prohibited from acting for a client or prospective client, the lawyer must suggest that the individual obtain his or her own *independent legal representation*. The retained lawyer or paralegal, if appropriate, must be objective and have no conflicting interest with regard to the matter.

3.3 Refuse to act, withdraw from representation — rr. 2.04(2)–(3)

In some cases, the existence of a conflict of interest may require the lawyer to decline the retainer at the outset or to terminate the retainer and withdraw from representing the client at a later time.

For example, the lawyer must refuse to act when he or she is asked to represent more than one side of a dispute. Because the parties are on opposing sides and have contrary interests, the lawyer would be in a conflict of interest because of his or her duty to maintain confidential information and to remain loyal to each client in the matter. The lawyer cannot fully represent one client's interests while fully representing the opposite interests of the other side in the dispute. The lawyer is prohibited from acting for both of them in the matter, even if both sides of the dispute wish to consent.

Similarly, a lawyer may be forced to withdraw during the retainer because a conflict of interest has arisen. For

example, a client who insists that a lawyer take or continue in a course of conduct that would be inconsistent with his or her duties to a tribunal under the *Rules* may be creating a conflict of interest that cannot be resolved. If the lawyer cannot convince the client to abandon those instructions, the conflict of interest remains, and the lawyer must withdraw. If, however, the lawyer is able to persuade the client to provide different instructions that do not conflict with the lawyer's other duties, the conflict has been removed, and the lawyer can continue to act.

4. Acting against clients — rr. 2.04(4)–(5) and commentaries

The *Rules* prohibit a lawyer and his or her partners or associates from acting against clients unless certain criteria are met. This applies equally to prospective, current, and former clients of the individual lawyer or law firm, as well as persons involved or associated with the client in his or her matter. These are potential conflicts of interest that arise both from the lawyer's duty to maintain confidential information and the duty to remain loyal to the client (and those associated with the client). Even where the issue of confidential information does not exist or is not relevant, the lawyer must consider the duty of loyalty.

4.1 Same or related matters

A lawyer and his or her partners and associates may not act against a client or those involved with the client in the same matter or a related matter, unless the client and those involved with the client consent. For example, a lawyer retained by a client for a particular matter who is later discharged by the client cannot act for another party in the same matter or a related matter, unless the original client and those others involved agree. Likewise, if a prospective client consults with a lawyer regarding a matter but does not retain the lawyer, the lawyer must not act against that prospective client in the same or related matter, unless the prospective client consents.

4.2 New matters

A lawyer and his or her partners or associates may not act against a former client in a new matter if they have confidential information from the first retainer that is relevant to the new matter. However, there are exceptions:

- The lawyer may act against the former client or against those involved with the client in a new matter if the former client and all those involved consent to the lawyer acting against him or her.
- The lawyer's partner or associate may act against the former client in a new matter if the former client

consents to the partner or associate acting against him or her.

- The lawyer's partner or associate may act against the former client in a new matter if the law firm establishes that it is in the interests of justice for the partner or associate to act against that client, considering the factors outlined in r. 2.04(5)(b) of the *Rules*.

Where the confidential information obtained from the original matter is not relevant to the new matter, the lawyer and his or her partners or associates may act in the new matter against a client or those who were involved with the client in the original matter.

5. Joint retainers — rr. 2.04(6)–(10) and commentaries

A lawyer may be asked to represent more than one client in a matter, where the interests of those clients are the same or are somehow aligned. Acting for joint clients or acting in a joint retainer places the lawyer in a potential conflict of interest: the lawyer must remain loyal and devoted to all joint clients equally; and if the interests of the joint clients diverge during the course of the retainer, the lawyer may not be able to serve all the joint clients because of conflicting interests. To act in joint retainer, the lawyer must

- advise the joint clients of the nature of a joint retainer, confidentiality in a joint retainer, and conflicts of interest that may arise in a joint retainer;
- in certain circumstances, recommend that the joint client(s) obtain independent legal advice prior to entering into the joint retainer;
- obtain each joint client's written consent to enter into the joint retainer; and
- deal with contentious issues that arise during the joint retainer, which may result in withdrawal.

Though the *Rules* may allow a lawyer to act for more than one client in a matter, there are circumstances where the lawyer should not do so. Before agreeing to accept a joint retainer, the lawyer must carefully evaluate the circumstance and any possible developments. If it is likely that the clients will disagree on some aspects of the matter or if the clients' concerns, rights, interests, or obligations will differ as the matter proceeds, the lawyer must avoid the potential conflict of interest and decline the joint retainer.

5.1 Advice to joint clients, informed consent

The lawyer must discuss with joint clients all issues that may arise during the joint retainer. Before accepting a joint retainer, the lawyer must advise all prospective joint clients of all of the following:

- The lawyer has been asked to act for both or all of them.
- No information regarding the matter received from one joint client may be kept confidential from the other joint client(s).
- If a conflict develops that cannot be resolved by the joint clients, the lawyer cannot continue to act for both or all of them and may have to withdraw from the joint retainer completely.

Once the lawyer has advised the prospective joint clients of the above, if they are content to have the lawyer act for them in a joint retainer, the lawyer must obtain their written consent to act. However, there are circumstances where the above advice is not sufficient for the joint client(s) to provide their informed consent to the joint retainer and independent legal advice must be discussed.

The lawyer has an additional obligation if the lawyer has a continuing relationship with a client who wants to retain the lawyer jointly with another new client. Before agreeing to act in a joint retainer for the ongoing client and the new client in a matter, the lawyer must advise the new client of the continuing relationship and must recommend that the new client obtain independent legal advice about the joint retainer. The lawyer should also consider recommending independent legal advice to a prospective joint client where he or she is not sophisticated or is vulnerable. This will ensure that the individual's consent to the joint retainer is informed, genuine, and uncoerced.

5.2 Contentious issues, withdrawal

Where a controversial issue arises among some or all of the clients in a joint retainer, the lawyer is prohibited from advising on the issue. He or she must refer the clients to other lawyers unless two conditions are met: the contentious issue does not require legal advice, and the clients are sophisticated and, therefore, capable of dealing with the issue outside of the joint retainer. If so, the clients may settle the contentious issue by direct negotiation with each other, and the lawyer may continue to act in the joint retainer. However, the lawyer is permitted to advise one of the joint clients about the contentious issue if all the joint clients agreed to this arrangement upon entering into the joint retainer.

Where the contentious issue that arose between joint clients cannot be resolved and results in conflicting interests between them, the lawyer must withdraw his or her services from the joint retainer. The lawyer cannot continue to act for any of the joint clients, unless they agreed otherwise at the outset of the joint retainer. The lawyer must arrange an interview with all joint clients to advise them that the lawyer must terminate the retainer. The lawyer must try to minimize the expense and

prejudice to the clients and do all that can reasonably be done to help each client find a new lawyer to look after his or her matter.

6. Joint retainers in estate and real estate matters

The *Rules* provide additional guidance regarding joint retainers as they occur in certain estate and real estate matters. Typically, these are retainers in which the joint clients share a primary common interest (e.g., the successful transfer of title in real property from the vendor client to the purchaser client) but may have differing secondary interests that may or may not affect the joint retainer. Specifically, the *Rules* advise when these joint retainers are prohibited and any exceptions to that prohibition.

6.1 Joint wills for spouses or partners – commentary, r. 2.04(6)

A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act* to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with r. 2.04(6). At the outset of the initial joint retainer, the lawyer should advise the spouses or partners that if one of them subsequently were to communicate new instructions about his or her will (e.g., to change or revoke the will), both of the following would occur:

- The subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer.
- In accordance with r. 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner.

The lawyer should also advise the spouses or partners that the lawyer would have a duty to decline the new retainer to change or revoke the will unless they were no longer in a relationship (i.e., the spouses or partners had annulled their marriage, divorced, or permanently ended their conjugal or close personal relationship), as outlined in the commentary; the other spouse or partner had died; or the other spouse or partner was informed of the subsequent communication and consented to the lawyer acting on the new instructions.

6.2 Acting for borrower and lender – rr. 2.04(6.1), (8.1)–(8.2), (11)–(12), and commentaries

A lawyer and his or her partners or associates are prohibited from representing both the borrower and lender in a mortgage or loan transaction, unless any of the following are true:

- The lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction.
- The lender is selling real property to the borrower, and the mortgage represents part of the purchase price (vendor take-back mortgage situation).
- The lender is a bank, trust company, insurance company, credit union, or finance company that lends money in the ordinary course of business.
- The consideration for the mortgage or loan does not exceed \$50,000.
- The lender and borrower are not at “arm’s length” as defined in the *Income Tax Act* (Canada).

If none of these exceptions applies, the lawyer or law firm cannot enter into the joint retainer. Where a lawyer determines that one of these limited, defined circumstances applies and the lawyer intends to accept the retainer, the lawyer must comply with all the other provisions of the joint retainer rule in r. 2.04(6).

Before the advance or release of mortgage or loan funds, the lawyer who acts jointly for both borrower and lender must disclose to them in writing all material information relevant to the transaction. What is material should be determined objectively and includes any facts that a reasonable borrower or lender might consider relevant. This duty to disclose arises even if neither joint client asks for the information.

A lawyer who agrees to act for both lender and borrower in a mortgage transaction must remember that the lawyer’s obligations to these joint clients are the same as in any other joint retainer. Should a borrower demand that the lawyer not disclose relevant information to the lender or insist in providing instructions that conflict with the lawyer’s duties to the lender, the lawyer may be forced to withdraw from acting in the mortgage transaction.

Depending on the type of lending client, the lawyer for borrower and lender may not be required to fulfill the general advice and informed consent requirements prior to accepting the joint retainer. Where the lending client is a bank, trust company, insurance company, credit union, or finance company that lends money in the ordinary course of business, the lending client’s consent to act is deemed to exist upon the lawyer’s receipt of written instructions from the lending client, and the lawyer is not required to

- advise the lending client of the nature of a joint retainer, confidentiality in a joint retainer, and conflicts of interest that may arise in a joint retainer;

- if the borrower is a continuing client, recommend that the lending client obtain independent legal advice prior to entering into the joint retainer; and
- obtain or confirm in writing the lending client’s consent to enter into the joint retainer unless the lending client so requires this.

This is intended to simplify the advice and consent process between lawyer and institutional lender clients, who are generally sophisticated and provide their acknowledgment and consent to the joint retainer in the documentation for the transaction (e.g., mortgage loan instructions). However, the lawyer must still fulfill these obligations to the borrower client in the joint retainer.

6.3 Acting for transferor and transferee – r. 2.04.1

The *Rules* require that there be two lawyers for transfers of title, one for the transferor (vendor) and one for the transferee (purchaser). Unlike the prohibition against acting for both borrower and lender, the lawyers may practise in the same law firm as long as the general rules on the avoidance of conflicts of interest are observed. There are also exceptions to the two-lawyer rule. Provided that there is no violation of r. 2.04, one lawyer may represent both transferee and transferor in a transfer to real property if any of the following is true:

- The transfer is one where the transferee and transferor are “related persons” as defined in s. 251 of the *Income Tax Act* (Canada).
- The lawyer practises law in a remote location where there are no other lawyers that neither the transferee nor transferor could retain for the transfer without undue inconvenience.
- The *Land Registration Reform Act* permits the lawyer to sign the transfer on behalf of the transferor and transferee (e.g., transfers where the transferor and transferee are the same and the transfer is being made to effect a change in legal tenure or to effect a severance of land, etc.).

Even if the lawyer is permitted to act for both parties and the clients consent, a lawyer should avoid acting for more than one client when it is likely that a contentious issue will arise or their interests, rights, or obligations will diverge as the matter progresses. The probability of a conflict of interest arising between a purchaser and vendor in a real estate transaction is high. The interests of each of these clients will likely differ, and the advice the lawyer would give to each would likely not be the same and may even conflict. If an unexpected conflict between the parties were to arise on the date of closing and the lawyer is forced to withdraw, there may be insufficient time for each of them to retain separate lawyers, and their rights may be prejudiced. All of these

potential issues should be considered prior to accepting the retainer.

7. Short-term, limited legal services — rr. 2.04(15)–(19) and commentary

To properly serve the public interest and the administration of justice, the *Rules* provide a modification in the standard for conflicts of interest for lawyers participating in the court-based, brief services programs offered by Pro Bono Law Ontario (PBLO). The standard was adjusted to facilitate convenient access to justice by those self-represented litigants in need of the immediate services offered within these programs.

The modification permits a lawyer to provide to a client *pro bono*, summary legal services through PBLO programs, unless the lawyer knows or learns of a conflict of interest that would prevent him or her from acting. The lawyer is only disqualified from acting if the lawyer has actual knowledge of a conflict of interest between the *pro bono* client and an existing or former client of the lawyer, the lawyer's firm, or PBLO. For example, a lawyer would be precluded from assisting a *pro bono* client where the lawyer knows that the client's interests are directly adverse to those of a current client of the lawyer's firm, or where the *pro bono* client provides the lawyer with confidential information relevant to another client whose interests are adverse. Where there is a disqualifying conflict of interest, the lawyer must decline or cease to act for the *pro bono* client and is prohibited from requesting that client's waiver of the conflict.

For the modified conflicts standards to apply, there must be the expectation by the lawyer and the *pro bono* client that the lawyer will not continue to act as legal representative in the matter beyond the short-term, limited legal services provided within a recognized PBLO program. To ensure no misunderstanding, r. 2.04(19) requires the lawyer providing short-term, limited legal services to

- before providing legal services, ensure that he or she has appropriately disclosed to the *pro bono* client the limited nature of the legal services to be provided; and
- determine whether the *pro bono* client may require additional legal services beyond the short-term, limited legal services and, if required or advisable, encourage the client to seek further legal assistance.

8. Transfers between law firms — r. 2.05

The duty to protect confidential information may also lead to a conflict of interest when a lawyer transfers from one law firm to another. The rule regarding conflicts from transfers between law firms applies where the

transferring lawyer or the new firm knows at the time of the transfer or later learns of all of the following:

- The new and former firms act for different clients in the same or a related matter.
- The interests of those clients in that matter conflict.
- The transferring lawyer actually possesses relevant confidential information about that matter.

The risk is that confidential information about a client or former client from the lawyer's previous firm may be revealed to lawyers at the new firm and used against that client. The *Rules* set out the steps that must be taken to avoid this disclosure, which also may allow the new firm to continue to represent its own client. If the requirements of the *Rules* cannot be satisfied, the new firm must withdraw from representing its client.

The rule applies equally to articling students transferring between law firms and lawyers transferring to or from government service or an in-house counsel position, but does not extend to internal transfers where the lawyer remains with the same employer. The rule does not apply to a lawyer employed by the federal, a provincial, or a territorial Attorney General or Department of Justice who continues with that employer after transferring from one of its departments, ministries, or agencies to another.

8.1 Law firm disqualification

Where the transferring lawyer (or articling student) actually possesses relevant confidential information regarding the former client that may prejudice the former client if it were disclosed to a member of the new firm, the new firm must withdraw from representing its client, unless either of the following occurs:

- The former client consents to the new firm's continued representation of its client.
- The new law firm establishes that it is in the interests of justice to act in the matter, considering the factors outlined in r. 2.05(4)(b) of the *Rules*.

If the client does not consent and the firm cannot establish that its continued representation of its client is in the interests of justice (i.e., in response to a challenge before a tribunal of competent jurisdiction), the new firm is forced to withdraw from representing its client.

Where the transferring lawyer (or articling student) actually possesses relevant information regarding the former client that is not confidential but that may still prejudice the former client if it were disclosed to a member of the new firm, all of the following must occur:

- The transferring lawyer must execute an affidavit or a solemn declaration that the information he or she possesses is relevant but not confidential.

- The new law firm must notify its client and the former client (through his or her lawyer, if represented in the matter) of the situation arising from the transfer and the new firm's intended action under this rule, providing to each of them a copy of the affidavit or solemn declaration executed by the transferring lawyer.

Where the information the transferring lawyer possesses is relevant but not confidential, the new firm is not immediately forced to withdraw from representing its client. The new law firm may choose to withdraw or to continue to act in its client's matter. The notification the new firm must provide offers the new firm's client the opportunity to terminate the retainer and puts the former client of the previous firm on notice should the former client wish to apply to a tribunal of competent jurisdiction for a determination as to whether the information the transferring lawyer possesses is actually confidential and should disqualify the new firm from continuing to act in the matter.

8.2 Transferring lawyer disqualification

Unless the former client consents, a transferring lawyer shall not

- disclose any confidential information respecting the former client; or
- participate in any manner in the new law firm's representation of its client in that matter.

This means that regardless of why the new law firm is able to continue in its representation of its client (i.e., because the relevant information the transferring lawyer has is not confidential, the former client consents, or to do so is in the interests of justice), the transferring lawyer may only be involved if the former client consents. It also means that, unless the former client consents, the transferring lawyer who possesses relevant confidential information must not disclose it to anyone regardless of whether the new firm is able to continue in its representation of its client or is disqualified.

Further, unless the former client consents, no member of the new law firm may discuss with the transferring lawyer

- the new law firm's representation of its client in that matter; or
- the former law firm's representation of the former client in the matter.

The commentary to r. 2.05 contains guidelines for insulating or screening the transferring lawyer to ensure that the disclosure of confidential information is avoided.

8.3 Due diligence, determination of compliance

A lawyer is required to exercise due diligence to ensure that each partner, associate, and employee of the lawyer's firm, both lawyer and non-lawyer, complies with the rule regarding conflicts from transfers between law firms and does not disclose confidential information of clients of the firm and confidential information of clients of another firm in which that person has worked.

Anyone who has an interest or represents a party in a matter referred to in the rule regarding conflicts from lawyers transferring between firms may apply to a tribunal of competent jurisdiction for a determination of any aspect of the rule. For example, applications may be made by the new firm or its client, the former firm or its client, the transferring lawyer, and any other persons or groups that may have an interest.

9. Doing business with a client — r. 2.06

Because the relationship between a lawyer and client is a fiduciary one in which the lawyer must put the client's interests before his or her own, the lawyer must not act for a client when the lawyer's own financial interests conflict with those of the client. Thus, lawyers should not enter into a business transaction with a client, apart from the business of providing the client legal advice and representation. To do so may complicate the lawyer's fiduciary duty and duties regarding confidentiality and conflicts of interest since the client who enters into a secondary business relationship with the lawyer may still expect to receive the lawyer's professional advice and guidance regarding this.

9.1 Investment by client where lawyer has an interest

Before a client enters into a transaction with the lawyer or with a corporation or other entity that is not publicly traded in which the lawyer an interest, financial or otherwise, the lawyer must

- disclose and explain to the client the nature of any existing or potential conflict of interest as it relates to the transaction;
- recommend that the client obtain independent legal representation for the transaction and require the client to obtain independent legal advice; and
- obtain the client's written consent to proceed with the transaction.

The *Rules* also stipulate that the independent legal advice must be confirmed by way of a written certificate, a copy of which must be signed by the client and provided to the lawyer who wishes to transact business with the client. The lawyer is precluded from proceeding with the

transaction if the client refuses to obtain, at a minimum, independent legal advice. However, where the transaction is one in which the client will pay for the lawyer's legal services by a transfer of shares, independent legal advice is not required but should be recommended before the lawyer accepts the retainer. In any circumstance, if the lawyer opts not to disclose a conflict or cannot do so without breaching confidentiality, the lawyer must decline to act for the client.

9.2 Borrowing from and lending to clients

A lawyer is prohibited from borrowing money from a client unless the client is

- a lending institution, financial institution, or insurance or trust company;
- any similar corporation whose business includes lending money to members of the public; or
- a related person as defined by the *Income Tax Act* (Canada) and the lawyer can discharge the onus of proving that the client's interests were fully protected by the nature of the case and by independent legal advice or independent legal representation.

To preserve and protect the client's interests, a lawyer must require the client to obtain independent legal representation where money is borrowed from the client by

- a lawyer's spouse; or
- a corporation, syndicate, or partnership in which the lawyer, the lawyer's spouse, or both of them have a direct or indirect substantial interest.

Though the *Rules* do not prohibit a lawyer from loaning money to a client, to do so may cause a conflict of interest (i.e., the lawyer's financial interest versus the client's interests), particularly if the loan goes into default either during or after the retainer. Therefore, the client must be informed of the potential conflict of interest and encouraged to obtain independent legal advice on the loan prior to advancing funds. The terms of any such loan should be clear and reduced to writing.

9.3 Lawyers in loan or mortgage transactions

A lawyer in private practice in Ontario is prohibited from engaging in certain mortgage or loan transactions that involve clients, investors, and other persons. The lawyer shall not directly or indirectly

- except with the lawyer's usual skill, competence, and integrity, sell or arrange for clients or other persons mortgages or loans;
- arrange or recommend that a client or other person participate as an investor in a syndicated mortgage

or loan where the lawyer is an investor, unless the lawyer can demonstrate that the client or other person had independent legal advice regarding the investment; or

- hold a syndicated mortgage or loan in trust for investor clients unless each investor client receives a complete reporting letter on the transaction, a copy of the duplicate registered mortgage or security instrument, and a trust declaration signed by the person in whose name the mortgage or security instrument is registered.

As stated in the rule, "indirectly" means through a corporation, syndicate, partnership, trust, or other entity in which the lawyer or a related person has a financial interest, but does not apply to an ownership interest of less than 5% of a corporation or of some other entity offering any class of securities to the public. A lawyer is prohibited from advertising or promoting individual or joint investments by clients or other persons with money to lend in any mortgage in which the lawyer has a direct or indirect financial interest.

Where a lawyer sells or arranges mortgages or loans for clients or other persons (with the appropriate skill, competence, and integrity), the lawyer must disclose in writing to each client or individual the priority of the mortgage and all other information relevant to the transaction that the lawyer is aware of and that would pose a concern to a proposed investor.

The commentary to the rule outlines acceptable mortgage or loan transactions related to the practice of law that the lawyer may engage in. These include the introduction of borrowers to lenders, the collection of mortgage or loan payments on a client's behalf, the lawyer's personal investment in mortgages or loans, and the lawyer's involvement in a mortgage or loan as an executor, administrator, committee, or trustee of a trust.

9.4 Guarantees by lawyer

Lawyers are prohibited from providing a personal guarantee or any security for debts where the client is a borrower or lender. However, there are three exceptions. The lawyer may give a personal guarantee in any of the following situations:

- (1) The lender is directly or indirectly providing funds solely for the lawyer or the lawyer's spouse, parent, or child, and the lender is a
 - lending institution or financial institution;
 - insurance company or trust corporation; or
 - any similar institution whose business includes lending money to members of the public.
- (2) The transaction is for the benefit of a non-profit or charitable institution where the lawyer is asked

individually or as a member or supporter of the institution, to provide a guarantee.

- (3) The lawyer has entered into a business venture with a client, the lender requires personal guarantees from all participants in the venture, and both of the following have occurred:
- The lawyer has complied with the requirements of the *Rules* regarding the avoidance of conflicts of interest.
 - The lender and the venture participants who are or were clients of the lawyer have obtained independent legal representation regarding the business venture.

Before agreeing to personally guarantee any debt involving clients, lawyers should carefully review the *Rules* to ensure they meet their professional obligations.

10. Other conflicts of interest

Conflicts may also arise because of the lawyer's personal or other interests. Though these conflicts or potential conflicts are equally important as those arising from the lawyer's financial interests, duty of confidentiality, or duty of loyalty, they are often more difficult to anticipate and avoid.

10.1 Personal relationships – commentary, r. 2.04(3)

Though a lawyer is not precluded from acting for a friend or relative, *pro bono* or otherwise, the existing personal relationship may impair the lawyer's professional judgment. If the lawyer cannot fulfill the obligation to provide objective and disinterested advice because of personal feelings or history, the lawyer should decline to make that individual a client. At any social or family gathering, the lawyer should avoid discussing legal issues or should ensure that the information he or she provides is understood to be information only and not mistaken as legal advice.

The potential for a conflict also exists when a lawyer has a sexual or intimate relationship with a client. Problems may arise because emotional or psychological influences can affect the lawyer's ability to consider only the client's interests, which should be separate and apart from the lawyer's own. The commentary to the rule outlines some of the issues the lawyer should consider to evaluate whether the lawyer should represent such a client, including the client's vulnerability and whether the personal relationship will affect what information is considered confidential or covered by privilege or may require the lawyer to act as a witness in the proceedings. Lawyers should avoid acting for persons to whom they have close emotional ties if they are unable to remain impartial.

10.2 Affiliations and multi-discipline practices (MDPs) – rr. 2.04(10.1)–(10.3) and commentary, r. 2.04(13)

The ordinary conflicts rules apply equally to affiliations. A lawyer in an affiliation must check for conflicts as if the legal practice and that of the affiliated entity were one, where services are provided jointly to a client by the firm and the affiliated entity. Because of the risk of conflict, the lawyer who offers legal services jointly with an affiliated entity has special obligations. Before accepting a retainer to provide joint services, the lawyer in the affiliation must disclose to the client

- any risk to confidentiality or privilege because of the involvement of the affiliated entity, including circumstances where non-lawyers provide services in the lawyer's office;
- the role the lawyer has in providing legal and non-legal services or both;
- any financial, economic, or other arrangements between the lawyer and the affiliated entity that may affect the independence of the lawyer's representation of the client (i.e., potential conflicts of interest), including whether the lawyer shares in the affiliated entity's revenues, profits, or cash flows; and
- agreements between the lawyer and the affiliated entity that may affect the independence of the lawyer's representation of the client (i.e., potential conflicts of interest), including referral agreements.

After making such disclosure, the lawyer must obtain the client's consent to act. Consent must be written or confirmed in writing.

Lawyers who practise law through a multi-discipline practice or a multi-discipline partnership must ensure that non-licence partners and associates abide by the rules regarding conflicts of interest since they apply to the legal practice and to the other non-legal business of the practice. This means that the lawyers and non-licence partners and associates must avoid or deal with conflicts as they relate to all clients, whether the client consults the practice for a legal or non-legal matter or both.

10.3 Outside interests and public office – rr. 6.04–6.05

As discussed elsewhere in these materials, the *Rules* recognize that lawyers may engage in outside interests that may or may not be related to the practice of law, including an involvement in public office as an elected or appointed official. Whatever the outside interest, lawyers must guard against allowing these outside interests to interfere or conflict with their duties to clients or to others. Where there is a possibility of a conflict between the activities of the outside interest and the duties of the

lawyer, the lawyer must avoid the conflict. The lawyer may do so by disengaging from the outside interest, declining to act for the client, or where appropriate, obtaining the client's informed consent to act. The nature of the outside interest, the client retainer, and the conflict will dictate what options are available to avoid the conflict.

10.4 Unrepresented persons – r. 2.04(14)

As discussed previously in these materials, lawyers have a special responsibility when acting for a client where an opposing or other party is unrepresented in the matter. The lawyer must urge the unrepresented person to obtain independent legal representation. The lawyer must also ensure that the unrepresented person understands that his or her interests are not protected by the lawyer and that the lawyer is acting only in the interest of the lawyer's own client. The purpose of this rule is to ensure that the unrepresented party does not misunderstand that the lawyer is acting for him or her, which allows the lawyer to avoid any potential conflict or the appearance of conflict that could otherwise arise from this misunderstanding.

11. Conflicts checking systems

Conflicts of interest may arise at any time. To fulfill their responsibilities regarding conflicts, lawyers should use and maintain an up-to-date firm database against which all names (e.g., client, prospective clients, and adverse and associated parties) are checked. Every time a prospective client or person contacts or consults with the firm, all names and matter information should be recorded in the database. The lawyer should perform a preliminary conflicts check before the initial consultation with the prospective client and before any confidential information is provided. The lawyer should check again after the initial consultation and before accepting the retainer. This should be done whether or not the prospective client actually retains the firm for further services. Another conflicts check should be made each time a new person becomes involved in the matter or whenever a new lawyer joins the firm. More information on conflicts checking systems can be found in the Practice Management chapter of these materials.

Chapter 7

Duty to the client

The *Rules of Professional Conduct (Rules)* outline the lawyer's professional responsibilities to many parties: the client, other lawyers and paralegals, the Law Society of Upper Canada, and the administration of justice itself. Though it may be affected by duties to other parties, one of the most important responsibilities is the duty to the lawyer's client. These client-related duties, discussed elsewhere in these materials, include the obligation to

- provide competent service to the client;
- safeguard confidential client information;
- avoid conflicts of interest;
- charge fair and reasonable fees for services;
- withdraw from representation under certain circumstances; and
- manage the client relationship and client expectations through proper communication.

This chapter will focus on the additional duties to the client, which include the

- obligation to appropriately advise the client;
- special duties that relate to title insurance and mortgage transactions; and
- responsibility to protect client funds and property.

1. The lawyer as fiduciary

The lawyer-client relationship is

- a fiduciary relationship, a relationship of trust, in which the lawyer acts on behalf of and in confidence for the client;
- an agency relationship in which the lawyer is agent for the client;
- a business or contractual relationship where the lawyer and client have entered into an agreement for legal services; and
- a professional relationship where the lawyer's dealings with the client are subject to the *Rules*.

Though each of these relationships is essential, the most important duties to the client arise from the lawyer's role as the client's *fiduciary*. A fiduciary is one who does and must act for another person with total trust, good faith, and honesty and has the complete confidence and trust of that other person. As fiduciary, the lawyer must put the needs of the client before the lawyer's own. Because the lawyer-client relationship exists for the benefit of the client, lawyers must ensure that they meet the minimum standard of care expected of them. Generally, the standard of care requires the lawyer to

- be honest and candid with the client in order to provide the client with full disclosure of any information that is relevant to the client's matter;
- protect the client's information in order to keep client information confidential; and
- place the client's interests before those of the lawyer or others in order to avoid conflicts of interest.

2. Duties when advising clients

The *Rules* further expand on the minimum standard of care expected of the lawyer as fiduciary. Duties that the lawyer must fulfill when advising clients, which are detailed in this section, relate to

- honesty and candour;
- encouraging compromise or settlement;
- abstaining from threatening criminal proceedings;
- refraining from assisting or encouraging a client in any dishonesty, fraud, crime, or illegal conduct;
- acting appropriately with clients under a disability;
- properly handling medical-legal reports;
- advice on title insurance in real estate conveyancing;
- reporting on mortgage transactions;
- errors and omissions; and
- official language rights.

2.1 Honesty and candour — rr. 2.02(1)–(1.1) and commentary

The lawyer must be honest and candid when advising clients, whether the client is an individual or an organization, or a joint or a prospective client. The lawyer must provide the client with the lawyer's true opinion regarding the options, possible outcomes, or risks of the matter so the client is able to make informed decisions and give appropriate instructions. Lawyers should be wary of providing assurances to the client or of guaranteeing an outcome when advising the client. The lawyer must also be honest with the client when the client's expectations about the matter are unreasonable or cannot be performed under the law. Honesty and candour are essential if the client is to trust the lawyer's judgment and fully benefit from the professional relationship.

2.2 Settlement and ADR — rr. 2.02(2)–(3)

Lawyers must encourage compromise or settlement of a dispute if settlement is reasonably possible. Receipt of an offer to settle is an important stage in a matter or proceeding, and the lawyer must present all settlement offers to the client as soon as possible for discussion and decision. A lawyer must not accept or reject an offer without advising the client on the suitability of the offer and obtaining the client's clear and informed instructions. To avoid any misunderstanding, lawyers should confirm those client instructions in writing.

Lawyers must also consider the use of alternative dispute resolution (ADR) for every dispute and must inform the client of ADR options, if appropriate. If the client instructs the lawyer to take steps to pursue an ADR option, the lawyer must do so.

2.3 Threatening criminal proceedings — r. 2.02(4)

A lawyer is not permitted to use threats or promises regarding criminal or quasi-criminal charges to gain an advantage in the client's negotiations in a civil matter. A client who suggests or requests that the lawyer use this tactic must be advised that the lawyer cannot comply with the client's wishes.

2.4 Dishonesty, fraud, etc., by client — rr. 2.02(5)–(5.2) and commentaries

When advising a client, the lawyer must not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct by the client, whether or not it is directly related to the legal services the lawyer was retained to provide to the client. Lawyers are also prohibited from instructing the client on how to violate the law and avoid punishment whether or not that was the client's intent. For example, it would be inappropriate for a lawyer to offer to continue to hold client funds in trust after the services to the client have been completed or to assist the client in concealing the funds from a third party or an external authority.

Lawyers must not ignore the warning signs that may indicate dishonesty of the client. Lawyers should take all reasonable measures to avoid becoming the tool or dupe of a corrupt client or associates of the client and should be alert to avoid being misled or used to further a client's illegal or dishonest actions. For example, a lawyer is prohibited from accepting funds that were gained through illegal means and should not hold stolen property or any other evidence of a crime.

The lawyer has special obligations when the proposed or actual misconduct involves a client that is an organization. A lawyer who learns that the institutional

client is acting or intends to act dishonestly, fraudulently, criminally, or illegally with respect to the matter for which the lawyer was retained or employed is required to advise those responsible for the organization about the wrongful conduct and that the conduct must stop. The lawyer must

- advise the person who gives instructions to the lawyer and the organization's chief legal officer that the conduct is or was fraudulent (dishonest, criminal, or illegal) and should be avoided or stopped;
- if the conduct persists, advise progressively the next highest persons or groups, ultimately including the board of directors that the conduct is or was fraudulent (dishonest, criminal, or illegal) and should be avoided or stopped; and
- if the wrongful conduct continues despite the lawyer's advice, withdraw from acting for the organization in that matter in accordance with r. 2.09 of the *Rules*.

These reporting and withdrawal obligations apply equally to lawyers in private practice as well as those employed in-house. In circumstances where a lawyer employed in-house must withdraw because the corporate client or employer refuses to abandon a course of illegal conduct, the lawyer may have to resign from his or her position of employment.

2.5 Client under a disability — r. 2.02(6) and commentary

Lawyers have a special obligation to ensure that the needs of a client under a disability are being met. This includes the need for the lawyer to have a normal business relationship with the client even if the client's ability to make decisions is impaired because of minority, physical health, mental disability, functional disability (e.g., illiteracy), or some other reason. Lawyers must be sensitive to the individual needs of the client. Where a lawyer suspects that a client may not have capacity to give instructions, he or she should make efforts to confirm the client's capability (e.g., by obtaining a medical opinion from the client's treating physician, upon the client's consent). If the client no longer has the legal capacity to provide instructions, the lawyer must also be prepared to take steps to have a lawfully authorized representative appointed for the client, such as a litigation guardian, to protect the client's interests.

2.6 Medical-legal reports — rr. 2.02(7)–(9) and commentary

As part of the legal services that are provided to the client, the lawyer may need to obtain a report from an expert. Because a medical-legal report may contain information sensitive to the client, lawyers have special

responsibilities where such reports are concerned. After an expert has been hired but before the expert prepares a written report, the lawyer should discuss the expert's findings and conclusions with the expert to determine if they will advance the client's cause. If the findings do not, subject to any legal requirements, the lawyer may decide not to obtain a written report. A written report should not be ordered unless the client has instructed the lawyer and the lawyer has obtained the client's written consent to do so.

Because lawyers must be honest and candid with the client, a lawyer cannot follow the instructions of the report writer to withhold a medical-legal report from the client. If a physician or health professional provides the lawyer with a medical-legal report on the condition that it is not to be shown to the client, the lawyer must return the report immediately without making a copy unless the client has given the lawyer advance instructions to accept the report on this condition.

If the lawyer receives a medical-legal report that contains opinions or findings that might cause harm or injury to the client if disclosed to the client, the lawyer must try to protect the client by persuading the client not to review the report. If the client insists, the lawyer must produce the report for the client to review. Where the client insists on reviewing such a report, the lawyer must also recommend that the client do so at the office of the physician or health professional who prepared the report so that the client will have the benefit of the physician's or health professional's expertise and advice regarding the contents of the report.

2.7 Title insurance — rr. 2.02(10)–(13) and commentaries

Conveyancing is the transfer of title of property from one person to another or the granting of an encumbrance such as a mortgage or a lien. Title insurance is an insurance policy that protects residential or commercial property owners and their lenders against losses related to the property's title or ownership. A lawyer who advises clients about a real estate conveyance is required to advise that title insurance is not mandatory in Ontario and that there are other options available to protect the client's interests in a real estate transaction. Although title insurance is intended to protect a client against title risks, it is not a substitute for the lawyer's competent service.

When advising the client on how to minimize the risks in a particular transaction, the lawyer

- must assess all reasonable options to assure title;
- should recognize when title insurance may be an appropriate option;

- must be fully informed regarding a particular insurance product before recommending it to a client;
- should discuss with the client the advantages, conditions, and limitations of coverage options available;
- if discussing LAWPRO's TitlePLUS® program, must fully disclose the relationship between the legal profession, the Law Society, and the Lawyers' Professional Indemnity Company (LAWPRO).

A lawyer is prohibited from receiving any direct or indirect compensation from a title insurer, agent, or intermediary for recommending a particular product and must also disclose to the client that the lawyer is not receiving any such compensation.

2.8 Reporting on mortgage transactions — r. 2.02(14)–(15)

There are special obligations for the lawyer who represents a lender where the loan is secured by a mortgage on real property. The lawyer is required to provide to the lender the duplicate registered mortgage and a final report on the transaction within 60 days of the registration of the mortgage or within some other time period as instructed by the lender. This time frame, 60 days or otherwise, applies even if the lawyer paid funds to satisfy one or more prior encumbrances to ensure the priority of the mortgage as instructed and the lawyer has obtained an undertaking to register a discharge of the encumbrance(s) but the discharge remains unregistered.

2.9 Errors and omissions — r. 6.09

A lawyer must also fulfill specific duties to the client when the lawyer makes an error or fails to do something that he or she should have done. If a lawyer does or fails to do something that may involve a breach of the *Rules*, the lawyer must disclose the error or omission to the client and do all that can reasonably be done to correct it. If the lawyer learns that the error or omission is or may be damaging to the client's matter and cannot be readily corrected, the lawyer must

- promptly inform the client of the error or omission, while being careful not to prejudice any rights either the client or the lawyer may have under an insurance, client's protection, or indemnity plan or otherwise;
- recommend that the client get legal advice elsewhere to discuss any rights of claim the client may have against the lawyer; and
- advise the client that in the circumstances, the lawyer may no longer be able to provide legal services to the client.

The need for the lawyer to withdraw from representing the client may result from the lawyer being put in a potential conflict of interest, where the lawyer might be tempted to prefer his or her own interests regarding the mistake over those of the client in the original matter. Lawyers cannot continue to act in a matter where there is or is likely to be a conflict of interest unless, after adequate disclosure, the client consents.

The lawyer must also promptly notify the professional liability insurer of any circumstances that might reasonably give rise to a claim against the lawyer so that the client's insurance protection will not be prejudiced.

2.10 Official language rights – commentary, r. 1.03

When dealing with French-speaking clients, lawyers have a special responsibility to inform clients of their French language rights relating to the matter. Where applicable, lawyers must advise clients of their rights under

- s. 19(1) of the *Constitution Act, 1982* on the use of French or English in any court established by Parliament;
- s. 530 of the *Criminal Code* on an accused's right to a trial before a court that speaks the official language of Canada that is the language of the accused;
- s. 126 of the *Courts of Justice Act* that requires that a proceeding in which the client is a party be conducted as a bilingual (English and French) proceeding; and
- s. 5(1) of the *French Language Services Act* for services in French from Ontario government agencies and legislative institutions.

3. Duties regarding client property – r. 2.07 and commentaries

Lawyers may be required to receive, hold, and deliver property belonging to a client as part of the retainer. As a fiduciary, the lawyer has an obligation to care for clients' property as a careful and prudent owner would when dealing with like property. The lawyer must

- (1) promptly notify the client when the lawyer receives any money or other property of the client unless the lawyer is satisfied that the client is already aware of this;
- (2) clearly label the client's property and place it in safekeeping that can clearly be identified as different and separate from the lawyer's property;
- (3) maintain required records to identify and track client property that is in the lawyer's custody;
- (4) promptly account for client property that is in the lawyer's custody and deliver it to the client upon the client's request; and

- (5) apply to a tribunal of competent jurisdiction for direction if the lawyer is unsure of the proper person to receive a client's property.

In addition to the above, when an external authority seizes or attempts to seize client property held by the lawyer, the lawyer should be alert to claim privilege on the client's behalf. An example of an external authority is the Canada Revenue Agency (CRA). Lawyers should be familiar with the nature of the client's privilege and with relevant statutory provisions that may be found in the *Income Tax Act* (Canada) and other legislation.

Under the *Rules*, the term *client property* covers a wide range of items such as money or other valuables, physical items, and information. By-Law 9 under the *Law Society Act* sets out the specific requirements regarding the handling of clients' money and other property, as well as record keeping requirements.

3.1 Client property

Lawyers may be asked to safeguard client assets or items that have value, monetary or otherwise. Client property in the lawyer's possession, including original client documents held by the lawyer for the client (e.g., original wills, power of attorney documents, trust deeds, or share certificates), must be stored in a secure manner and location befitting the property, such as a safety deposit box or a fireproof safe. Lawyers must keep track of any property held for the client and must be able to account for or deliver the property upon the client's request. A lawyer should only hold client property that is the subject of the legal services the lawyer is providing to the client. For example, it would be appropriate for a lawyer representing a client in the transfer of shares to hold the share certificates in trust. A lawyer should not hold client property that is unrelated to the retainer.

Valuable property (i.e., property with monetary value) cannot be sold or negotiated by the lawyer unless the client has given instructions to do so, which instructions should be written or confirmed in writing. By-Law 9 requires lawyers to record valuable client property in their care. This *valuable property record* documents assets other than client money, and as a minimum, the record must show

- the name of the property owner(s);
- a description of the property;
- the date the property came into the lawyer's possession or control;
- the name of the person who had control of the property immediately before the lawyer took possession;
- the value of the property;

- the date that the property was delivered or transferred to or on the direction of the owner(s); and
- the name of the person who received the property.

The record should include items such as

- stocks, bonds, or other securities in bearer form;
- jewellery, paintings, furs, collector's items, or any saleable valuables;
- any property that a lawyer can convert to cash, on his or her own authority; and
- mortgages, transfers, or other instruments registered in the lawyer's name in trust (includes mortgages or other investment securities held in trust by a corporation or other business entity controlled by the lawyer, a firm of lawyers, and/or the spouse(s) of the lawyer(s)).

Though a lawyer may be asked to hold other client items that have value to the client but no monetary value, the valuable property record should not include items that cannot be sold or negotiated by the lawyer. The valuable property record should not include wills, power of attorney documents, deeds of title, securities registered in the client's name, corporate records or seals, etc. Lawyers should maintain a list of these properties, but this list must be separate from the valuable property record. Also, the valuable property record should not include any client trust moneys since lawyers should record these in their financial accounting records. These would include term deposits, deposit receipts, savings accounts, or similar deposit accounts maintained for individual clients at chartered banks or registered trust companies.

3.2 Client money

As part of the retainer, a lawyer may receive, hold, or disburse client funds on behalf of a client. These may include

- funds received by the lawyer from an opposing or other party that belong to the client;
- funds received by the lawyer from the client that belong to the opposing or another party;
- money provided to the lawyer for payment of disbursements that will be incurred on behalf of the client by the lawyer; or
- money provided to the lawyer by the client or a third party to secure legal services or as a deposit for fees that will be charged for these services (i.e., a *money retainer*).

Lawyers have a duty to preserve the money they hold on a client's behalf. Lawyers must keep track of these client funds and must be able to account for them upon request by the client. Any money received and held by the lawyer for the client must be deposited into a designated *trust*

account and must be kept separate from the lawyer's own funds. A lawyer who operates any type of trust account must meet the minimum record keeping requirements as outlined in By-Law 9. If the lawyer does not receive or hold client money in trust, the lawyer does not need to open a trust account. The lawyer must still meet the record keeping requirements outlined in By-Law 9 that apply to the operation of the lawyer's business or *general account*.

3.3 Client file

The duty to preserve client property also applies to the documents that a client may provide to the lawyer or that the lawyer may create or collect for the client's benefit during the professional relationship. Lawyers should keep the client's papers and other property out of sight and out of reach of those not entitled to see them and should promptly return them to the client at the end of the retainer.

To determine what documents to return to the client, the lawyer must determine which documents belong to the client. Documents in existence before the client retained the lawyer that were provided by the client belong to the client. Generally, documents created during the retainer that were prepared as part of the service provided to the client belong to the client. Normally, documents to be returned to the client include

- originals of all documents prepared or collected for the client;
- copies of all other documents prepared or collected for which the client has paid;
- copies of letters requested and received by the lawyer and paid for by the client;
- copies of letters from the lawyer to third parties;
- letters received by the lawyer from third parties;
- originals of letters from the lawyer to the client (presumably these would have already been sent to the client in the course of the retainer);
- copies of case law;
- briefs;
- memorandums of law where the client paid for the preparation;
- trial preparation documents, trial briefs, document books, and trial books;
- discovery and trial transcripts;
- vouchers and receipts for disbursements the lawyer made on the client's behalf;
- experts' reports;
- photographs or other items of evidence; and
- data storage media containing information that belongs to the client (e.g., DVD, CD, etc.).

Documents that belong to the lawyer do not need to be returned to the client at the end of the engagement. These include documents that came into existence during the retainer that the lawyer was under no duty to prepare, were not prepared for the client's benefit, and for which the client cannot be regarded as being liable to pay. Examples of such documents include the lawyer's time docket, internal memorandums, accounting records, working notes, and copies of any client documents made for the lawyer's benefit and at the lawyer's expense.

If the client requests copies of these documents, the lawyer may choose to provide copies at the lawyer's discretion and may discuss the cost of photocopying them directly with the client. Lawyers should also consider retaining copies of client documents, at their own cost, to defend against complaints or claims that may be made against them. Lawyers must not charge clients for these copies since they are for the benefit of the lawyer, not the client.

Fees and disbursements

Once retained for a particular matter, the lawyer should discuss with the client two essential terms of the engagement: the scope of the legal services to be provided and the costs of those services. In discussing scope, the lawyer should set out which services will be provided to the client and which services will not be provided. In discussing costs, the lawyer should discuss the amount of fees and disbursements that will likely be charged to the client and whether a money retainer will be required.

Lawyers should ensure that the client clearly understands what the lawyer is expected to accomplish and at what cost. Too often, misunderstandings about fees and financial matters result in disputes over legal bills and complaints from unhappy clients. These disputes reflect badly on the legal profession and the general administration of justice. Rule 2.08 of the *Rules of Professional Conduct (Rules)* outlines the lawyer's obligations regarding fees and disbursements.

1. Retainers

In the context of providing legal services, the word *retainer* may mean

- the act of retaining a lawyer to provide legal services or the professional engagement (a *retainer*);
- the contract that outlines the legal services the lawyer will provide to the client (a *retainer agreement*); or
- an initial fee or deposit paid to the lawyer in advance to secure the lawyer's services in the near future, against which future fees and disbursements will be charged (a *monetary* or *money retainer*).

Whenever it is practical to do so, the lawyer should obtain a money retainer from the client at the beginning of the professional relationship. The money retainer must be deposited into the lawyer's trust account. As the lawyer works on the client matter and after the lawyer has properly billed and delivered an account to the client for services rendered, the lawyer may pay the account from the money retainer held in trust. Disbursements and expenses paid on behalf of the client to others are also paid from the money retainer and may be paid directly from trust if the client has instructed the lawyer to do so.

When determining the amount of the money retainer the client should provide, the lawyer should consider the circumstances of each matter. These include the amount

of time and tasks that will be required and the urgency of the matter. Many of the factors the lawyer should consider when determining the amount of the money retainer are the same as those for deciding whether a fee is fair and reasonable, which are discussed later in this chapter. There are also certain circumstances where a money retainer may not be appropriate, for example, where the client and lawyer have entered into a contingency fee agreement. Contingency fees are also discussed in detail later in this chapter.

The client should be advised at the outset if and when further money retainers will be required as the matter progresses and the original money retainer is used to pay fees and disbursements. Lawyers should also consider their obligation to continue to represent the client, in some situations, even if the client has not paid the lawyer's accounts. Lawyers cannot withdraw for non-payment where serious prejudice to the client would result. If the lawyer has obtained a money retainer in advance, the lawyer may be able to avoid these situations.

2. Fees and disbursements

Clients pay *fees* for the legal services the lawyer provides to them. Fees may be billed in various ways, and lawyers should select a method that best suits the circumstances and the client. Common fee types include

- an *hourly rate*, charging for the actual time spent on the client matter;
- a *block, fixed, or flat fee*, charging a fixed amount for performing a particular task or tasks regardless of the time spent on the matter;
- *fees by stages*, charging for a matter, which is broken down into stages, and giving an estimate as to the fee for each stage or step in the matter; and
- *contingency fees*, where part or all of the fee depends on the successful completion of the matter.

A *disbursement* refers to any expense that the lawyer pays on behalf of the client for which the lawyer is entitled to be reimbursed by the client. Lawyers cannot charge clients more than the actual cost of the disbursement and are not permitted to make a profit from disbursements. Common disbursements include charges for

- research;
- mileage;
- mailing or sending documents by courier;

- photocopying or faxing documents, and long distance calls; and
- administrative and filing fees related to the client matter.

As stated in the *Rules*, lawyers may only charge or accept an amount for a fee or disbursement that is fair, is reasonable, and has been disclosed to the client in a timely fashion.

2.1 Fair and reasonable — rr. 2.08(1), (5), and commentary, r. 2.08(2)

To determine what is fair and reasonable for fees, the lawyer must consider

- the time and effort required and spent on the matter;
- the difficulty and importance of the matter;
- whether special skill or service was required and provided;
- the amount involved or the value of the subject matter;
- the results obtained for the client;
- fees authorized by statute or regulation; and
- special circumstances (e.g., loss of other business to accept the retainer, delay in payment by the client, uncertainty of reward, or urgency of the matter).

When acting for two or more clients (i.e., in a *joint retainer*), the fees and disbursements must be divided equitably between the joint clients, unless the clients agree to a different arrangement. The division of fees between the joint clients should be shown clearly on the statement of account provided to each client.

Where warranted, lawyers are encouraged to provide legal services *pro bono*. Where a client or prospective client of limited means is unable to obtain legal services or representation, lawyers should consider reducing or waiving the fees they would normally charge to serve the greater good.

2.2 Timely disclosure to client, cost estimates — r. 2.08(1) and commentary, r. 2.08(2)

The *Rules* require lawyers to disclose to clients the charges for fees and disbursements in a “timely fashion.” Though what is considered timely may depend on the individual client and his or her matter, at a minimum, a lawyer should initially discuss charges for fees and disbursements at the outset of the retainer. Whenever possible, the lawyer should provide the client with an estimate of the expected fees and disbursements to complete the client’s matter or to bring it to a particular stage. To ensure there is no misunderstanding, this information should be provided or confirmed in writing.

This can be done in a retainer agreement signed by the client or in a retainer or engagement letter prepared by the lawyer and delivered to the client.

If unexpected developments in the client’s matter arise and result in costs that are higher than the lawyer’s original estimate to the client, the lawyer should immediately inform the client of the reason for the increased fees, additional disbursements, or other costs and should provide a revised estimate, all of which should be confirmed in writing. The client may then instruct the lawyer based on this new information, which should also be confirmed in writing. One method to manage the client’s expectations during the retainer and to ensure timely disclosure of fees is to provide the client with interim statements of account.

2.3 No hidden fees — commentary, r. 2.08(2)

Further to the lawyer’s fiduciary duty to the client, a lawyer cannot withhold from the client any financial dealings in his or her matter. A lawyer is prohibited from accepting payment or compensation from anyone other than the client in the matter unless the client is informed and consents in writing. Such payments that must not be hidden from the client include

- a fee;
- a reward;
- costs;
- a commission;
- interest;
- a rebate;
- an agency or forwarding allowance; or
- any other compensation related to the lawyer’s employment by the client.

2.4 Interest on overdue accounts — r. 2.08(2)

Lawyers must not charge a client interest on an overdue account except as permitted by s. 33 of the *Solicitors Act* or as otherwise permitted by law. This includes interest on unpaid fees, charges, or disbursements. Clients should be informed in writing of the potential for interest charges, the rate that will be charged (in accordance with the *Solicitors Act*), and when the interest will apply. Lawyers should consider including this information in their initial retainer letter or agreement and, as required by the *Solicitors Act*, must include it on any interim or final accounts delivered to the client.

2.5 Written confirmation – commentary, r. 2.08(2)

Lawyers should confirm their billing method in writing for both fees and disbursements via

- a written retainer agreement signed by the client;
- a retainer or engagement letter from the lawyer; or
- a confirming memo to the client (sent by mail, email, or fax).

The written confirmation should set out the scope of the legal services to be provided and describe how fees, expenses, and interest will be charged. It should also address when and how payment from the client must be received for outstanding accounts and the need for further money retainers, if appropriate. Lawyers should ensure that the terms for each engagement are appropriate for each individual client's matter.

Where appropriate, the lawyer should also include details regarding the receipt of client settlement funds. If the client has agreed that the lawyer may pay himself or herself from the client's settlement money received in trust, this should be clearly confirmed in writing to ensure no misunderstanding. As discussed below, payment from those funds can only be made after the lawyer has rendered the services and delivered an account in accordance with the Law Society of Upper Canada rules and by-laws.

If a lawyer does not accept a client's matter, the lawyer should confirm this by sending the client a non-engagement letter.

2.6 Statement of account – r. 2.08(4)

Whether interim or final, a statement of account or bill delivered to the client must clearly and separately detail the amounts the lawyer has charged for fees and disbursements and should also include the Harmonized Sales Tax (HST) and any interest charges. The amount for fees will be calculated based on the fee type and rate the lawyer and client have agreed to, and disbursements will be passed directly on to the client. The HST applies to fees and some disbursements, as outlined by Canada Revenue Agency (CRA) guidelines, and should be listed as a separate line on the bill. Clients in a joint retainer must receive separate statements of account outlining each of the above.

To preserve the lawyer's rights regarding the recovery of fees, disbursements, or other charges from a client, the lawyer must comply with s. 2(1) of the *Solicitors Act*, which requires a lawyer's bill to be "subscribed with the proper hand" of the lawyer. The lawyer should sign every statement of account to confirm that it was reviewed by the lawyer before it was sent to the client.

If a client disagrees with the amount charged by the lawyer on an interim or final statement of account, the lawyer should make efforts to discuss the matter openly and calmly with the client to resolve the dispute. The lawyer should promptly explain any charges questioned by the client and should inform the client about the right to have the account assessed under the *Solicitors Act*. Often client complaints about fees can be resolved by considering the client's perspective and dealing with the client in a polite and respectful manner. Civility and professionalism must govern all discussions, including discussions relating to fee disputes with clients.

2.7 Appropriation of funds from trust – r. 2.08(10)

When a lawyer receives funds to be held on the client's behalf, including a money retainer, those funds must be deposited into a trust account. Lawyers shall not appropriate client funds held in trust for or on account of fees except as permitted by By-Law 9 under the *Law Society Act*. A lawyer is only permitted to withdraw from the trust account

- money properly required for payment to a client or to a person on behalf of a client;
- money required to reimburse the lawyer for money properly paid on behalf of a client or for expenses properly incurred on behalf of a client;
- money properly required for or toward payment of fees for services performed by the lawyer for which a bill or statement of accounts has been sent;
- money that is directly transferred into another trust account and held on behalf of a client; or
- money that, under this by-law, should not have been paid into a trust account but was mistakenly paid into a trust account.

Lawyers may pay themselves for fees out of client funds held in trust (i.e., if a money retainer was provided by the client and deposited into the trust account) only if

- the lawyer has completed the work;
- the lawyer has delivered (i.e., not just filed) a bill or statement of account to the client; and
- there are sufficient funds in trust for that client available for the payment of the lawyer's fees.

In any other circumstance, paying oneself for fees from the client's money held in trust is misappropriation of trust moneys and a form of professional misconduct.

Disbursements can be paid directly from trust upon the client's instruction or consent since they are expenses incurred on the client's behalf. Lawyers should not withdraw funds from trust to pay themselves for fees or reimburse themselves for disbursements if the money is earmarked for some other purpose. For example,

settlement funds provided to the lawyer by the client in anticipation of payment to a third party or proceeds from the sale of property that the lawyer has agreed to hold until certain conditions are met have been earmarked for another purpose.

3. Division of fees and referral fees — rr. 2.08(6)–(8) and commentary

The *division of fees* (or *fee splitting*) occurs when a lawyer shares or divides his or her fee for legal services, paid by the client, with another individual. *Referral fees* are fees paid by a lawyer to another individual for referring a client to the lawyer. Fee splitting and referral fees are permitted between and among lawyers and paralegals under specific circumstances.

Lawyers or paralegals who are not at the same firm may divide between them the fees for a matter if

- the fees are split relative to the work done and the responsibilities of each of them; and
- the client is informed and consents to the division of fees.

Where a lawyer refers a client to another lawyer or a paralegal, the lawyer may accept (and the other legal representative may pay) a referral fee if

- the referral was not because of a conflict of interest;
- the referral was because of the receiving legal representative's expertise and ability;
- the fee is reasonable and does not increase the total amount of the fee charged to the client; and
- the client is informed and consents to the payment of the referral fee.

Lawyers should note that this rule does not prohibit an arrangement respecting the purchase and sale of a law practice. Where the consideration payable to a lawyer includes a percentage of revenues generated from the practice sold, that lawyer is still permitted to receive such payments.

3.1 Prohibition against non-licensees — rr. 2.08(6)–(8) and commentary

Lawyers are prohibited from sharing, splitting, or dividing fees for legal services with anyone who is neither a lawyer nor a paralegal. Lawyers are also prohibited from paying any financial or other reward to someone who is not a lawyer or paralegal (i.e., a non-licensee) for the referral of client matters. For example, a lawyer may not pay an acquaintance, friend, or family member for referring a client. A lawyer may receive such a financial or other reward from a non-licensee for the referral of a client to that non-licensee; however, to fulfill the lawyer's fiduciary duty to avoid hidden fees, the lawyer must obtain the client's informed consent before he or she can

accept the reward. This does not apply to a referral fee or compensation from a title insurer. Under r. 2.02(11), a lawyer is prohibited from accepting such a fee from a title insurer.

3.2 Exceptions for non-licensees — r. 2.08(9) and commentary

There are exceptions to the prohibition against referral fees and fee splitting with non-licensees. The prohibition does not apply to the sharing of fees, cash flows, or profits

- among the lawyer and non-licensee partners of a multi-discipline practice where the partnership agreement provides for this; and
- by the lawyers of an interprovincial law firm or a law partnership of Ontario and non-Canadian lawyers who otherwise comply with this rule.

However, all the other conditions outlined in rr. 2.08(6)–(7) of the *Rules*, including client consent, must also be met.

Lawyers must note that there is no such exception for affiliations. An affiliation is different from a multi-discipline practice (as outlined in By-Law 7, made under the *Law Society Act*), an interprovincial law partnership, or a partnership between Ontario lawyers and foreign lawyers. An affiliated entity is not permitted to share in the lawyer's revenues, cash flows, or profits, either directly or indirectly.

4. Contingency fees and contingency fee agreements — r. 2.08(3) and commentary

A *contingency fee* is a fee that is paid if and when a particular result in the client's matter is achieved. The *Rules* permit a lawyer to enter into a *written* contingency fee agreement that states that the lawyer's fee, either in whole or in part, may depend on the successful completion of the client's matter. However, contingency fee arrangements are not permitted in family, criminal, or quasi-criminal matters. To determine the appropriate percentage (or other basis) of the contingency fee, lawyers should consider

- the likelihood of success;
- the nature and complexity of the claim;
- the expense and risk of pursuing the matter;
- the amount of the expected recovery;
- who may receive an award of costs; and
- the amount of costs that may be awarded.

Regardless of what factors were used to determine the percentage that was agreed to by the lawyer and the client, the ultimate fee must still be fair and reasonable.

In accordance with the *Solicitor's Act* and its regulations, a contingency fee agreement must be

- in writing;
- titled "Contingency Fee Retainer Agreement";
- dated; and
- signed by both the client(s) and the lawyer, with signatures verified by a witness.

Where the arrangement requires the client to provide a money retainer to be used for disbursements and only the lawyer's fee will be contingent upon the outcome of the matter, this should be clearly documented and explained to the client.

The contingency fee agreement must be clear on how the fee will be calculated and must contain the terms outlined in the *Solicitor's Act* and related regulations, as they apply. The agreement must not limit the client's ability to make a decision to discontinue or settle the claim, or to end the retainer with the lawyer. A copy of the signed and dated agreement must be provided to the client, and a copy retained by the lawyer.

In addition to the fee payable under the contingency fee agreement, the lawyer and client may agree that any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer. However, under the *Solicitor's Act*, such an agreement must receive judicial approval. In such circumstances, after considering all relevant factors, a smaller percentage of the award than would otherwise be agreed to for the contingency fee is generally appropriate.

Lawyers must take extra care when considering a contingency fee agreement with a client who is under a disability or is vulnerable. A vulnerable client could be

one who has difficulty communicating with or understanding the lawyer, someone who may have limited life experience or education, or someone whose emotional state is being affected by his or her legal matter. This extra care is required to ensure that the client understands the arrangement to which he or she is consenting and that the consent is genuine, informed, and uncoerced.

5. Securing payment for legal services

The best way to ensure payment for legal services is for the lawyer to ask the client to initially provide a money retainer in an amount appropriate to cover the anticipated legal fees and disbursements for the client's matter. However, there may be circumstances where it is not feasible or possible to obtain a money retainer and the lawyer wishes to secure payment by some other means, including

- holding and registering a mortgage against the client's real property, per s. 35 of the *Solicitors Act*;
- obtaining a charging order on the client's property recovered or preserved by the lawyer's instrumentality, per s. 34 of the *Solicitors Act*; or
- asserting a common-law solicitor's lien on the client's property (e.g., the client's file) already in the lawyer's possession.

Even where the law permits any of the above, the lawyer may be limited in exercising these rights by other factors. For example, the lawyer may not assert a lien on the client's file for non-payment if doing so may prejudice the client's ongoing matter. In each circumstance, the lawyer should evaluate whether the security is appropriate.

Managing the client relationship

Lawyers should adopt business policies and risk management practices to help them meet client needs and fulfill their professional duties to the client. The lawyer must manage the client relationship and the client's expectations throughout all stages of the retainer.

1. Managing the stages of the client relationship

Managing the client relationship is in the best interest of both the lawyer and the client. To successfully manage their responsibilities to clients, lawyers should plan for each of the following stages in the relationship:

- initial client or case screening;
- non-engagement or engagement;
- implementation; and
- disengagement.

1.1 Initial screening stage

The purpose of client or case screening is to determine whether the lawyer can assist the client with his or her matter. The lawyer should determine whether he or she is competent to act, whether he or she can complete the tasks required in a timely manner, and whether there are any conflicts of interest. Lawyers should also be aware of signs that indicate the prospective client may be difficult to manage, as discussed later in this chapter. Prior to agreeing to act for potentially difficult clients, lawyers should ensure that they are willing and able to serve the client despite any expected difficulties.

The initial screening should be used to

- learn how the client heard about the lawyer—tracking the source of clients can assist in marketing efforts later;
- obtain identifying information about the prospective client in accordance with By-Law 7.1;
- assess the client's demeanour to help the lawyer determine if the lawyer can work effectively and cooperatively with the client;
- evaluate whether there are any potential conflicts of interest and whether the client can waive those conflicts—this should be done prior to obtaining any confidential information from the prospective client;
- determine whether the lawyer has the required level of knowledge or skill to handle the matter without undue expense or delay to the client—lawyers

should consider the tasks they must complete to serve the prospective client;

- confirm that the lawyer has time available to meet the deadlines imposed by the client and the nature of the matter;
- discuss with the client the potential cost of the matter, the client's ability to pay, and the lawyer's option to withdraw for non-payment of fees;
- evaluate whether the client's expectations are achievable;
- learn whether the client has been assisted previously by another lawyer or a paralegal and, if so, confirm that the former legal representative was discharged or has withdrawn; and
- avoid accepting clients whose conduct or objectives are dishonest or unlawful.

These factors will assist a lawyer in choosing whether to accept or decline the retainer. Information gathered at the screening should be recorded in a memo to the file, and a file should be opened even if the lawyer does not provide further services to the prospective client after the initial screening. If the lawyer declines a matter, he or she may refer the client to another lawyer or a paralegal, as appropriate, or suggest resources that the client may use to find another legal representative.

1.2 Engagement or non-engagement stage

Once the client has been screened, the lawyer must decide whether to accept or decline the retainer. If the lawyer declines the engagement for legal services or the client chooses not to retain the lawyer, the non-engagement should be confirmed in writing by way of a non-engagement letter. Though the lawyer will not be providing legal services to the individual beyond those that may have been provided during the initial consultation, that individual is or was a client for the purposes of the consultation, and his or her information must be included in the lawyer's conflicts checking system.

A *non-engagement letter* should

- include the date of the interview or consultation;
- clearly confirm that the lawyer is not retained for the matter discussed in the consultation;
- explain the reason for declining the retainer (e.g., lawyer is not available, client unable to pay retainer, or conflict of interest);

- refer to any applicable statute of limitation or other relevant deadline and urge immediate action, if appropriate;
- not include any opinion or advice regarding the matter unless careful research to support an opinion has been completed;
- recommend that the prospective client(s) seek other legal representation;
- list any documentation or other property provided during the consultation that is being returned to the individual;
- be sent via registered mail to confirm delivery and receipt; and
- be copied and retained in the lawyer's file.

If the lawyer accepts the retainer, the terms of the engagement should be confirmed in writing either by way of a retainer agreement or a letter of engagement. Two basic terms to include in any retainer agreement or letter are the scope and costs of legal services to be provided. Depending on the nature of the matter and the individual client, lawyers may want to include other terms. Confirming the terms of the engagement in writing reduces the risk of misunderstanding between lawyer and client.

An *engagement letter or retainer agreement* should

- clearly identify the client(s) by using proper legal names;
- explain that there is no confidentiality between the clients if the lawyer is acting for more than one client in a joint retainer;
- outline other issues regarding confidential information (e.g., disclosure to a third-party expert to obtain his or her opinion);
- confirm the client's goals and the suggested strategy to meet those goals;
- outline the scope of representation and set out specific limits (i.e., a limited scope retainer);
- specify what the lawyer requires from the client (e.g., information, documents, actions, etc.) for the representation;
- describe the key steps in the representation;
- identify any additional staff members that will be involved and what functions they will perform;
- provide an estimated time for the key steps and completion of the matter;
- set out the method and frequency with which the lawyer will communicate with the client;
- clearly outline the type and amount of fees the lawyer will charge (e.g., hourly rate, flat rate, etc.) and whether the fees may change in the future;
- clearly outline potential disbursements and indicate whether the client is responsible for paying these

directly or the lawyer will pay them and later bill the client for reimbursement (e.g., third-party experts, accountants, actuaries, valuers, other advisors);

- indicate whether a money retainer is required and when it needs to be replenished;
- set out if and how often the lawyer will provide the client with interim bills, what they will include, and when the client can expect the final bill;
- indicate consequences of late payment, including interest to be charged on overdue accounts in accordance with the *Solicitors Act*;
- indicate consequences of non-payment of fees, including withdrawal of services;
- outline other circumstances under the *Rules of Professional Conduct (Rules)* where the lawyer may withdraw from representation;
- outline consequences if the lawyer cannot obtain adequate instructions to complete the tasks for which the lawyer was retained;
- discuss ownership of file contents and work product, transfer of files, and the file destruction policy in the event the retainer is ended by the client or by the lawyer;
- specify that any changes to the terms of the letter or agreement must be in writing; and
- clearly state that the engagement does not begin until the letter or agreement is signed by the client and returned to the lawyer and any applicable money retainer has been paid.

The language and meaning of the engagement letter or retainer agreement must be clear, and lawyers should review the terms of the engagement with the client to ensure that there is no misunderstanding.

Though a lawyer should use an engagement letter or retainer agreement for every matter, the lawyer is required to document the terms of engagement when acting in a limited scope retainer. Once the lawyer has advised the client about the nature, extent, and scope of the services that he or she can provide (and whether those services can be provided within the financial means of the client), the lawyer must confirm the services in writing and give the client a copy of the written document when practicable to do so.

1.3 Implementation stage

Once retained, the lawyer must competently carry out the services that the lawyer was hired to provide to the client. The lawyer must serve the client in a conscientious, diligent, and cost-effective manner. The lawyer must keep the client informed regarding his or her matter, through all stages of the matter and concerning all aspects of the matter. Because the client's needs and goals may change as the matter proceeds, lawyers must

continue to work and communicate with the client to review and adjust the strategy to meet those changing needs and goals. If the terms of the initial engagement change, a letter to the client should confirm those changes. Where the changes to the scope of the retainer or the terms of the lawyer's representation of the client are significant, these should be documented in a new retainer agreement. This will help the lawyer to document when the changes became effective and to avoid misunderstanding by the client.

Any new or different instructions from the client should also be obtained or confirmed in writing. As well, the lawyer must explain to the client any limitations regarding the client's instructions. For example, the lawyer should make it clear to the client that the lawyer cannot accept or act on client instructions that would cause the lawyer to violate any of the *Rules*.

If a lawyer later discovers that he or she lacks the competence to fulfill the retainer, the lawyer must obtain the client's written consent to retain, consult, or collaborate with another lawyer who is competent for the task. To ensure that the client provides informed consent, the lawyer must also advise the client of any anticipated increase in cost that might result from this arrangement.

1.4 Disengagement stage

Eventually the retainer will end, either because the matter is complete or because the client or lawyer terminated the retainer before completion. Although the client has the right to end the retainer at will, the lawyer does not. The *Rules* set out circumstances where the lawyer must end the engagement or may choose to do so.

The lawyer should record in the file and confirm with the client in writing why the retainer came to an end. Such letters to the client may be known as a *closing* or *reporting letter* or a *disengagement* or *termination letter*. Where the retainer has ended because the matter is complete, the letter should

- confirm that the particular matter was completed;
- detail the steps that were taken to complete the matter;
- specify any additional steps to be taken by the client in the future to protect his or her interests regarding the completed matter;
- inquire whether the client requires any further assistance from the lawyer if any new developments occur;
- include the return of client documents and remind the client of the lawyer's destruction policy regarding the client file (as outlined in the retainer agreement or engagement letter);

- include the final account and provide a trust statement reconciling funds received and dispersed, if appropriate; and
- thank the client for the opportunity to work on the matter.

Where the lawyer was retained only to provide limited services to the client, the lawyer should provide the client with a similar letter that confirms that the terms of the limited scope retainer have been completed and reminds the client of the steps that may still need to be taken in the client's matter but for which the lawyer was not retained.

If the client or the lawyer ended the retainer before the matter was completed or before the lawyer could complete the tasks required to fulfill the retainer, the letter should

- confirm why the relationship is ending;
- address any final or outstanding account; and
- remind the client of important deadlines or limitation periods and unfinished activities so that the client is aware of the status of the matter and can avoid prejudicing his or her interests.

As in the case of a non-engagement letter, the lawyer should confirm receipt of the disengagement letter by the client. This may be done by delivering the letter by registered mail or process server, or by having the client sign an acknowledgement of receipt of the letter if the letter is given to the client in person.

2. Managing client expectations

Many client complaints result from a failure to meet client expectations as to service, rather than dissatisfaction with the results obtained for the client by the lawyer. A client's service expectations may relate to a variety of things, such as how long it will take to achieve legal results, how quickly the lawyer will return the client's calls, and the cost of the legal services the lawyer will provide. Client expectations may change as the matter progresses or as new developments arise. The lawyer must keep the client informed of all developments throughout the retainer, both negative and positive. To manage the client's expectations regarding the cost of legal services being provided, the lawyer should consider providing the client with interim bills.

The lawyer must also monitor the client's expectations and the lawyer's ability to meet those expectations. If the client's expectations are unreasonable or if the lawyer cannot meet the client's reasonable expectations, this should be discussed and resolved with the client. Subject to the *Rules* on withdrawal from representation, the lawyer may have to end the engagement if the lawyer can no longer serve the client as the client requires.

2.1 What do clients want?

To meet the client's expectations, the lawyer must first determine what those are. Though the client's needs and wants will vary with the client and the matter, common expectations voiced by clients include

- the specific legal services the client will receive from the lawyer;
- the specific results the lawyer is likely to achieve for the client;
- the costs associated with achieving those goals; and
- the time required to complete the legal services and achieve the results.

Even if the client does not specifically ask about the above, these issues should be addressed by the lawyer and should be confirmed in the engagement letter or retainer agreement provided to the client.

Clients may have unspoken expectations, which are equally as important. Most clients expect the lawyer to

- be available to the client;
- listen to the client;
- ask for the client's opinion;
- acknowledge the client's concerns;
- speak *to* the client, not *at* the client;
- keep the client informed;
- treat the client as a person, rather than as a file; and
- care about the client and not just the matter.

These aspects of client service and communication are also components of competence under the *Rules*. Lawyers should realize that successfully completing the legal tasks associated with the client matter is not always enough to satisfy the client. Difficulty in the lawyer-client relationship can develop if the lawyer and client do not agree on what they expect of each other or if these expectations were not discussed at the beginning of the retainer.

2.2 Difficult clients

Some clients can be more challenging than others. Knowing how to recognize and deal with such clients can put the lawyer in a better position to avoid or manage a difficult relationship. Lawyers should be alert for indicators that a client may be difficult:

- The client has a pressing emergency or a "life or death" matter; if the client cannot give sufficient lead-time to do the work properly, consider declining the matter and confirm this in writing.
- The client has already been through a number of legal representatives and has been dissatisfied with each one.

- The client wants to barter for the lawyer's services, offering inducements such as work or benefits for handling the client's case.
- The client thinks he or she knows the legal process better than the lawyer.
- The client has unrealistic expectations (e.g., taking estimates as guarantees, becoming overly irritated with delay, and constantly complaining).
- The client demands that the lawyer set aside all other cases to handle the client's matter.
- The client makes unrealistic demands of the lawyer and his or her staff.
- The client is clearly motivated by malice and has instituted proceedings solely for the purpose of injuring the other party.

Lawyers are encouraged to provide legal services to clients who need it, whether or not they are difficult. If a lawyer chooses to represent a client who later becomes difficult, the lawyer should encourage realistic client expectations and manage the unpleasant relationship as best as possible. To do so, the lawyer may address issues directly with the client, involve another lawyer or a paralegal, as appropriate, or evaluate whether another legal representative would better serve the client.

Once a lawyer agrees to act for a difficult client, the lawyer must fulfill all client-related duties, regardless of how challenging the relationship may be. Though a lawyer may withdraw after the retainer is established where there has been a loss of confidence between the client and the lawyer, the fact that a client is or has become difficult to deal with may not be reason enough to end the engagement.

2.3 Client communication

Effective client communication is essential for a successful lawyer-client relationship. Lawyers must communicate with clients in a timely and effective manner that is appropriate to the age and abilities of the client. This may include using plain language to explain an issue or ensuring that a letter to a visually impaired client is printed in a large font or that the services of an interpreter or translator are used. Lawyers must be sensitive to the communication needs of their individual clients since each client may require a different approach or strategy. The lawyer must consider the client's

- age;
- education;
- physical health;
- mental health;
- functional ability;
- communication style;

- level of understanding or sophistication; and
- ability to make decisions or provide instructions.

Where the lawyer has a client with a disability, the lawyer may need to adjust the manner in which he or she communicates with the client, depending on the client's abilities. The lawyer has the duty to provide the same level of service to the client, regardless of ability.

Lawyers should use various methods to communicate with the client and at the beginning of the retainer should discuss with the client

- the method of preferred contact and related details (e.g., telephone, facsimile, email, mail, courier, priority post, or office or home visits);
- the drawbacks or risks associated with a particular method of communication;

- the frequency with which the lawyer will update the client on the matter going forward;
- the method used to update the client (e.g., sending client copies of correspondence, court documents, or memos to the client file); and
- the average time for the lawyer to respond to calls, emails, letters, or other communications.

It is the lawyer's responsibility to ensure that what is communicated to the client is understood by the client. Where information being shared is sensitive, complicated, or important to the client's ability to provide instructions, the lawyer should consider confirming this information in writing.

Withdrawal from representation

Once a lawyer has been retained, the client may end the lawyer-client relationship any time and for any reason, while the lawyer cannot. A lawyer may only withdraw from representing a client

- for good cause; and
- upon notice to the client, appropriate to the client's circumstances.

The lawyer must have a legitimate reason to withdraw. The amount of time or advance warning and the way in which the lawyer informs the client of the intention to stop acting for the client depend upon the type of matter, the individual client, and the client's needs and expectations.

Rule 2.09 of the *Rules of Professional Conduct (Rules)* deals with the lawyer's obligations relating to withdrawal of services and sets out situations where the lawyer

- may choose to withdraw (i.e., *optional withdrawal*);
- must withdraw (i.e., *mandatory withdrawal*); and
- must comply with special rules (i.e., *withdrawal from criminal cases*).

1. Good cause, notice appropriate to the circumstance — r. 2.09(1)

Whether a lawyer has good cause for withdrawal will depend on many factors, including

- the nature and stage of the matter;
- the relationship with the client;
- the lawyer's expertise and experience; and
- any harm or prejudice to the client that may result from the withdrawal.

Appropriate notice of the intent to withdraw will also vary. The rules of the court or tribunal may outline what steps the lawyer must take to properly withdraw. When no specific timelines or provisions are set out, the lawyer should protect the client's interests to the best of the lawyer's ability and not abandon the client at a critical stage of a matter or when it may disadvantage the client. The client should have adequate time to retain another legal representative to continue with the matter and should be able to continue without losing any advantages or rights already obtained by the original lawyer during the original lawyer's representation.

To ensure that the lawyer and the client are clear as to when the lawyer may or must end the relationship, the

lawyer should explain to the client at the beginning of the retainer

- when the lawyer may or must withdraw from representing the client;
- that the client's documents will be provided or returned to the client when the matter or retainer is completed or the lawyer withdraws; and
- which documents in the client file belong to the lawyer and will be kept by the lawyer when the matter or retainer is completed or the lawyer withdraws.

To ensure the client understands these details, the lawyer should consider including them in the engagement letter or retainer agreement.

2. Optional withdrawal

Where there is good cause to do so, a lawyer is permitted to withdraw from representing the client if the lawyer can give the client reasonable notice of the withdrawal and the withdrawal will not prejudice the client's matter. The lawyer is not required to withdraw but may choose to do so as long as he or she follows the direction of the tribunal and the specific rules regarding withdrawal from criminal proceedings. The *Rules* provide that a lawyer may choose to withdraw from representing a client where

- there has been a serious loss of confidence between the lawyer and the client; or
- the client does not pay the lawyer's fees and no serious prejudice to the client would result.

2.1 Serious loss of confidence — r. 2.09(2) and commentary

Subject to any direction of the tribunal or rules relating to withdrawal in criminal matters, a serious loss of confidence between the lawyer and client may be good cause for the lawyer to withdraw. A *serious loss of confidence* means that the trust between the lawyer and client has diminished such that it becomes very difficult for the lawyer to properly serve the client and for them to have a functional lawyer-client relationship.

For example, a serious loss of confidence may result when the client deceives the lawyer. If the client is not truthful, the lawyer may not have all the information needed to effectively represent the client. Another example is where the client refuses to accept and act on the lawyer's advice on an important point. A lawyer who continues to represent a client who will not take the

lawyer's professional advice may no longer be acting in the client's best interest. Any benefit of the lawyer's advice will be lost to the client or greatly reduced.

Even when faced with a serious loss of confidence, the lawyer must never threaten to withdraw legal services to force the client to make a quick decision on a difficult question or matter. As in all withdrawal cases, the lawyer must give the client notice appropriate to the circumstances.

2.2 Non-payment of fees — r. 2.09(3)

A lawyer may withdraw from representing a client for non-payment of fees if no serious prejudice would result from the withdrawal. Where immediate withdrawal would harm the client's interests, the lawyer must continue to act for the client competently and diligently even if the fees remain unpaid. Once the risk of prejudice has passed, the lawyer may then withdraw for non-payment of fees.

Where there is no risk of prejudice to the client's matter, the lawyer must first notify the client that payment of outstanding fees is required and that failure to remit payment within a reasonable and defined time will result in the lawyer ending the retainer. The notice must be reasonable; it must give the client enough advance warning and should be in writing. Withdrawal of services for non-payment is subject to any direction of the court or tribunal, where it applies. If the matter relates to a criminal matter, lawyers must comply with special rules relating to withdrawal in the types of cases discussed below.

3. Withdrawal from criminal proceedings

A lawyer may withdraw from acting for a client in a criminal matter if the lawyer has good cause, the withdrawal will not prejudice the client, and the lawyer complies with the special provisions in the *Rules* that relate to these types of matters. Whether a lawyer will be permitted to withdraw depends upon the interval between

- *the withdrawal*: the time, day, or date when the lawyer intends to stop acting for the client; and
- *the trial*: the time, day, or date the client's trial begins.

Generally, the amount of time between withdrawal and trial must be enough to allow the client to hire another lawyer or paralegal, as appropriate, and to allow that new legal representative enough time to prepare for the trial. What is considered a sufficient interval will vary with the level of knowledge and expertise required of the new legal representative and the type, stage, and complexity of the matter, among other factors. Where the interval is

not sufficient, if possible, the trial should be adjourned to allow the client to obtain proper representation and for full preparation.

3.1 Withdrawal permitted — r. 2.09(4) and commentary

Where no prejudice would result, a lawyer acting in a criminal matter may withdraw for non-payment of fees or some other good cause if the interval between the withdrawal and the trial of the matter is enough to allow the client to retain other representation and to allow the other legal representative enough time to prepare for trial. Prior to withdrawing, the lawyer must also

- notify the client, preferably in writing, of the intent to withdraw and the reason for the withdrawal;
- provide an account to the client for all moneys received for fees and disbursements;
- notify the Crown counsel or prosecutor in writing of the withdrawal; and
- notify the clerk or the registrar of the court in writing of the withdrawal if the lawyer is on the record as acting for the accused.

While the *Rules* do not require the lawyer to make an application to the court to be removed as the client's legal representative, most rules of court do (e.g., rules and any practice directions). The lawyer must consult the rules of the court to determine the appropriate process that must be followed. As in every case, the lawyer must not tell the court or prosecutor the reasons for withdrawal unless the disclosure is justified in accordance with the *Rules*. This is important in situations where the lawyer has withdrawn due to a loss of confidence between the lawyer and the client or due to a conflict of interest involving other clients.

3.2 Withdrawal not permitted — r. 2.09(5)

If the interval between the trial date and the intended withdrawal is insufficient to allow the client to retain other legal representation or to allow a new legal representative to prepare for trial, a lawyer acting in a criminal matter may not withdraw for non-payment of fees. The lawyer may seek to adjourn the trial to give the client or the new lawyer or paralegal more time to prepare and to create the interval needed to permit the withdrawal, as long as the adjournment does not prejudice the client.

3.3 Withdrawal with permission of trial judge — r. 2.09(6) and commentary

If the interval between the trial date and the intended withdrawal is not sufficient to allow the client to retain other legal representation or to allow a new legal representative to prepare for trial, a lawyer acting in a

criminal matter may only withdraw for good cause other than non-payment of fees with the permission of the court. The lawyer may seek to adjourn the trial to give the client or the new lawyer or paralegal more time to prepare and to obtain permission for the withdrawal, as long as the adjournment does not prejudice the client. A court application to withdraw should be made as promptly as possible to minimize the disruption and inconvenience to the administration of justice. If the court agrees to the adjournment but does not grant permission for the withdrawal, the lawyer must continue to act.

4. Mandatory withdrawal – r. 2.09(7) and commentary

Circumstances may also arise where the lawyer is required to withdraw from representing a client regardless of whether the lawyer and the client both wish to continue with the retainer. Subject to the special rules about criminal proceedings and the direction of the tribunal, the lawyer must withdraw from representing a client in any of the following circumstances:

- The client has discharged the lawyer, regardless of the reason the client has done so.
- The client has instructed the lawyer to do something inconsistent with the lawyer's duty to the tribunal and, following an explanation by the lawyer, the client persists in such instructions.
- The client is guilty of dishonourable conduct in the proceeding or is taking a position solely to harass or maliciously injure another.
- It becomes clear that the lawyer's continued employment will lead to a breach of the *Rules*.
- The lawyer is required to withdraw because of dishonesty, fraud, etc., by an organizational client, pursuant to rr. 2.02(5.1)–(5.2).
- The lawyer is not competent to handle the matter.

Depending on the circumstances, failure to withdraw in compliance with the *Rules* may be considered professional misconduct.

5. Manner of withdrawal – rr. 2.09(8)–(9) and commentary

When a lawyer withdraws from representing a client, for whatever reason, the lawyer is obligated to do all that can reasonably be done to assist in the smooth transfer of the matter to the successor legal practitioner (i.e., a lawyer licensed in Ontario or another Canadian jurisdiction or a licensed paralegal).

When a lawyer withdraws or is discharged by the client, the lawyer must

- deliver all papers and property to which the client is entitled to the client or as per the client's orders;
- give the client all information that may be required in connection with the case or matter;
- account for all funds of the client that the lawyer has or previously held, including the refund of moneys not earned by the lawyer during the representation;
- promptly render an account for outstanding fees and disbursements; and
- cooperate with the successor legal practitioner to minimize expense and avoid prejudice to the client.

The obligation to deliver papers and property to the client is subject to the lawyer's right of lien. Where the lawyer may be able to assert a solicitor's lien for unpaid fees and disbursements, the lawyer should consider the effect of its enforcement upon the client's position. The lawyer should not enforce the lien if to do so would prejudice materially the client's position in any uncompleted matter.

It should be noted that a lawyer's obligations do not change when withdrawal results because the lawyer is leaving a firm or because a law firm is dissolving. In such cases, most clients will prefer to continue the professional relationship with the lawyer that they considered to be in charge of their business before the departure or dismantling of the firm, regardless of where that lawyer continues to practice law. However, the final decision rests with the client, and the lawyers who are no longer retained by that client must comply with the manner-of-withdrawal obligations outlined above.

5.1 Confidentiality upon withdrawal – r. 2.03(1) and commentary

As mentioned previously in these materials, the duty of confidentiality continues indefinitely after the lawyer's relationship with the client ends, even if differences have arisen between them. Upon withdrawal, the lawyer must not disclose any information regarding the client obtained during the professional relationship unless the client consents or disclosure is mandated or justified according to r. 2.03 of the *Rules*. Accordingly, the lawyer must not reveal the reason for withdrawal to the successor legal practitioner, opposing parties, or court or tribunal.

5.2 Written confirmation

If a lawyer's services are terminated while the client's matter is ongoing and the client requests that the matter be transferred to a new legal practitioner, the lawyer should confirm in writing his or her withdrawal from representation. The lawyer should obtain a direction signed by the client for the transfer of the client file to the successor legal practitioner. If the file is to be delivered to

the client personally, the lawyer should obtain the client's written acknowledgement that the client has received the file from the lawyer. Where the client also requests copies of documents from the client file that belong to the lawyer (i.e., documents that came to exist during the retainer that the lawyer was under no duty to prepare or were not prepared for the client's benefit and for which the client was not liable to pay), the lawyer may choose to provide these and may discuss the cost of photocopying them directly with the client.

**6. Duties of successor lawyer –
r. 2.09(10) and commentary**

A lawyer who is contacted by a prospective client who was represented by another lawyer or paralegal has

obligations as the *successor lawyer*. Before accepting the retainer, the successor lawyer must ensure that the client's former legal representative has withdrawn, agrees to withdraw, or was discharged by the client. It may be appropriate for the successor lawyer to urge the client to settle any accounts outstanding to the former representative, especially if the former representative withdrew for good cause or was discharged arbitrarily. However, if a trial or hearing is approaching or in progress, or if the client would otherwise be prejudiced, an outstanding account should not interfere with the successor lawyer's representation of the client.

Though the lawyer's first duty is to the client, lawyers have concurrent duties to others. These may be related to the administration of justice, to other individuals licensed by the Law Society of Upper Canada, to the legal professions at large, or to the Law Society itself.

1. Duty to the Law Society

Both lawyers and paralegals have the privilege of providing legal services to the public because they have met the Law Society's competence and professional responsibility requirements. In accepting a licence to practise law or provide legal services, they have also agreed to submit to the Law Society's authority to govern their conduct. Lawyers must fulfill certain duties to the Law Society so that it can effectively and efficiently carry out its mandate to govern the legal professions in the public interest. Much of the lawyer's duty to the Law Society focuses on measures to protect the public from inappropriate lawyer and paralegal conduct. The lawyer's duties to the Law Society include the obligation to

- respond promptly to the Law Society;
- assist the Law Society in preventing the unauthorized practise of law or provision of legal services;
- obtain the Law Society's permission to work with or employ a person who is no longer authorized to practise law or provide legal services;
- cease practising law when the lawyer's licence is suspended or otherwise restricted by the Law Society or via the lawyer's undertaking; and
- submit to the disciplinary authority of the Law Society.

1.1 Responding promptly – r. 6.02

Lawyers must reply promptly to all communications from the Law Society regardless of the topic. Failure to respond promptly to the Law Society is a breach of the *Rules of Professional Conduct (Rules)* and is grounds for disciplinary action by the Law Society. For example, a lawyer who fails to respond to a Law Society inquiry about a complaint may be disciplined by the Law Society for failure to respond promptly, regardless of the merits or outcome of the original complaint. Complying with this obligation is often less time consuming than dealing with the consequences of failing to respond, such as a discipline hearing.

1.2 Unauthorized practice of law or provision of legal services – r. 6.07(1) and commentary

Unlicensed individuals who claim to practise law or provide legal services are not subject to the Law Society's competence or professional responsibility requirements, which exist to protect the public. Though an unauthorized person may seem to have technical skill or ability, the client who hires such an individual has none of the safeguards available to the clients of regulated legal service providers, including

- options for assessing or reviewing a lawyer's or paralegal's accounts;
- rules regarding the protection of confidential client information;
- rules regarding the protection of client funds and property, including the operation of trust accounts;
- professional liability insurance requirements; and
- the requirement to finance and maintain a compensation fund for clients who have been victimized by dishonest lawyers or paralegals.

Lawyers have a duty to assist the Law Society to prevent the unauthorized practice of law and the unauthorized provision of legal services in order to protect the public interest. A lawyer who suspects an unauthorized individual is practising law or providing legal services is obliged to advise the Law Society. A lawyer is similarly obliged to advise the Law Society if the lawyer learns that a paralegal is providing legal services outside the permitted scope of practice (i.e., both authorized proceedings and accepted activities related to those proceedings) as outlined in By-Law 4, made under the *Law Society Act*. Such activities would also be considered the unauthorized practice of law or provision of legal services.

1.3 Working with or employing unauthorized persons – r. 6.07(2)

The protections mentioned above are also not available to clients and lawyers who become victims of former lawyers or paralegals who may be employed by a firm. For this reason, a lawyer shall not share space or associate with, hire, or use the services of a lawyer or paralegal who is no longer licensed by the Law Society unless a committee of Convocation expressly approves it.

The rule applies whether the individual gave up his or her licence or the licence was revoked or suspended by the

Law Society. The rule is broad and prevents lawyers from hiring a former or suspended lawyer or paralegal in any capacity. It is meant to protect both the public and the employing lawyer from harm that may be done by an individual who is no longer licensed to practise law or provide legal services to the public but may be tempted to do so while working at a firm.

Because there is a danger that such an employee may provide legal services to clients in breach of this rule, the lawyer's duty to prevent unauthorized practice or provision of legal services is closely linked to the obligation to supervise the lawyer's employees. If a lawyer is a sole practitioner or operates a satellite office, the lawyer must ensure that all matters requiring legal skill and judgment are handled by a lawyer or paralegal, as appropriate. When working with or employing a paralegal, the lawyer has the additional obligation to ensure that paralegal is providing services within the scope of permitted practice as outlined in By-Law 4.

1.4 Licence suspended or restricted, undertaking not to practice law — rr. 6.07(3)–(5); By-Law 7.1, Part II; and By-Law 9, Part II.1

A lawyer whose licence to practise law has been suspended or restricted by the Law Society or by an undertaking must refrain from providing legal services that the lawyer is no longer entitled to offer. Whether a lawyer has provided the Law Society an undertaking to limit the services he or she provides or has undertaken not to practise law at all, the lawyer must comply with the terms of the undertaking.

A lawyer who has been suspended or who has given the Law Society an undertaking must not

- practise law or provide legal services; or
- hold themselves out as someone who is entitled to practise law or provide legal services.

A lawyer whose licence has been suspended, regardless of the reason why, also has specific obligations to disclose the lawyer's suspended status to prospective, existing, and former clients and to engage another lawyer to complete certain tasks related to any existing client's file. There are additional obligations if the lawyer is holding client funds or property in trust, which are outlined in By-Law 9.

1.5 Disciplinary authority — rr. 1.02, 6.11, and commentary

The Law Society has the authority to regulate and discipline every lawyer, whether or not the lawyer is acting in a professional capacity and in whatever jurisdiction the lawyer's activities take place. A lawyer

may be disciplined by the Law Society for either professional misconduct or conduct unbecoming a lawyer. Both are prohibited by s. 33 of the *Law Society Act*. While professional misconduct relates to actions the lawyer may take in the course of the lawyer's practice, conduct unbecoming relates to actions the lawyer may take in his or her personal life.

Professional misconduct is defined in the *Rules* as conduct by a lawyer in his or her professional capacity "that tends to bring discredit upon the legal profession" and includes

- violating or attempting to violate any of the *Rules* or a requirement of the *Law Society Act*, its regulations, or its by-laws;
- knowingly assisting or inducing another legal practitioner (i.e., a lawyer licensed in Ontario or another Canadian jurisdiction or a licensed paralegal) to violate or attempt to violate any of the *Rules*, the *Paralegal Rules of Conduct*, or a requirement of the *Law Society Act*, its regulations, or its by-laws;
- knowingly assisting or inducing a non-licensee (i.e. non-paralegal or non-lawyer) partner or associate of a multi-discipline practice to violate or attempt to violate any of the *Rules* or a requirement of the *Law Society Act*, its regulations, or its by-laws;
- misappropriating or otherwise dealing dishonestly with a client or third party's money or property;
- engaging in conduct that is prejudicial to the administration of justice;
- stating or implying an ability to improperly influence a government agency or official; and
- knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Conduct unbecoming a lawyer or conduct unbecoming a barrister or solicitor is also defined in the *Rules*, and refers to conduct in a lawyer's personal or private capacity "that tends to bring discredit upon the legal profession." For example, this includes

- committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
- taking improper advantage of the vulnerability, youth, inexperience, lack of education, unsophistication, ill health, or unbusinesslike habits of another; or
- engaging in conduct involving dishonesty or conduct that undermines the administration of justice.

Generally, where a lawyer's conduct in a private or personal capacity does not bring into question his or her professional integrity, the Law Society will not review the

conduct. However, if a client's awareness of a lawyer's conduct would be likely to impair the client's trust in the lawyer, the Law Society may be justified in taking disciplinary action whether the conduct occurred in the lawyer's professional or personal sphere.

2. Duty to the legal profession

Public confidence in the legal profession as a whole may be eroded by an individual lawyer's irresponsible conduct. Accordingly, a lawyer has an obligation to the profession to conduct himself or herself in a way that inspires the confidence, respect, and trust of clients and the community. Duties to the profession specifically outlined in the *Rules* include the lawyer's obligation to

- report lawyer or paralegal misconduct;
- encourage clients to report lawyer or paralegal misconduct;
- report criminal charges or convictions; and
- report errors and omissions.

2.1 Reporting misconduct — r. 6.01(3) and commentary

Detecting and preventing misconduct at an early stage reduces the risk to clients and prevents damage to the reputation of the legal profession. Lawyers must assist the Law Society to protect the public and the profession by reporting misconduct of a serious nature. Unless it would be unlawful to do so or it would require the lawyer to divulge confidential client information, a lawyer must report to the Law Society

- the inappropriate removal or use of moneys from trust by a lawyer or paralegal;
- the abandonment of a law practice by a lawyer or a legal services practice by a paralegal;
- involvement in serious criminal activity related to a lawyer's or paralegal's practice;
- the mental instability of a lawyer or paralegal that is of such a serious nature that clients are likely to be severely prejudiced; or
- any other situation where a lawyer's or paralegal's clients are likely to be severely prejudiced.

It should be noted that this rule does not require or permit a lawyer to reveal confidential client information and, therefore, does not interfere with the lawyer's duty of confidentiality to the client. The lawyer's purpose for reporting must be motivated by an honest intention to protect the public and the reputation of the profession. It must not be used against another member of the profession for malice, spite, or a desire to harm another, or for some other hidden inappropriate purpose.

The obligation to report misconduct applies to the lawyer's own conduct and that of other individuals licensed by the Law Society. A lawyer who fails to report such conduct to the Law Society when the lawyer is aware of it is in violation of this rule and may be subject to discipline. If a lawyer is unsure as to whether the lawyer must report certain conduct, the lawyer should consider seeking the advice of the Law Society. The lawyer may do so by contacting the Law Society's Practice Management Helpline either directly or indirectly (e.g., through another lawyer or a paralegal).

2.2 Encouraging client to report dishonest conduct — rr. 6.01(4)–(7)

If a lawyer's client has a claim against an apparently dishonest lawyer or paralegal, the lawyer must try to persuade the client to report the facts to the Law Society before seeking private remedies against that dishonest legal representative. The lawyer should inform the client of the Law Society's compensation fund for clients who are victims of dishonest lawyers or paralegals. If the client refuses to report to the Law Society and wishes to pursue private remedies, the lawyer must take each of the steps outlined below:

- (1) Obtain the client's written instructions to proceed with the client's private remedies without notice to the Law Society.
- (2) Inform the client of the provisions of the *Criminal Code* (s. 141), where the client may be guilty of an indictable offence if the client assists a dishonest lawyer or paralegal in concealing his or her indictable offence in return for valuable consideration (money, materials, or something else that can be valued in money's worth).
- (3) If the client wishes to pursue a private agreement with the apparently dishonest lawyer or paralegal, withdraw from representation if the agreement results in a violation of the *Criminal Code*.

2.3 Reporting criminal charges or convictions — r. 6.01(8) and commentary

As outlined in s. 2 of By-Law 8, made under the *Law Society Act*, lawyers and paralegals also have a duty to report themselves to the Law Society if charges have been laid against them pursuant to the *Criminal Code*, the *Controlled Drugs and Substances Act*, or the *Income Tax Act* (Canada). Both lawyers and paralegals must send written notification to the Law Society to advise of a charge made against them alleging that they committed

- an indictable offence under the *Criminal Code*;
- an offence under the *Controlled Drugs and Substances Act*;

- an offence under the *Income Tax Act* or under an Act of the legislature of a province or territory of Canada in respect of the income tax law of that province or territory, where the charge explicitly or implicitly alleges dishonesty on the part of the lawyer or paralegal or relates in any way to that individual's professional business;
- an offence under an Act of the legislature of a province or territory of Canada in respect of the securities law of the province or territory, where the charge explicitly or implicitly alleges dishonesty on the part of the lawyer or paralegal or relates in any way to that individual's professional business; or
- an offence under another Act of Parliament or under another Act of the legislature of a province or territory of Canada, where the charge explicitly or implicitly alleges dishonesty on the part of the lawyer or paralegal or relates in any way to that individual's professional business.

An *indictable offence* excludes an offence for which an offender is punishable only by summary conviction but includes

- an offence for which an offender may be prosecuted only by indictment; and
- an offence for which an offender may be prosecuted by indictment or is punishable by summary conviction at the instance of the prosecution.

Lawyers must also inform the Law Society in writing of the decision and the final result of any charge mentioned above. The lawyer must report a charge as soon as it is reasonably possible after he or she receives notice of the charge and must report the outcome of a charge as soon as reasonably possible after receiving notice of the disposition.

If the offence is being pursued by private prosecution and the charge against the lawyer is under s. 504 of the *Criminal Code* and refers to information other than the information referred to in s. 507(1) of the *Criminal Code*, the lawyer is only required to inform the Law Society of the charge and of its outcome if the charge results in a finding of guilt or conviction.

It should be noted that the by-law requires lawyers to self-report the above criminal charges or convictions. A lawyer is only required to report another lawyer or paralegal involved in criminal activity if it is related to the latter's practice such that it may prejudice the latter's clients.

2.4 Reporting errors and omissions — r. 6.09 and commentary

As outlined previously in these materials, a lawyer who realizes that an error or omission has occurred has a duty to advise the client of the error or omission, to recommend that the client obtain independent legal

advice regarding any claim that may arise from the error or omission, and to advise that the lawyer may no longer be able to act for the client. When a lawyer discovers an error or omission, the lawyer has additional duties to the liability insurer for the legal profession, the Lawyers' Professional Indemnity Company (LAWPRO). The lawyer must

- subject to r. 2.03 regarding confidentiality, promptly give notice of any circumstance that the lawyer may reasonably expect to give rise to a claim to an insurer or another indemnitor (so that the client's protection from that source will not be prejudiced);
- where a claim of professional negligence is made against the lawyer, assist and cooperate with the insurer or other indemnitor as necessary to enable the claim to be dealt with promptly;
- if the lawyer is not indemnified or not fully indemnified for a client's error or omission claim, deal with the claim swiftly and refrain from taking unfair advantage that would defeat or impair the client's claim;
- in cases where liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim, make arrangements to pay the remaining balance of the client's claim (including payment of the deductible under a professional liability insurance policy).

There may be occasions when a lawyer believes that he or she may be liable for damages to the client when no liability actually exists. The requirement to inform and cooperate with the insurer preserves the rights of the insurer but must not interfere with the lawyer's obligations to the client.

3. Duty to lawyers and others

Lawyers have duties to the individual lawyers, paralegals, other legal practitioners (e.g., lawyers licensed in Canada but outside of Ontario), and other individuals that they may deal with while practising law. The *Rules* outline the lawyer's obligations concerning

- courtesy and good faith;
- communications with others, generally;
- communications with represented persons or organizations and the provision of second opinions;
- undertakings and other professional promises; and
- financial obligations.

3.1 Courtesy and good faith — rr. 6.03(1)–(4) and commentary

Lawyers are obliged to be courteous and civil and to act in good faith with all persons with whom they have dealings in the course of their practice. Discourteous and

uncivil behaviour between lawyers and other legal practitioners lessens the public's respect for the profession and may impair the lawyer's ability to fully serve the client in an efficient manner.

The *Rules* set out the type of conduct that is prohibited. Lawyers who engage in this conduct violate the *Rules* and will be subject to the Law Society's review if a complaint is made. In the course of professional practice, lawyers must not

- engage in *sharp practice*, such as trying to gain advantage for themselves or for their clients by using dishonest or dishonourable means when dealing with other legal practitioners;
- take advantage of another legal practitioner's slip or mistake without fair warning (including those that are purely formal or technical in nature, do not go to the merits of the case, or do not involve a sacrifice of the client's rights);
- deny reasonable requests from other legal practitioners that will not prejudice the client's rights, such as those concerning trial dates, adjournments, or the exclusion of strictly formal procedures when not necessary;
- engage in unfounded criticism about the competence, conduct, advice, or charges of other legal practitioners unless the lawyer has given the matter careful and wise consideration and has clear evidence or information to support the lawyer's judgment; and
- use a recording device to record a conversation with a client or another legal practitioner without that person's prior knowledge, even if to do so is lawful.

3.2 Communications — rr. 6.03(5)–(6)

The obligation to behave with courtesy and civility when dealing with others also applies to any communications from the lawyer. In the course of professional practice, a lawyer shall not

- communicate via correspondence or otherwise with a client, another legal practitioner, or any other person in a manner that is abusive, offensive, or otherwise unprofessional;
- cause undue delay in responding to communications from or in fulfilling professional commitments to other legal practitioners.

3.3 Communications with represented person or organization, second opinions — rr. 6.03(7)–(9.2) and commentary

The *Rules* impose specific obligations on a lawyer who wishes to communicate with a represented person or organization. The lawyer must respect the relationship between the opposing party and his or her legal practitioner. Unless the legal practitioner representing a

person in a matter consents, subject to r. 6.03(8) regarding second opinions, a lawyer shall not

- approach, communicate, or deal with the person on the matter; or
- attempt to negotiate or compromise the matter directly with the person.

The prohibition concerns communications with any person who is represented by a legal practitioner, whether or not the person is a party to the matter to which the communication relates, and applies where the lawyer knows or has substantial reason to believe that the person is represented in the matter to be discussed. A lawyer may communicate with a represented person about matters outside the representation, and this subrule does not prevent parties to a matter from communicating directly with each other.

A lawyer may provide a second legal opinion to a person represented by a legal practitioner in a matter. However, the obligation to render competent service requires that the opinion be based on sufficient information, which may include facts that can only be obtained through consultation with the first legal practitioner involved. The lawyer should advise the client if this is necessary and, unless the client instructs otherwise, should consult the first legal practitioner.

Lawyers face a similar restriction regarding communication with a represented corporation or other organization, such as partnerships or limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies, and sole proprietorships. The restriction applies whether the legal practitioner is employed by the organization in-house or has been retained separately to act in the particular matter.

Unless the legal practitioner representing an organization in a matter consents or a lawyer is otherwise authorized or required by law, a lawyer shall not communicate, facilitate communication, or deal with any person

- who is a director or officer or is authorized to act on behalf of the corporation or organization;
- who is likely involved in decision-making for the corporation or organization or provides advice in relation to the particular matter;
- whose act or omission may be binding or imputed to the corporation or organization for the purposes of its liability; or
- who supervises, directs, or regularly consults with the legal practitioner and makes decisions based on the legal practitioner's advice.

Where a person described above is individually represented in the matter by a legal practitioner, that legal practitioner's consent to the communication is sufficient if the communication is about the individual's personal interests. However, where the legal representation is only with respect to the personal interests of the individual and the intended communication concerns the interests of the corporation or organization, consent of the corporation's or organization's legal practitioner would be required. A lawyer may communicate directly with such individuals about matters that are outside the representation and may communicate with any person not actively involved in the matter. The commentary clarifies the rule and provides examples as they relate to the context of unions, governments, and municipalities.

Where a lawyer representing a corporation or other organization has also been retained to represent its employees, the lawyer must comply with the *Rules* as they apply to avoiding conflicts of interest (r. 2.04) and joint retainers. However, unless the lawyer complies with the requirements of r. 2.04, a lawyer must not imply that the lawyer acts for an employee of a client and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

3.4 Undertakings – r. 6.03(10) and commentary

Unless clearly qualified, a lawyer's undertaking is his or her personal promise and responsibility. Lawyers must fulfill every undertaking given in a timely manner and shall not give an undertaking that cannot be fulfilled. This also applies to any professional or practice-related promises the lawyer may give. The person who accepts a lawyer's undertaking or promise is entitled to expect that lawyer to personally carry it out. Using the phrase "on behalf of my client" even in the undertaking itself may not release a lawyer from the obligation to honour it. If a lawyer does not intend to take personal responsibility, this should be clearly stated in the undertaking or promise provided.

All undertakings and other practice-related promises should be written or confirmed in writing as soon as possible and should be unambiguous in their terms, including a time period for fulfillment. It may be appropriate to provide for contingencies (e.g., if the obligations in the undertaking rely on certain events occurring, indicate what will happen if these events do not occur), and before accepting an undertaking or promise, the lawyer should confirm that the individual providing it is a lawyer or paralegal.

Lawyers who act in real estate transactions using the system for the electronic registration of title documents (e-regTM) are required to sign (with client consent) and be bound by a Document Registration Agreement (DRA). The DRA will contain undertakings that, accordingly, become the lawyer's professional responsibility to fulfill upon the lawyer's signature of the DRA.

It should be noted that a court or a tribunal may enforce a lawyer's undertaking or other professional promise. The lawyer may be brought before a court or tribunal to explain why the undertaking was breached and ordered to take steps to satisfy the undertaking or pay damages caused by the breach. The Law Society may also discipline a lawyer for breach of an undertaking or other practice-related promise, which may result in a finding of professional misconduct.

3.5 Financial obligations – r. 6.01(2) and commentary

Unless it was otherwise documented in writing beforehand, lawyers must promptly meet all financial obligations incurred on behalf of clients during the course of practice. This is a professional duty that is separate from any legal liability and includes the responsibility to make payments to third parties that the lawyer assumed or undertook on the client's behalf.

4. Duty to uphold the integrity of the profession – r. 6.01(1)

As explained previously in these materials, lawyers have a duty to practise law and fulfill their professional responsibilities to others with honour and integrity. Upholding the integrity of the profession is especially important when a lawyer becomes involved in activities whereby there may be further scrutiny of the lawyer's conduct, professional or otherwise. The duty to uphold the integrity of the profession applies when the lawyer engages in activities related to

- outside interests;
- public office;
- public appearances and statements; and
- multi-discipline practices.

4.1 Outside interests – r. 6.04 and commentary

A lawyer must not allow activities that are unrelated to the practice of law interfere with his or her obligations under the *Rules*. A lawyer engaged or involved in outside interests while concurrently practising law must not allow that outside interest to

- jeopardize the lawyer's professional integrity, independence, or competence; and

- impair the exercise of the lawyer's independent judgment on behalf of a client.

The term *outside interest* covers the widest possible range of activities and includes those that may overlap with the practice of law, such as engaging in the mortgage business or writing on legal subjects, as well as activities that have no connection to a lawyer's practice. Where the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence.

4.2 Public office — r. 6.05

Whether or not the office was attained because of professional qualifications, a lawyer who is elected or appointed to a legislative or administrative office at any level of government has a duty to uphold the integrity of the profession because he or she is in the public eye. Generally, a lawyer in public office must properly discharge all official duties while adhering to the same standards of conduct as the *Rules* require of lawyers practising law. Specifically, the *Rules* outline the lawyer's responsibilities while in and after leaving public office, which include the obligation to

- maintain confidential information acquired by virtue of the office;
- exercise the lawyer's independent judgment, free of any influence;
- avoid conflicts of interest that relate to official duties or to issues that arose while in office;
- declare any conflicts and abstain from consideration, discussion, or vote on related issues;
- decline private legal business where the duty to the client will or may conflict with official duties;
- withdraw from private representation where a conflict develops that interferes with official duties; and
- refrain from appearing professionally before a public body of which the lawyer or the lawyer's partners or associates are a member.

Though the Law Society may not be concerned with the way in which a lawyer holding public office carries out official responsibilities, conduct in office that reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action.

4.3 Public appearances and statements — r. 6.06

Lawyers may communicate with the media and may make public appearances or statements as long as there is no violation of the lawyer's duty to

- maintain confidential client information;
- uphold the integrity of the profession;
- promote courtesy and respect for the courts; and
- support and improve the administration of justice.

However, a lawyer is prohibited from making any public statements about a matter that is before a tribunal if the lawyer knows or should know that making such statements are likely to prejudice any party's right to a fair hearing. This includes opposing or related parties, in addition to the lawyer's client. When making statements to the public or the media, lawyers should avoid petty or unsupported criticism of fellow lawyers, paralegals, other legal practitioners, the tribunal, or the justice system.

Before making a statement to the public or the media, the lawyer must be satisfied that doing so is in the client's best interests and is within the scope of the lawyer's retainer with the client. A lawyer should not use public communications about a client's affairs for self-promotion, and the lawyer should be aware that he or she will normally have no control over any editing or the context in which any statement to the media is ultimately used.

4.4 Multi-discipline practices — r. 6.10

Where a lawyer has chosen to associate or partner with one or more non-legal professionals to serve clients through a multi-discipline practice (MDP), that lawyer must ensure that non- licensee partners and associates comply with the *Rules* and all ethical principles that govern a lawyer in the discharge of the lawyer's professional obligations. This includes the duty to uphold the integrity of the profession and, as previously discussed in these materials, the obligation to avoid conflicts of interest.

5. Duty to the administration of justice

Admission to and continuance in the practice of law implies on the part of the lawyer a basic commitment to the concept of equal justice for all within an open, ordered, and impartial system. Because of this, the lawyer's responsibilities to the justice system, its processes, and its participants, are greater than those of a private citizen. As detailed both in RR. 4 and 6 of the *Rules*, the lawyer's general duty to the administration of justice includes the obligations to

- encourage respect for the administration of justice;
- disclose the interest being advanced when seeking legislative or administrative change;
- maintain the security of court facilities;
- remain neutral and supportive to all parties involved when acting as a mediator; and

- preserve impartiality of the justice system when returning to the practice of law from the bench.

5.1 Encouraging respect for the administration of justice — r. 4.06(1) and commentary

Lawyers must encourage public respect for the justice system and take steps to try to improve it. Lawyers must avoid making careless remarks or complaints about the system since they may weaken or destroy public confidence in legal institutions or authorities. Lawyers should take care when commenting on judges or members of a tribunal since they are often restricted by law or by custom from defending themselves. Lawyers should be available to advise and represent a client in a complaint involving another lawyer or paralegal but should avoid making critical remarks about the competence, conduct, advice, or charges of other paralegals or lawyers without first learning all the facts.

5.2 Seeking legislative or administrative change — r. 4.06(2) and commentary

Because of training, opportunity, and experience, lawyers are in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions, and public authorities. Lawyers should lead the search for improvements in the legal system, but any criticisms and proposals should be *bona fide* and reasoned. A lawyer seeking legislative or administrative changes shall disclose the interest being advanced, whether the lawyer's interest, the client's interest, or the public interest.

5.3 Security of court facilities — r. 4.06(3) and commentary

The justice system cannot function effectively if its participants cannot safely attend court facilities. If a lawyer reasonably believes that a dangerous situation is likely to arise at a court facility, the lawyer must take action by informing the police of the details. Where appropriate, the lawyer should consider requesting added security at the facility and notifying other lawyers or paralegals that may be affected. As outlined previously in these materials, lawyers are not permitted to disclose confidential client information unless they are permitted or justified to do so in accordance with r. 2.03 of the *Rules*.

5.4 Acting as mediator — r. 4.07 and commentary

A lawyer who acts as a mediator must remain neutral to ensure that the mediation process is unbiased and serves the administration of justice. When acting as mediator, the lawyer is not acting for any party in the mediation, and the relationship between the parties and the lawyer is not a lawyer-client relationship. The lawyer must ensure that parties understand the role of the mediator is to facilitate agreement between the parties and that communications are not covered by confidentiality or lawyer-client privilege (though some other common-law privilege may apply).

Generally, a lawyer-mediator should suggest and encourage the parties to seek the advice of separate counsel before and during the mediation process if they have not already done so. Neither the lawyer nor the lawyer's partners or associates should provide legal advice to the parties, and where the lawyer prepares a draft contract for review by the parties, the lawyer should advise and encourage the parties to seek separate independent legal representation concerning the draft contract.

5.5 Retired judges returning to practice — r. 6.08

To preserve the impartiality of the justice system and its image as such, the *Rules* provide specific guidance for former judges and appellate judges who wish to return to the practice of law. Unless the former judge or appellate judge has obtained the express approval of a committee of Convocation appointed for that purpose,

- a former appellate judge is prohibited from appearing as counsel or advocate in any court, in chambers, or before any administrative board or tribunal; and
- a former judge is prohibited from appearing as counsel or advocate before the court on which the former judge served, any lower court, or any administrative board or tribunal over which the court on which the former judge served exercised an appellate or judicial review jurisdiction for two years after leaving the bench

In both cases, such approval may only be granted under exceptional circumstances and may be restricted.

Rule 4 of the *Rules of Professional Conduct (Rules)* outlines the lawyer's professional responsibilities when acting on behalf of the client as the client's advocate. As advocates, lawyers may be required to appear in court, before boards, and in front of administrative tribunals, arbitrators, or mediators. The obligations set out in the *Rules* apply regardless of how informal the proceeding may be. When acting as advocate, lawyers must balance their duties to the client with their duties to the tribunal and to the administration of justice.

1. Lawyer as advocate — rr. 4.01(1), (5)–(7), and commentaries

When acting as an advocate, the lawyer must represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect. A lawyer has the duty to

- raise every issue, advance every argument, and ask every question that the lawyer thinks will help the client's case, however distasteful;
- endeavour to obtain for the client the benefit of every remedy and defence authorized by law;
- never waive or abandon a client's legal rights without the client's informed consent;
- avoid and discourage the client from resorting to frivolous or vexatious objections;
- avoid and discourage the client from attempts to gain advantage from mistakes or oversights made by the opposing side that do not go to the merits of the case; and
- avoid and discourage the client from using a strategy designed only to delay or harass the opposing side.

As advocate, the lawyer will provide advice and opinions to the client and may make submissions to a tribunal regarding the client's matter. A lawyer may express his or her professional opinions but should avoid expressing personal views on the merits of their client's case. The lawyer must ensure that the client matter remains the client's matter and does not become the lawyer's personal cause.

The *Rules* also specify the lawyer's obligations to disclose errors or omissions, to act with courtesy, and to fulfill all undertakings since they relate to his or her role as advocate.

1.1 Duty as defence counsel — commentary, r. 4.01(1)

The lawyer's duty when defending an accused person is to shelter the client from being convicted of an offence except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for that offence. Generally, defence counsel may put forward any defence not known to be false or fraudulent. If the client has admitted to the lawyer the elements necessary to constitute the offence, those admissions limit the lawyer because the lawyer may only put forward a defence that is consistent with the client's admissions. Lawyers who advocate for the accused should discuss this limitation with every client.

1.2 Duty as prosecutor — r. 4.01(3) and commentary

When engaged as a prosecutor, the lawyer is effectively an advocate for the public and the administration of justice. The prosecutor's prime duty is to not to seek a conviction but to see that justice is done through a fair trial on the merits. Because a prosecutor exercises a public function with substantial discretion and power, a prosecutor must act and treat the accused fairly and dispassionately.

2. Lawyer and the tribunal process

Despite a lawyer's duty to the client, a lawyer is limited as to what the lawyer may do to advocate the client's cause before a tribunal. Generally, the lawyer shall not

- abuse the tribunal process;
- mislead the tribunal;
- influence the tribunal;
- engage in dishonest conduct; and
- mistreat or influence witnesses.

The lawyer is also obligated to prevent anyone else from trying to do any of the above, including the lawyer's own client. The lawyer should remember that inappropriate behaviour before a tribunal or judge may result in discipline by the Law Society of Upper Canada, even in cases where the tribunal member or judge says nothing to the lawyer about the conduct.

2.1 Shall not abuse the tribunal process — rr. 2.02(2), (4), 4.01(2)(a), and (l)

Though a proceeding itself may be legal, a lawyer is not permitted to begin or continue a "useless proceeding" or

a proceeding motivated only by malice to injure another. A lawyer should not assist a client to bring a claim that the lawyer believes has no merit since such claims waste the time of the tribunal and its officers and do not further the cause of justice.

A lawyer is also not permitted to threaten to lay criminal charges against someone or offer to have criminal charges withdrawn in an attempt to gain an advantage for a complainant. As explained earlier in these materials, a lawyer is similarly prohibited from threatening criminal or quasi-criminal prosecution in order to secure a civil advantage for the client. Both would be considered an abuse of the tribunal process.

2.2 Shall not mislead the tribunal – rr. 4.01(2)(e)–(f) and (h)

For the tribunal to effectively review and decide upon a matter, the tribunal must have access to all that is relevant to the issues before them for a decision. A lawyer must not

- mislead the tribunal by providing misinformation about an issue, fact, or law;
- allow the tribunal to be misled by others; or
- allow the tribunal to mislead itself by not taking steps to correct any misunderstanding it may have about any aspect of the matter.

The lawyer must not offer false evidence or affidavits that contain statements that are untrue, misleading, or incomplete. The lawyer must not misstate the facts or the law and must disclose all that is required by law and according to the applicable rules of procedure. Though it is not the advocate's responsibility to assist the opposing side when before a tribunal, the lawyer must not deliberately avoid informing the tribunal of any binding authority that may be directly relevant to the matter.

2.3 Shall not influence the tribunal – rr. 4.01(2)(c)–(d)

For the justice system to function effectively, members of tribunals and courts must be fair and objective. To ensure independence and impartiality, there should be no personal connection between a tribunal member or judge and any of the parties in the proceeding or their legal representatives.

A lawyer is prohibited from appearing before a tribunal member or judge if that tribunal member or judge has or may seem to have an outside relationship with the lawyer, the lawyer's firm, or the client. This outside relationship may be a personal or business one. The lawyer must declare any outside relationship that exists and advise the tribunal member or judge that the lawyer is precluded by the *Rules* from appearing before him or

her. If the tribunal member or judge does not recuse himself or herself from presiding over the matter or allow an adjournment to permit a new legal representative to act for the client, the lawyer would be in breach of the *Rules* and may be forced to withdraw.

Lawyers must also ensure that no one else directly or indirectly influences the tribunal's decisions. The only appropriate way to influence the tribunal's decision is through open persuasion as an advocate.

2.4 Shall not engage in dishonest conduct – rr. 4.01(2)(b), (e), and (g)

A lawyer must treat the tribunal and its officers with honesty and candour. A lawyer is prohibited from misstating the contents of a document, a client's testimony, an argument, or a statutory provision. A lawyer must not assist anyone to engage in fraud, dishonesty, or illegal conduct and must withdraw from representing a client who insists that the lawyer engage in or continue in this type of conduct.

Where the client in a criminal matter has admitted to the lawyer the elements of the offence with which the client is charged, the lawyer must not present a defence that contradicts the facts since it would mislead the court. For example, during the examination of a witness or in making submissions or arguments, a lawyer cannot suggest that someone else committed the offence. In this circumstance, the lawyer may only argue that the evidence given by each witness, as a whole, is not enough to prove that the client is guilty.

2.5 Shall not mistreat or influence witnesses – rr. 4.01(2)(i)–(k), (m), and 4.03

When acting as an advocate, a lawyer may contact all possible witnesses for both sides, but the lawyer must be fair and honest when dealing with them. The lawyer must disclose his or her interest and must ensure that no evidence is suppressed and no witness is dissuaded from testifying. A lawyer is prohibited from deliberately allowing a witness or a party to be presented to a tribunal in a false or misleading way, which would include allowing a witness to impersonate another individual. Lawyers must not abuse, harass, or inconvenience witnesses before or at the hearing.

3. Lawyer dealing with witnesses

Witness testimony is an important part of the tribunal process. Witnesses do not "belong" to either party in a proceeding since the evidence that a witness provides to the tribunal may support either side of a case. Though the lawyer is free to speak with any potential witness after disclosing the lawyer's interest, a witness does not

have to speak to the lawyer. The lawyer's duties when dealing with witnesses, outlined below, apply to all witnesses.

3.1 Interviewing witnesses — r. 4.03

As advocate, the lawyer should interview and prepare all possible witnesses. When speaking to a witness who may support the client's cause, the lawyer must ensure that he or she is only preparing a witness and not influencing the witness. A lawyer may help prepare a witness by discussing with the witness

- suitable dress for the hearing or court appearance;
- the need to be respectful and courteous in behaviour and tone;
- appropriate ways to address the judge or tribunal officer, lawyers, paralegals, and other parties;
- the need to listen to each question posed and to answer truthfully; and
- how to give evidence in a clear and straightforward manner.

As previously discussed, a lawyer is prohibited from mistreating or influencing a witness regarding the witness's testimony or participation in a proceeding. The lawyer also has special obligations with respect to interviewing a witness who is represented by his or her own legal practitioner.

3.2 Interviewing represented persons — rr. 4.03, 6.03(7)–(9.2), and commentary

As outlined in the previous chapter, lawyers are not permitted to deal with or approach any represented person except through or with the consent of that person's legal practitioner. This prohibition applies to any person related to the matter with whom the lawyer wishes to discuss and includes non-parties, such as a potential witness. The rule applies where the lawyer knows or should know that the person is represented by a lawyer, a paralegal, or a lawyer from a Canadian jurisdiction outside of Ontario, and a similar rule applies to represented organizations and their employees, agents, and other relevant persons.

3.3 Communication with witnesses giving evidence — r. 4.04

To ensure that a lawyer does not influence a witness who is giving testimony, the lawyer's ability to speak with a witness during a proceeding is limited. The lawyer must comply with the *Rules* unless the judge or tribunal allows or instructs the lawyer to do otherwise. To comply, lawyers must consider both

- the stage of a witness's testimony; and

- whether the evidence the witness is providing is sympathetic to one party in the proceeding.

3.3.1 Stage of witness's testimony

To decide whether the lawyer may communicate with a witness, the lawyer must determine the stage of the witness's testimony. Different considerations apply whether the lawyer intends to speak to the witness

- during the *examination-in-chief*, where the lawyer examines his or her own witness on behalf of the client;
- after the completed *examination-in-chief* by the lawyer but before *cross-examination* by the opposing legal practitioner;
- during *cross-examination*, where the opposing legal practitioner cross-examines the lawyer's witness;
- after the completed *cross-examination* by the opposing legal practitioner but before *re-examination* by the lawyer; or
- during *re-examination*, where the lawyer re-examines his or her own witness after that witness has been cross-examined by the opposing legal practitioner.

3.3.2 Sympathetic and unsympathetic witnesses

Either party may call witnesses to provide evidence that supports one side in the proceeding or to provide facts that are not in dispute. *Sympathetic* witnesses are witnesses whose testimony supports the cause of the lawyer's client. Witnesses are *unsympathetic* if their testimony supports the opposing party's case.

Usually, a lawyer will prefer to only call witnesses sympathetic to the client's cause and to decline to call unsympathetic witnesses. Because a witness may refuse to speak with the opposing side, it may be difficult to know what the witness's testimony will be. Consequently, it is possible that a lawyer may call a witness whose testimony does not support the lawyer's client or that a witness may be called by the opposing side that supports the lawyer's client. Lawyers may be faced with examining their own unsympathetic witnesses, or they may have to cross-examine sympathetic witnesses called by the opposing side. To determine whether the lawyer can communicate with a witness, in addition to the stage of the witness's testimony, the lawyer must consider whether the witness is sympathetic or unsympathetic to the client's case.

Generally, if the lawyer is dealing with a sympathetic witness,

- during the examination-in-chief, the lawyer may only discuss with his or her witness anything that

- has not yet been mentioned in the witness's testimony (r. 4.04(a));
- after completion of the lawyer's examination-in-chief and before the opposing side's cross-examination of the lawyer's witness, the lawyer should not discuss with the witness any evidence mentioned during the examination-in-chief (r. 4.04(c));
 - during the opposing side's cross-examination of the lawyer's witness, the lawyer cannot discuss with his or her witness any evidence or issues in the proceeding (r. 4.04(d));
 - during the lawyer's cross-examination of the opposing side's witness (sympathetic to the lawyer's case), the lawyer may only discuss with the witness anything that has not yet been mentioned in the witness's testimony (r. 4.04(g));
 - after completion of the opposing side's cross-examination but before the lawyer's re-examination of the lawyer's witness, the lawyer cannot discuss with the witness any evidence that will be dealt with during re-examination (r. 4.04(e)); and
 - during the opposing side's re-examination of its own witness (sympathetic to the lawyer's case), the lawyer cannot discuss with that witness any evidence to be given during re-examination (r. 4.04(h)).

When the lawyer is dealing with a witness who is not sympathetic to the client's case

- during the opposing side's examination-in-chief of its own witness, the lawyer may discuss the witness's evidence with the witness (r. 4.04(1)(b))
- during the lawyer's cross-examination of the opposing side's witness, the lawyer may discuss the witness's evidence with the witness (r. 4.04(f)); and
- during the opposing side's re-examination of its own witness, the lawyer may discuss with that witness any evidence to be given during re-examination (r. 4.04(h)).

If the lawyer is unsure whether he or she may speak with a witness under this rule, the lawyer should obtain the consent of the opposing legal practitioner or leave of the tribunal to speak with the witness before actually doing so. This rule also applies to examinations out of court (e.g., cross-examinations on an affidavit), with some necessary modifications.

Though the *Rules* allow the lawyer to discuss limited topics with a witness who is giving testimony during the various stages of the proceeding before the tribunal, a lawyer may choose to avoid communicating with such witnesses altogether. Though not required, it may help the lawyer to avoid confusion or impropriety when communicating with witnesses who are giving testimony. The lawyer should consider implementing this policy when in doubt or as a best practice. The following chart summarizes the lawyer's obligations.

The following chart summarizes the lawyer’s obligations.

	Witness Sympathetic to A	Witness Unsympathetic to A
During examination-in-chief	Witness called by Lawyer A: Lawyer A may discuss anything not yet covered in the examination (r. 4.04(a))	Witness called by Lawyer A: Lawyer A may discuss anything not yet covered in the examination (r. 4.04(a))
	*Witness called by Lawyer B: Nothing in the <i>Rules</i> prohibits or limits Lawyer A’s discussion with the witness	Witness called by Lawyer B: Lawyer A may discuss any of the witness’s evidence (r. 4.04(b))
After examination-in-chief but before cross-examination	Witness called by Lawyer A: Lawyer A should not discuss any evidence mentioned by the witness during the examination-in-chief (r. 4.04(c))	Witness called by Lawyer A: Lawyer A should not discuss any evidence mentioned by the witness during the examination-in-chief (r. 4.04(c))
	*Witness called by Lawyer B: Nothing in the <i>Rules</i> prohibits or limits Lawyer A’s discussion with the witness	*Witness called by Lawyer B: Nothing in the <i>Rules</i> prohibits or limits Lawyer A’s discussion with the witness
During cross-examination	Witness called by Lawyer A: Lawyer A should not discuss any of the witness’s evidence or any issue in the proceeding (r. 4.04(d))	Witness called by Lawyer A: Lawyer A should not discuss any of the witness’s evidence or any issue in the proceeding (r. 4.04(d))
	Witness called by Lawyer B: Lawyer A may discuss anything not yet covered by the cross-examination (r. 4.04(g))	Witness called by Lawyer B: Lawyer A may discuss any of the witness’s evidence (r. 4.04(f))
After cross-examination but before re-examination	Witness called by Lawyer A: Lawyer A should not discuss any of the witness’s evidence to be dealt with during re-examination (r. 4.04(e))	Witness called by Lawyer A: Lawyer A should not discuss any of the witness’s evidence to be dealt with during re-examination (r. 4.04(e))
	*Witness called by Lawyer B: Nothing in the <i>Rules</i> prohibits or limits Lawyer A’s discussion with the witness	*Witness called by Lawyer B: Nothing in the <i>Rules</i> prohibits or limits Lawyer A’s discussion with the witness
During re-examination	*Witness called by Lawyer A: Nothing in the <i>Rules</i> prohibits or limits Lawyer A’s discussion with the witness, but Lawyer A may be guided by r. 4.04(a) (Lawyer A may discuss anything not yet covered in the examination)	*Witness called by Lawyer A: Nothing in the <i>Rules</i> prohibits or limits Lawyer A’s discussion with the witness, but Lawyer A may be guided by r. 4.04(a) (Lawyer A may discuss anything not yet covered in the examination)
	Witness called by Lawyer B: Lawyer A should not discuss any of the witness’s evidence to be dealt with during re-examination (r. 4.04(h))	Witness called by Lawyer B: Lawyer A may discuss any of the witness’s evidence (r. 4.04(h))

4. Relations with jurors

The role of the jury is an important one in the administration of justice. To ensure that any jury trial proceeds free of actual or suggested influence and that justice is served, jurors and prospective jurors are forbidden to discuss with anyone the case on which they are or may be sitting upon. As officers of the court, lawyers must not allow or tempt a juror to violate this obligation and must inform the court and the opposing side if they discover improper conduct by a member of the jury.

4.1 Communications with jurors – rr. 4.05(1), (4)–(5), and commentaries

A lawyer connected to a case for which a jury will or has been called is prohibited from communicating with or causing another to communicate with anyone the lawyer knows to be a potential or actual jury member, both before and during trial. Though a lawyer may investigate a prospective or actual juror to ascertain any basis for challenge or removal, there must be no direct contact between the lawyer and the juror or any of the juror's family members. A lawyer who is not connected to a case before the court is also prohibited from communicating with any juror about the case the lawyer is involved in.

4.2 Disclosure of information – r. 4.05(2)–(3)

Unless the judge and opposing counsel have been previously informed, a lawyer shall disclose to them that he or she is aware that a juror or prospective juror

- has or may have a direct or indirect interest in the outcome of the case;
- is acquainted with or connected in any way to the presiding judge, any counsel, or any litigant; or
- is acquainted with or connected in any way to any person who has appeared or is expected to appear as a witness in the matter.

A lawyer is also obligated to promptly notify the court of any information the lawyer has about improper conduct by a juror or a member of a jury panel toward another member of the jury panel, another juror, or a juror's family member.

5. Lawyer as witness – r. 4.02

As advocate, the lawyer's role is to further the client's cause within the limits of the law. The role of the witness is to give evidence of facts that may or may not assist in furthering the case of any of the parties to a proceeding. Because these roles are different, a person may not be able to carry out the functions of both advocate and witness at the same time. Therefore, the *Rules* do not

permit a lawyer to represent a client in a matter and appear as witness in that same matter.

Subject to any legal requirements or the direction or order of the tribunal, a lawyer who appears as advocate

- shall not submit the lawyer's own affidavit to the tribunal;
- shall not testify before the tribunal unless permitted to do so by the procedural rules of the court or tribunal, or unless the matter is purely formal or is unchallenged (e.g., the matter must not deal with the legal rights or obligations of the parties or the parties must have agreed on all issues of the matter); or
- should not appear as an unsworn witness by expressing personal opinions or stating as fact anything that is subject to legal proof, cross-examination, or challenge.

If the lawyer becomes a necessary witness and must testify in the matter, the lawyer should cease to be advocate and withdraw from representing the client, entrusting the conduct of the case to another lawyer. A lawyer appearing as a witness should be prepared to be cross-examined and have testimony challenged as might occur with any other witness. A lawyer who has appeared as witness in a proceeding is further prohibited from acting as advocate in the appeal of any decision from that proceeding.

6. Discovery obligations – r. 4.01(4)

Where the rules of the tribunal require parties to produce documents or to provide information through an examination for discovery, a lawyer acting as advocate must

- explain to the client the need to make full disclosure (i.e., produce all documents and answer any proper question to the best of his or her ability);
- assist the client to fulfill his or her obligation to make full disclosure; and
- refrain from making frivolous demands for the production of documents or information.

Lawyers must not use the process of disclosure to wear down the opposing side. A lawyer must take care when dealing with a client who instructs the lawyer to take steps to make the process longer and more complicated than necessary to injure the other side since such instructions conflict with the lawyer's duty as an advocate. If the client insists that the lawyer follow those instructions after the lawyer has explained the purpose of the disclosure process to the client, the lawyer must take steps to withdraw in compliance with r. 2.09 of the *Rules*.

7. Agreement on guilty plea — r. 4.01(8)–(9)

As an advocate for a person accused in a criminal matter, a lawyer may discuss with the prosecutor how to resolve the case, unless the client has instructed the lawyer not to do so. Before entering into any agreement with the prosecutor regarding the plea, the lawyer must first

- advise the client about the prospects of acquittal or finding of guilt (i.e., explain the client's chances of being found guilty if the case were to go to trial); and
- explain how a guilty plea may affect the client's life (e.g., what effect the conviction following the guilty plea will have on the client's employment prospects or ability to travel outside the country).

The lawyer must inform the client that the court is not bound by any agreement on a guilty plea. The judge may ignore the agreement, refuse to accept the client's guilty plea, and order that the client proceed to trial. The judge may also impose a sentence on the client that is different than the terms of the plea agreement.

If the client wishes to enter into an agreement regarding a guilty plea, after the lawyer has properly informed the

client as required by the *Rules*, the lawyer must ensure that the client voluntarily

- admits the factual and mental elements of the offence charged (i.e., admits that all the facts that make up the offence exist, are true, or happened and admits that he or she intended to and did commit the crime); and
- instructs the lawyer to enter into an agreement as to a guilty plea.

The lawyer should obtain the client's admission and instructions regarding the guilty plea agreement in writing before entering into a guilty plea.

The lawyer cannot assist the client with a guilty plea regarding a charge if the client denies involvement but hopes to obtain a lesser sentence by entering into a guilty plea. This rule applies even where the client believes that he or she will be convicted. In a case like this, the best the lawyer can do is to review the Crown's case with the client, explore why the client feels that conviction is inevitable, and tell the client that the lawyer cannot assist them in entering into an agreement as to a guilty plea.

Practice management

Operating a successful law practice requires more than the skill and ability to provide advice, opinions, and services regarding the law. Running an effective practice means managing all of the responsibilities associated with that practice to properly serve the client. In addition to managing the client relationship, which is discussed elsewhere in these materials, the lawyer must address how he or she will

- make legal services available to the public;
- manage the files, time, and technology of the practice;
- manage financial responsibilities;
- manage supervisory responsibilities; and
- manage the administrative and business aspects of the practice.

Though the primary benefit is to ensure that the client is adequately served, proper practice management also allows a lawyer to manage or reduce the risks of claims. Because r. 2.01(1)(i) of the *Rules of Professional Conduct (Rules)* require a lawyer to manage his or her practice effectively, proper practice management is also a professional responsibility.

1. Permitted business structures and practice arrangements – By-Law 7

Because some of the practice management obligations contained in the *Rules* relate to the firm structure or arrangement, lawyers should be aware of the business structures or practice arrangements available to lawyers under the *Law Society Act* and its by-laws. In addition to an interprovincial law firm that carries on the practice of law in more than one province or territory of Canada, lawyers are permitted to practise law through a

- sole practice or sole proprietorship;
- general partnership under the *Partnerships Act*;
- limited liability partnership (LLP) under the *Partnerships Act*; and
- professional corporation under the *Business Corporations Act*.

The Law Society of Upper Canada also recognizes two practice arrangements that involve professionals who are neither lawyers nor paralegals: multi-discipline practices (MDPs) or multi-discipline partnerships, and affiliations. The specific Law Society requirements for these business entities are contained in By-Law 7.

2. Making legal services available – r. 3.01

Lawyers who offer legal services must do so in a way that is efficient and convenient for the public. Lawyers may offer their services by any method; however, the means shall not

- be false or misleading;
- amount to coercion, duress, or harassment;
- take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover;
- be intended to influence a person who has retained another lawyer or paralegal for a particular matter to change the legal representative for that matter unless the change is initiated by the client or the existing legal representative; or
- otherwise bring the profession or the administration of justice into disrepute.

Lawyers must ensure that they do not misrepresent the nature of their practice to prospective clients and the public at large. In presenting and promoting a law practice, the lawyer must comply with the *Rules* relating to the marketing of legal services (in any medium) and the advertising of fees for those services. The *Rules* are in place to ensure that lawyers do not mislead clients or the public, while still permitting lawyers to differentiate themselves and their services from those of other lawyers and law firms.

2.1 Marketing legal services – rr. 3.02(1)–(2) and commentary

For purposes of the *Rules*, marketing includes

- firm names (including trade names);
- letterhead;
- business cards;
- logos; and
- advertisements and other similar communications in various media.

Lawyers may market their services in any medium; however, the marketing must be

- demonstrably true, accurate, and verifiable;
- not misleading, confusing, or deceptive and not likely to mislead, confuse, or deceive; and
- in the best interests of the public and consistent with a high standard of professionalism.

Examples of inappropriate marketing may include those that suggest the lawyer is aggressive, that suggest qualitative superiority over other lawyers, or that use testimonials that contain emotional appeals. Where a lawyer is a member of an interprovincial law firm, the lawyer must ensure that his or her partners, associates, or employees who are not qualified to practise in Ontario are not held out and do not represent themselves as such in any of the firm's marketing or otherwise.

To ensure that a law firm's descriptive or trade name is not misleading, it should not refer to a specific geographical area nor should it imply a connection with any other organization, entity, or public agency. A law firm name should not include phrases such as "John Doe and Associates," "John Doe and Company," or "John Doe and Partners" unless there are actually two or more associates or partners with John Doe at that law firm. A firm that is a professional corporation or a limited liability partnership must also indicate this on any marketing to comply with Ontario's *Business Corporations Act* and the *Partnerships Act*, respectively.

2.2 Advertising of fees — r. 3.02(3)

A lawyer or law firm may advertise in any medium the fees charged for legal services as long as the following conditions are complied with:

- The advertising is reasonably precise as to the services offered for each fee quoted.
- The advertising states whether other amounts will be charged in addition to the fee, such as disbursements and taxes.
- The lawyer adheres to the advertised fee.

2.3 Advertising nature of practice — r. 3.03

A lawyer's marketing materials may include information to assist a potential client to choose a lawyer who has the appropriate skills and knowledge for the client's particular legal matter. A lawyer may advertise areas of practice, including preferred areas of practice or that the lawyer's practice is restricted to a certain area of law. Marketing may also include a description of the lawyer's or firm's proficiency or experience in an area of law. In all cases, the representations must not be misleading.

Where a lawyer has been certified by the Law Society as a specialist in a specified field, the lawyer may include this in advertising and other marketing. Under s. 20(2) of By-Law 15, made under the *Law Society Act*, a lawyer who is not a certified specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist.

3. File management

Effective file management provides the basis for timely and effective client service. Being able to easily store, organize, and retrieve information and documents regarding a client's matter means less time looking for documents and more time serving the client. Files may be electronic or paper-based or both. A proper file management system will assist the lawyer in complying with requirements under the *Rules*, such as preserving client confidentiality and avoiding conflicts. Lawyers should have and use systems to

- record information and store copies of documents required to identify and verify the identity of clients and third parties, as per By-Law 7.1;
- store and retrieve key information regarding all firm clients and opposing parties;
- open and maintain active client files for individual client matters;
- check for conflicts;
- check for limitation periods;
- close, retain, and dispose of closed files;
- review and update systems to ensure they meet changing standards, techniques, or practices;
- identify clients' property and place it in safekeeping; and
- comply with the Law Society's record and bookkeeping requirements.

Lawyers may also wish to use systems to manage their own documents (electronic and hardcopy) in order to ensure that undertakings have been satisfied, and manage their obligations to any third-party service providers.

3.1 Conflict checking — rr. 2.04(1)–(3) and commentaries

The *Rules* require lawyers to avoid acting in a matter where there is a conflict of interest or where a conflict may develop. Lawyers must examine whether a potential conflict exists at the very first contact with the prospective client, at the outset of the retainer, and throughout the retainer. The lawyer should maintain a record of each search that includes the date the search was completed, the names searched, and the name of the person who conducted or reviewed the search.

To determine whether a conflict or potential conflict exists, lawyers should use a system that checks for conflicts

- at the initial point that the prospective client first contacts the firm seeking legal services, usually by phone or email (i.e., before giving any confidential information);

- after the first interview with the client or when additional (i.e., confidential) information about the prospective client's matter is available;
- after being retained by the client, at any time a new party or person is added to the matter; and
- when a lawyer is considered for employment by a firm.

At the initial meeting with the prospective client, a lawyer needs to determine who the client is, persons that may be involved in or associated with the client in the matter, and the opposing parties in the matter. Information regarding current and former clients should be documented in the firm records and conflicts checking system. Conflicts checking systems require the lawyer to record and check *conflict names*. Conflict names are the names of individuals or entities that have some relationship to the client or the matter that may give rise to a conflict of interest. Conflict names include, for example, the names of

- *adverse parties* in the matter;
- persons (or entities) *related or associated to adverse parties* in the matter; and
- persons (or entities) *related or associated to the client* in the matter.

Every variation of conflict names (such as nicknames, maiden names, and company names) should be checked; every possible spelling of conflict names should be checked.

Conflicts checking systems may be manual or computerized. *Manual* conflicts checking systems make use of index cards; one for each client identifying the client and listing all conflict names. Additional cards for each conflict name are cross-referenced to the client. The cards are filed alphabetically in an index card box and are reviewed whenever a prospective client contacts the office. *Computerized* systems can store and manage a large amount of information about individuals and their relationships to each other, and allow for fast and easy inputting and retrieval of this information.

Whether manual or computerized, every conflicts checking system should contain a record of

- all current and previous client names (e.g., former and other names used by the client);
- all adverse parties;
- all persons connected to the matter;
- officers and directors of a corporate client;
- owners of a corporate client;
- parent corporation or subsidiary of a corporate client;
- partners or affiliates of a client;

- co-plaintiffs or co-defendants;
- common-law spouses or relatives of the client, and any other affiliated persons; and
- members of the law firm and any organizations in which they have a major interest.

When a prospective client contacts the firm, the lawyer or a staff member should check the prospective client's name and any other adverse party names against the names in the firm's conflicts checking system. If there is a match, the lawyer must review and determine if there is or is likely to be a conflict of interest. If there is or is likely to be a conflict, the lawyer must determine the appropriate way to manage the conflict. If a lawyer cannot act for a client because of a conflict, the lawyer must advise the client of this and should confirm the non-engagement in writing.

3.2 Opening files, file organization, and storage

Lawyers should follow appropriate file opening procedures to organize file contents and to properly store files. A lawyer should use a system, electronic or otherwise, that allows him or her to

- identify, organize, store, and track information, documents, evidence, and property relating to each file or client matter; and
- confirm in writing the substance of every communication with the client and other individuals associated with a client's matter, by way of dated file notation or memo to file (i.e., every meeting, conversation, or telephone communication, including messages left and received).

A lawyer should open a file when retained to provide services for any new matter for new, current, and former clients. This includes a new matter that is related to an existing client matter. However, if a prospective client reveals confidential information during the initial communication with the firm, the lawyer should open a new file then and should not wait until the lawyer meets with the prospective client at the initial interview. A memorandum to file outlining the confidential information received from the prospective client during the first communication should be made and added to the file.

Maintaining a notation of confidential information received from a client or a prospective client during any communication is important whether dealing with a client or an individual who has not yet retained the lawyer or firm. Apart from ensuring that the lawyer has confirmation of what was said during that initial conversation, the memorandum will assist the lawyer in managing potential conflicts of interest since conflicts

may arise as a result of the lawyer's duty to protect a client's confidential information.

Generally, there is no need to open a new file when an individual contacts the lawyer or firm to make general inquiries and does not disclose any confidential information. At the initial contact, whether or not the lawyer accepts the client's matter, the lawyer should note any limitation period and advise the client if it is imminent. This should be confirmed by way of memo to file and by letter to the client. To ensure the client receives such a letter, the lawyer should provide it to the client at the end of the consultation or send it via registered mail. A copy of this letter should also be included in the file.

A dated notation should be made of every meeting, conversation, or telephone communication, including messages left and received, and stored in the file. It should confirm the substance of the communication; it should record the information provided to the client or third party by the lawyer, as well as the information received by the lawyer from the client or others regarding the client matter. Confirmation may be made by way of a memo to file or, in some cases, by letter to the client or other party. A copy of the confirming letter should be kept in the file.

Lawyers may use a file opening checklist to ensure that all required information is gathered each time they meet with a prospective client for the first time or with an existing client or former client for a new matter. A separate file should be opened for each individual client matter. They should assign a distinct file name and number to each file. The file name should include the client name and the reference or matter number.

To enable the lawyer to retrieve file contents or information quickly, file contents should be organized according to class or type of document, including

- communications (e.g., correspondence, memorandums to file, conversation or meeting notes, and telephone notes);
- substantive memorandums and investigations;
- original documents;
- retainer letter;
- firm accounts and billing information;
- legal research;
- undertakings to be satisfied; and
- other documents or items, as appropriate to the file.

Active client files should be stored separately from closed files. They should be contained in a secure or locked cabinet or location, and filed in an orderly fashion (i.e., by file number or alphabetically, as per the file naming

system) for easy retrieval. All documents relating to a client matter should be kept in the file.

3.3 Closing, retaining, and disposing of file contents

A lawyer should only close a file after all matters related to the file have been completed and all undertakings have been satisfied. When dealing with client files, lawyers should use a file closing procedure that requires the lawyer or firm to

- assign a new closed file code to the file;
- store closed files separately from active files;
- protect closed files from damage or destruction;
- organize closed files for easy retrieval;
- store electronic files in a format that can be retrieved later;
- preserve client confidentiality;
- distribute or dispose of file contents properly prior to closing;
- assign a retention period; and
- destroy closed files only when appropriate.

Prior to closing the file, unnecessary documents should be removed from the file. Documents belonging to the client should be returned to the client. These include the client's original documents, any opposing party documents, any reports, asset or liability statements, and any other documents related to the matter. If not provided to the client during the course of the retainer, the lawyer should also forward any other court or legal documents to the client (e.g., pleadings and affidavits).

The lawyer should have the client sign an acknowledgement indicating receipt of the client's documents, which should be added to the closed file. Lawyers may also consider destroying or disposing of any documents that can be obtained again later from court or another government registry if they do not anticipate that they will need the information for purposes of their own defence.

Lawyers should consider whether each closed client file should be retained indefinitely or if it should be destroyed. If the file is to be destroyed, the lawyer should determine

- the date the file is to be destroyed, considering any legal or regulatory requirements to maintain file contents and any limitation periods relating to the lawyer's potential liability for malpractice or misconduct; and
- the manner of file destruction to preserve confidentiality (e.g., shredding documents may be an appropriate method for destroying file contents, while simply recycling them is not).

It is the lawyer's responsibility to decide whether file contents should be destroyed or retained. If the lawyer chooses to store file contents, the lawyer must also decide for how long. The lawyer should review and consider each file individually before making this decision. Files containing client documents, as opposed to the lawyer's copy of client documents, must not be destroyed. These documents belong to the client and must be returned to the client before the other documents in the file are destroyed.

3.4 Documents to be retained by the lawyer

Documents that belong to the lawyer should be retained by the lawyer in the closed client file. The documents created by the lawyer during the retainer belong to the lawyer if

- they were not prepared for the client's benefit;
- the lawyer was under no duty to prepare them; or
- the client is not considered liable to pay for them.

Such documents include

- copies of all original correspondence copied at the lawyer's own expense;
- copies of all original documents belonging to the client that were copied at the lawyer's expense;
- working notes, summaries of evidence, and submissions to the court;
- pre-trial notes and tape recordings of conversations other than with witnesses;
- inter-office memoranda;
- time entries or dockets;
- accounting records and financial information that relate to the client matter (i.e., client bills, trust statements, and ledgers); and
- notes and other documents prepared for the lawyer's own benefit and protection and at the lawyer's own expense.

These documents belong to the lawyer and would not normally be sent to the client. As well, accounting records related to the client matter belong to the lawyer, not the client. They are part of the office accounting system, must be maintained by the lawyer in accordance with By-Law 9, and should not be kept in the client file for the particular matter.

Lawyers should consider keeping copies of documents that will be returned to the client in case the client sues the lawyer for negligence, makes a complaint to the Law Society alleging misconduct, or disagrees with the lawyer's account. The lawyer may wish to keep copies of

- all correspondence, including non-engagement letters;

- written retainer agreements;
- client's written authorizations and directions;
- documents containing client's instructions or changes to instructions;
- draft agreements or other documents to support changed instructions;
- documents that confirm the client's refusal to follow the lawyer's instructions;
- offers to settle and the client's acceptance or rejection of such offers; and
- documents or records that cannot easily be obtained from another source.

Lawyers who choose to make and keep copies of the above for their own files must do so at their own expense. Lawyers must not charge clients for the cost of these copies.

4. Time management

Timeliness is an important part of client service and, therefore, of managing a law practice. Lawyers who manage their time effectively are more productive and more likely to meet the client's needs and service expectations in a cost-effective manner. The basic features of an effective time management system are time planning, reminders, and time docketing.

4.1 Time planning

Lawyers should organize the time they spend on their practice to ensure they are using their time wisely. To assist in planning the lawyer's time, the lawyer should maintain regular office hours and allocate blocks of time to specific tasks for each day, week, month, and year.

The lawyer should schedule time each day to

- review the tasks that need to be completed that day;
- return phone calls and emails from clients and opposing parties;
- review and respond to correspondence;
- ensure time docket entries are recorded or assigned to client files; and
- address urgent or arising matters.

Depending on the lawyer's practice, the lawyer should allot time each week or each month to

- review the tasks that need to be completed that week or that month;
- meet with clients;
- work uninterrupted on client files (e.g., drafting, research, and document review);
- schedule external attendances (e.g., client meetings, examinations, and court and tribunal appearances);
- meet with firm staff and colleagues;

- attend to the administration or business aspects of the law practice;
- attend to accounting, bookkeeping, and filing requirements; and
- conduct periodic reviews of open client files (usually monthly).

Lawyers should also schedule time monthly and yearly to take part in continuing education and professional development activities to ensure they maintain their competence.

To accomplish more during the time they devote to their practice, lawyers should use strategies to

- *control interruptions* by limiting “open door” policies and by accepting phone calls or meetings at a specific time each day;
- *focus on one task at a time* to avoid distractions;
- *delegate work to supervised support staff* to free the lawyer’s time for tasks and activities that may only be addressed by the lawyer;
- *cultivate time management skills* by overcoming procrastination and limiting or refusing unreasonable requests from others;
- *maintain time records* for individual client matters and also to evaluate where there are inefficiencies in their use of their time;
- *adopt procedures to reduce inefficiency* including proper meeting management through the use of an agenda or telephone conference, tracking completed work to avoid duplication, proper file organization and storage to allow efficient access, prompt filing of documents to prevent loss, and standardizing routine tasks.

4.2 Reminder systems

Lawyers should have systems in place to remind them of what needs to be accomplished and when. An effective system will assist the lawyer to meet important deadlines, such as limitation dates or filing periods and court appearances. Missing a limitation date can damage a client’s case and missing a Law Society filing date could result in a suspension of the lawyer’s licence to practise law. Lawyers should use to-do lists to set priorities, and desk diaries or calendars (either paper or electronic) to plan time and track appointments, appearances, and crucial dates.

A centralized reminder or *tickler system* should be used to

- flag limitation periods or deadlines;
- follow up in order to respond to reminder notices on time; and
- remind lawyers of the upcoming steps to take in ongoing client files.

Reminder systems may be manual or computerized. A manual system uses index cards containing the client name, file, or matter number, the name of the lawyer handling the file, and relevant deadlines. The cards are sorted by month and date and are filed chronologically in an index card box. A computerized reminder system must draw the lawyer’s attention to any deadlines or due dates and keep these dates on the system until the tasks associated with each date have been completed. When using an electronic computerized system, the information should be backed-up daily to ensure information for that day is not damaged or lost. This will also help the lawyer avoid a negligence claim from a missed deadline resulting from a computer problem.

Though the responsibility for noting and following up on key dates may be assigned to a trusted employee, it is ultimately the lawyer’s responsibility to ensure that deadlines and limitation periods are met. Lawyers should conduct a periodic review of all open client files to confirm that work on all files is being completed in a timely and effective manner. Lawyers should also consider conducting a physical inventory of open files at a frequency appropriate to the nature and size of the lawyer’s practice. Review and inventory dates should also be included in the lawyer’s reminder system.

4.3 Time docketing

A *time docket* is a record of the time the lawyer spends on a client matter. A docket entry should record the client name, file or matter number, date, time, time spent, and a description of the work performed. Lawyers should consider maintaining time dockets for all files, either through paper or electronic means, to ensure that fee billings are accurate or to assist in justifying fees if the client later questions the amount charged, whether or not the lawyer charges an hourly rate. For example, time dockets may assist the lawyer in determining whether the block fee being charged for a particular task, service, or matter is appropriate.

Lawyers should also track non-billable hours to monitor their own productivity. Dockets should be detailed, updated as soon as any activity on the client file is completed, and recorded or assigned to client files daily. This will allow the lawyer to bill most clients on a regular basis.

When implementing a manual or computerized time docketing system, lawyers should select one that will allow them to

- explain services to be performed;
- accumulate the total time spent on the file by each lawyer;

- record billable and non-billable time;
- produce interim and final statements of accounts for services rendered to clients; and
- produce time data for monthly, quarterly, and annual reports to assist in management of the firm.

A manual time docketing system involves the use of paper time sheets. The lawyer records the time spent on each file, and firm staff manually inputs the time records into the appropriate client file or firm database. A computerized system allows the lawyer to docket electronically and is fully integrated with the accounting and billing software implemented by the lawyer or law firm.

5. Use of technology

A lawyer should use whatever tools are available to effectively manage the lawyer's law practice. Many aspects of practice management can be efficiently accomplished by the use of manual or computerized systems. The lawyer or law firm must evaluate which systems will best suit the lawyer's or firm's needs. Lawyers may use technology to offer legal services and advertise, to serve the client, and to manage their files and time. Lawyers should ensure that they obtain and make proper use of the software, hardware, and other equipment they may need to effectively manage a practice.

5.1 To make available, market, and provide legal services

Lawyers may use electronic media to offer or advertise services. This includes the Internet, email, online chat rooms, discussion groups, and bulletin boards. When using electronic means to market or make legal services available, the lawyer must still comply with the *Rules*. Lawyers should also recall that

- to prevent confusion, the lawyer should properly identify himself, herself, or the law firm by providing the firm name and address, the jurisdiction where the lawyer is licensed, and the name and email address of one lawyer responsible for electronic communication;
- to ensure convenience, the lawyer should not use methods where the advertisement is directly and indiscriminately sent to a number of newsgroups or email addresses (e.g., spamming);
- to avoid misleading anyone, the lawyer should not post advertisements to newsgroups or bulletin boards where the posting topic does not match what is being advertised in the posting; and
- the lawyer should implement internal controls to restrict the downloading, viewing, or circulating of discriminatory material and provide for the

immediate deletion of unsolicited discriminatory material that is received from third parties.

When providing legal advice or services through electronic media, the lawyer

- should clearly indicate the capacity in which the lawyer is acting, especially if the lawyer is not providing legal advice, opinions, or services;
- must avoid conflicts of interest by ascertaining the identity of the parties with whom the lawyer is dealing;
- must maintain confidentiality by using appropriate means to minimize the risk of disclosure, discovery, or interception of such communications by using and advising clients to use encryption software, and by implementing internal controls to offer reasonable protections; and
- must uphold the law of other jurisdictions (e.g., other provinces, states, or countries) and not engage in the unauthorized practice of law.

5.2 To assist in practice management

To adequately manage the lawyer's practice, the lawyer should consider using technology tools such as

- *legal research tools* such as online facilities (e.g., CanLII or Quicklaw), Internet-based programs, or CD databases;
- *practice area specific software* such as Teraview software for the electronic registration of documents in real estate matters;
- *document management systems* or services such as case management or litigation support software, or templates to create legal forms and documents;
- *analysis support software* such as spreadsheets or calculators;
- *word processing software* to reduce time spent on writing and drafting;
- *communication tools* such as voice mail, email, facsimile transmission, and video or telephone conferencing;
- *database management systems* for housing client information or checking for conflicts of interest;
- *calendar and scheduling systems* to meet current and future deadlines; and
- *time docketing and accounting systems* to accurately bill clients and meet record-keeping requirements.

5.3 Special considerations

A lawyer should have a reasonable understanding of the technologies used in his or her practice or should have access to someone who has such understanding. If the lawyer uses third-party providers to set up, maintain, or repair any problems with technology tools that store or use client information, the lawyer must ensure that client

information remains confidential. Lawyers who use technology in their practice must also take appropriate security measures, make adequate plans for back-up and disaster recovery, and select tools that will last into the future.

Lawyers should implement security measures to prevent

- unauthorized copying of electronic data;
- accessing of electronic files by hackers;
- destruction of electronic information and hardware by computer viruses;
- damaging of electronic information and hardware by power failures and electrical storms; and
- theft of electronic information stored in stolen hardware.

Security measures may include the use of passwords to limit access to electronic data, the installing of firewalls or virus scanning software, and the installing of surge protection hardware or encryption software.

Despite efforts to prevent it, a lawyer may be required to deal with the loss or destruction of electronic information after it has occurred. Lawyers should have back-up and disaster recovery plans in place. Such plans should require the lawyer or law firm to

- perform regular back-up of data;
- store back-up disks or tapes in a secure off-site location;
- perform routine checks to ensure data can be restored; and
- have insurance in place to cover the cost to recover lost electronic information or hardware.

Lawyers must also ensure that the systems they implement will continue to meet their needs in the future. Lawyers should regularly review the software and hardware they have used to ensure that the information it contains can still be accessed and viewed, and that the technology has not become obsolete. This is especially important when retaining records or client information in electronic format only, either housed in a rarely used software program or deposited to an electronic storage device (e.g., CD). Lawyers should ensure that advances in technology do not result in an inability to access the data at a later date.

As a final consideration when using technology, lawyers must ensure that any activities or tasks are still being completed without error or omission. For example, a lawyer who sends a completed document to the opposing side via email must ensure that it is free of errors and does not contain any notes or references that might reveal strategy, tactics, or confidential client information. Similarly, a lawyer who sends client correspondence via

email must ensure that it is sent only to the proper recipient and should discuss with the client in advance the risks associated with corresponding electronically. Lawyers should consider encrypting all electronic communications to ensure confidentiality is preserved or should take other precautions.

6. Managing financial responsibilities

Effective management of a law practice includes management of the lawyer's financial responsibilities. To meet those financial obligations, the lawyer must know what they are and when they are due. Lawyers

- must meet financial obligations incurred on the client's behalf;
- should fulfill financial responsibilities related to operating a law practice; and
- must satisfy financial reporting and compliance requirements.

These materials refer only to a lawyer's professional responsibility obligations under the *Rules* and Law Society by-laws, which are quite apart from any legal obligations under other legislation or law.

6.1 On behalf of the client — r. 6.01(2) and commentary

As previously discussed in these materials, lawyers must promptly meet all financial obligations incurred in the course of practice on behalf of clients unless it is documented in writing beforehand that it is not the lawyer's personal obligation to do so. These include expenses such as the payment of fees to file a claim on the client's behalf, to obtain a transcript or other document needed for the client's matter, or to secure the services of a third party.

Lawyers should obtain the client's consent before retaining a third party on behalf of the client, which may include an expert, a consultant, or some other professional. The terms of that retainer should be confirmed in writing and should outline the services to be provided by the third party, the fees for the services, and the person responsible for payment. Payment may be made by either the client directly or the lawyer on behalf of the client. Where the lawyer has indicated in writing that he or she is not responsible for the payment of the third party's fees and the client has not taken steps to pay, the lawyer should assist in making satisfactory arrangements for payment if it is reasonably possible to do so. This may include negotiating a reduction in the third party's fees or arranging a payment plan for the client.

The lawyer should include in the estimate of fees and disbursements to the client the cost of payments to third

parties. To ensure that the client has funds available to pay for the services of the third party, the lawyer should obtain and hold in trust the estimated fees to pay for third-party services before hiring that third party. If something unexpected arises that raises the cost of a third-party service, the lawyer should immediately advise the client and revise the estimate for legal services and disbursements. The lawyer should explain why the costs have increased and why it may be reasonable for the client to incur these additional charges. This should be confirmed in writing for the client. If appropriate, the lawyer should ask for further additional funds to cover the increased cost of the third party services. Where the lawyer plans to bill the client for the third party's costs after they have been paid by the lawyer, the lawyer should also confirm this in a letter to the client.

In the event that the client discharges the lawyer or the lawyer otherwise withdraws before a third party has been paid for his or her services provided to the client, the lawyer who originally hired the third party should advise about the change and provide the name and contact information for the new legal representative.

6.2 To operate a law practice

It is prudent that lawyers meet their own financial responsibilities as they relate to running a law practice. Such financial obligations may include those associated with

- professional regulation fees;
- professional liability insurance premiums;
- business insurance;
- employee salaries;
- remittance of the Harmonized Sales Tax (HST);
- renting or leasing office space;
- office utilities (e.g., heat, electricity, and telephone);
- postage and courier costs;
- business supplies; and
- bank fees.

A successful law practice is a well-managed one. Lawyers must adopt accepted accounting and bookkeeping systems and must attend to billing, collecting, and paying ongoing firm expenses.

6.3 Reporting and compliance requirements — By-Laws 8 and 9

A final part of meeting a lawyer's financial responsibilities is to fulfill the reporting and compliance requirements related to those financial obligations. As outlined in By-Law 8, each year lawyers must file with the Law Society an annual report that includes

information on their books and records for client funds (i.e., the trust account) and their own funds (i.e., the general account). Lawyers must maintain accurate accounting records to properly track client funds as required by By-Law 9.

According to r. 3.04(3), a lawyer who is a member of an interprovincial law firm and qualified to practise in Ontario has the additional obligation to ensure that the books, records, and accounts pertaining to the practice in Ontario are available in Ontario on demand by the Law Society's auditors or their designated agents.

Lawyers must also report to the Law Foundation regarding the interest accrued on trust accounts and to the Canada Revenue Agency regarding income tax or the HST.

7. Managing supervisory responsibilities — r. 5.01; By-Law 7.1, Part I

Under the *Rules*, lawyers are responsible for the supervision of any support staff they employ. Proper use of support staff allows the lawyer to make efficient use of the time he or she has for the practise of law and may result in savings to the client. Lawyers must assume complete responsibility for all business entrusted to them, including tasks and work products completed by their non-lawyer employees, so proper hiring, training, and supervision practices are essential.

Because the definition of *non-lawyer* contained in the *Rules* does not include a candidate enrolled in the Law Society's Licensing Process for Lawyers, a lawyer's supervision of an articling student is not captured by this rule. As outlined separately in r. 5.02, the duty of a lawyer who has been approved as an articling principal is to give the student meaningful training and exposure to and involvement in work that will provide the student with knowledge and experience of the practical aspects of the law, together with an appreciation of the traditions and ethics of the profession. Because articling students are also subject to the *Rules*, principals should also ensure that articling students are familiar with the responsibilities contained within the *Rules*.

7.1 Hiring support staff

Lawyer should hire trustworthy individuals for their practice. Lawyers should obtain as much professional information about a potential employee as possible, and when interviewing a potential employee, the lawyer should ask about the candidate's past performance and experience. If the position involves handling money, the lawyer may ask for the candidate's consent to check his or her criminal record and credit reports. Lawyers must comply with privacy legislation and should refer to the

Rules to review questions that can and cannot be asked of an applicant, as outlined in the Ontario *Human Rights Code*. Lawyers should confirm the information contained in a candidate's resumé, consult references, and verify previous employment experience before offering employment to a candidate.

7.2 Training

Proper training ensures that employees have the skill, knowledge, and ability needed to fulfill job-related duties. The lawyer must properly train non-licensed employees before delegating tasks to them. In addition to training on the types of matters the lawyer handles, the lawyer should educate support staff on

- the need to act with courtesy and professionalism;
- the definition of discrimination and harassment, and the prohibition against conduct that amounts to discrimination and harassment;
- the duty to maintain client confidentiality and methods used to protect confidential client information (e.g., avoiding gossip inside and outside of the office);
- the definition of a conflict of interest, the duty to avoid conflicts, and how to use a conflicts checking system;
- proper handling of client property, including money; and
- proper record keeping.

Lawyers should consider documenting their office procedures and policies in an office manual. An office manual may be used to train new employees and support staff, may be used by them as a reference, may help ensure consistency to a lawyer's practice, and may assist to protect the lawyer from potential claims.

7.3 Delegation and supervision

Lawyers must ensure that employees only complete tasks for which they have been properly trained and have the required competence. The lawyer is responsible for all work delegated to employees and must directly and adequately supervise them. The extent of that supervision will depend on the type of matter, regardless of how standardized or repetitive the task, and the experience of the employee, both generally and with the matter in question. Extra care may be needed if there is something different or unusual in the matter.

To prevent the unauthorized practice of law or provision of legal services, lawyers must not allow any non-licensed employee to perform any of the duties that only a lawyer may perform. This rule applies at the lawyer's practice and at any satellite office of the practice. Part I of By-Law 7.1 outlines the specific obligations placed on

lawyers who delegate work to non-lawyer employees, while the commentary to r 5.01 provides examples of appropriate delegation of tasks as they relate to real estate matters, including electronic registration and title insurance; corporate and commercial matters; and wills, trusts, and estates.

With prior express instruction and authorization, a lawyer may allow a non-lawyer employee to

- take instructions from the client;
- give or accept an undertaking on the lawyer's behalf;
- act before an adjudicative body on the lawyer's behalf in respect of a scheduling or other related routine administrative matter; and
- upon client consent, conduct routine negotiations with third parties in relation to the client's matter, where the negotiation results are approved by the lawyer before any other action is taken.

Lawyers must not allow a non-lawyer employee to

- accept a client on the lawyer's behalf;
- provide the client legal advice;
- act finally in respect of the client's affairs;
- perform any of the duties that only lawyers may do;
- perform any duties that lawyers themselves are not permitted to do; or
- be held out as a lawyer.

Lawyers should ensure that non-lawyer employees clearly identify themselves as such when communicating with clients, prospective clients, or the public. This includes both written and verbal communications.

7.4 Supervision in real estate matters

The *Rules* also provide guidance on the supervision of non-lawyer employees in real estate matters for activities that relate to the electronic registration of title documents and title insurance.

A lawyer who acts in real estate transactions using the system for the electronic registration of title documents (e-regTM) assumes complete responsibility for documents he or she signs electronically and is responsible for the content of any document electronically signed and registered by a non-lawyer employee upon the lawyer's approval. The lawyer

- shall not permit a non-lawyer employee or others to use the lawyer's personalized specially encrypted diskette to access e-reg;
- shall not disclose the lawyer's personalized e-reg passphrase to others;

- shall ensure that a non-lawyer employee does not permit others to use the employee's personalized, specially encrypted diskette to access e-reg;
- shall ensure that a non-lawyer employee does not disclose the employee's personalized e-reg passphrase to others; and
- shall not permit a non-lawyer to sign for completeness any document that requires compliance with law statements.

A lawyer must not allow a non-lawyer employee to give legal opinions regarding title insurance. Where there is direct supervision by the lawyer, the lawyer may permit a non-lawyer to advise the client about any insurance (including title insurance), present to the client insurance options or information about premiums, and recommend one insurance product over another.

7.5 Supervision of paralegals

Due to the definition contained in Part I of By-Law 7.1, the supervisory responsibilities of a lawyer over non-licensed employees also applies to any paralegals the lawyer may employ. Despite the paralegal's own obligations and responsibilities under the *Paralegal Rules of Conduct* and his or her licence to provide independent legal services within the permitted scope of practice, a paralegal employed by a lawyer must expressly agree to the lawyer's effective control over the paralegal's provision of services to the lawyer.

7.6 Supervision of affiliated entities

Unless the client provides informed consent to do so, a lawyer is not permitted to delegate to staff of an affiliated entity any tasks in connection with the provision of legal services to the client. Where the client does provide consent, this should be confirmed in writing.

8. Managing administrative and business aspects of the practice

Effective management of a law practice also includes managing the administrative and business aspects of the practice. As mentioned previously in these materials, a lawyer's licence to practice law may be suspended if he or she fails to meet the Law Society's administrative requirements. Lawyers must

- inform the Law Society of any changes to status or contact information, per By-Law 8;
- pay an annual fee to the Law Society, due January 1st each year, per By-Law 5;
- submit an annual report to the Law Society, due March 31st each year, per By-Law 8;

- maintain appropriate professional liability insurance, per By-Law 6 (individual policy or exemption status will dictate due dates and fees);
- complete and report on continuing professional development hours, per By-Law 6.1;
- meet other requirements related to business structure, per By-Law 7, if applicable; and
- meet other requirements related to bankruptcy or insolvency and offences, per By-Law 8, if applicable.

Depending on the type of law practice, business structure, or other arrangements the lawyer has made, he or she may have administrative requirements beyond those imposed by the Law Society. Examples may include federal, provincial, or municipal business registrations or renewals, or commercial or personal insurance filings. Failure to comply with any administrative requirement may impact a lawyer's practice.

Proper practice management also involves protecting the practice and safeguarding clients' interests in all circumstances. Lawyers should create contingency plans that protect the client's interests by ensuring continuity during a business interruption or the lawyer's absence. A lawyer should also have plans that allow for others to properly deal with the practice in the event the lawyer is unable to return to the practice of law. Plans should address

- practice interruptions (e.g., natural disaster, office disaster, technology failure, theft or vandalism, or law office search or seizure);
- planned absences (e.g., vacation, parental leave, medical leave, or other leaves of absence); and
- unplanned absences (e.g., personal difficulties, sudden illness, incapacity, disability, or death).

A lawyer should consider drafting a power of attorney for the practice that grants another named lawyer the authority to act on his or her behalf and to access the general and trust accounts to continue with the practice during a planned or unplanned absence, with terms that allow that named lawyer to arrange for and oversee the sale, transfer, or closure of the practice in the event that the lawyer is unable to return to the practice of law.

A lawyer should also consider including in his or her will a clause that addresses how the practice should be sold, transferred, or closed in the event of the lawyer's death. A lawyer should consider appointing another named lawyer as the estate trustee or a co-estate trustee to oversee the conclusion of his or her practice.

Accounting, bank accounts, and bookkeeping

Knowledge of accounting principles and record keeping requirements are essential for running a successful law practice. They are also a required part of competence, as outlined in the *Rules of Professional Conduct (Rules)*. A lawyer's level of involvement in the accounting aspects of his or her practice may vary. Lawyers may choose to maintain their own books and records through manual or computerized accounting systems and may choose to delegate these tasks to a trained staff member or to a third-party accountant or bookkeeper. Whatever choice the lawyer makes, he or she is ultimately responsible for ensuring that client and firm funds are properly accounted for and that the appropriate books and records are maintained in accordance with By-Law 9, made under the *Law Society Act*.

1. Accounting in a law practice

Lawyers must use accounting principles and procedures to have a successful practice. This includes using procedures to record transactions as they occur, regularly reviewing records and transactions, and preparing and reviewing financial statements. Lawyers who fail to do any one of these may face difficulties with clients over billings or discipline by the Law Society. At

the very least, lawyers should be aware of bookkeeping and the types of accounting systems that are available for the lawyer to use.

1.1 Types of accounting systems

Financial recording, reporting, and billing systems are an important part of a law practice. There are several kinds of accounting systems: manual, "one-write," spreadsheet software, general accounting software, and law firm accounting software. When choosing an accounting system, a lawyer should consider what will work best in his or her practice by assessing

- the number of transactions the lawyer has or expects to have;
- whether the lawyer maintains his or her own records or hires someone to do them;
- what the lawyer can afford; and
- how well the lawyer understands bookkeeping and computer programs.

The Law Society cannot make this decision for the lawyer. The lawyer must determine what is right for his or her needs. The following is a comparison of five main types of accounting systems.

Type of System	Advantages	Disadvantages
manual	+ simple + inexpensive	- time consuming if many transactions - does not automatically post to sub-ledgers - math errors more common
one-write	+ simple + inexpensive + posts to sub-ledgers	- time consuming if many transactions - math errors more common
spreadsheet software	+ inexpensive + automatic calculations	- time consuming if many transactions - requires training - formulae errors are difficult to detect
general accounting software	+ automatic calculations + posts to sub-ledgers + produces financial reports	- reports not designed for trust accounting - requires training
legal accounting software	+ designed for trust accounting + automatic calculations + posts to sub-ledgers + produces financial reports	- may be expensive - requires training

When using an electronic or computerized method for accounting and bookkeeping, the lawyer must ensure that the computer program will enable or allow the lawyer to produce hard copies of any documents to meet the requirements of By-Law 9. The lawyer must also implement proper security, back-up, and disaster recovery plans to ensure that this information can be recreated if damaged or lost.

2. Bank accounts in a law practice

Lawyers may open as many bank accounts as required to meet the needs of the law practice. Every account must be operated and account records maintained in accordance with Law Society requirements. Most practices will have at least one *general account* for the business of the practice and one mixed *trust account* to hold client funds. Lawyers must not mix firm funds with client funds. If a lawyer intends to receive client funds and hold them for any period of time, the lawyer must operate a trust account separate from any account containing the lawyer's or the firm's funds. Lawyers must not deposit client money directly to the general account and must not deposit personal funds or the firm's money into the trust account. Lawyers who do not accept or hold client funds in trust are not required to operate a trust account.

Lawyers should note that the rules relating to accounting, bank accounts, and bookkeeping apply to individual lawyers who practise law as sole practitioners and to every lawyer member of a law firm, including lawyers who are employees.

3. General account

A *general account* is an operating account used by a lawyer or law firm to run the law practice. The money deposited or held in the general account belongs only to the lawyer or to the firm, and no client money can be directly deposited to this account. Payments from clients for services already provided and billed by the lawyer or firm should be deposited to this account.

A lawyer may use his or her personal bank account as a general account for the practice, but this is not recommended. If the Law Society performs a spot audit of the practice, the lawyer will be required to produce records regarding the personal account, which may include personal transactions not related to the lawyer's practice. To avoid having to reveal personal financial information unrelated to the practice, lawyers should open a separate account for the practice. Also, the lawyer's personal account may not generate the

appropriate statements, returned cheques, and duplicate deposit slips required by By-Law 9.

3.1 Depositing to the general account (general receipts)

Often, a lawyer's fee income will be the only income coming into his or her law practice. To generate a steady cash flow, lawyers should establish a routine of billing clients at regular intervals. This will assist lawyers to manage their flow of income throughout the year and will assist them to meet their financial obligations related to the practice. Interim bills keep the client informed as to the ongoing cost of the matter, even in cases where the client has provided the lawyer with a money retainer for future services. Providing the client with interim bills will allow the client to avoid a large payment at the end of the retainer.

When the lawyer receives a payment from a client for fees that have been earned and billed and disbursements paid by the lawyer on the client's behalf (a billing is not required before the lawyer repays himself or herself for disbursements), that money belongs to the lawyer or law firm and must be deposited into the general account. Lawyers may make deposits to the general account by whatever method they choose as long as the method provides the source documents required by By-Law 9. Deposits to the general account must be recorded in the *general receipts journal*, explained further in the "Record keeping requirements" section of this chapter.

3.2 Withdrawing from the general account (general disbursements)

As an operating or business account, payments for a lawyer or law firm's expenses will come from the general account. Payments include

- professional regulation and liability insurance fees;
- lease or rent for office space;
- employee salaries;
- business expenses (e.g., office utilities, bank fees, courier, and postage);
- office supplies;
- remittance of Harmonized Sales Tax (HST);
- bank fees (for both the general and trust accounts);
- transaction fees for accepting credit or debit card payments (for both the general and trust accounts); and

- disbursements paid on a client's behalf when there are no or insufficient client funds in trust.

Lawyers may make withdrawals from the general account by whatever method they choose, as long as they can provide the source documents required by By-Law 9. Withdrawals from the general account must be recorded in the *general disbursements journal*, explained further in the "Record keeping requirements" section of this chapter. Ideally, a lawyer or firm's general receipts should match or exceed their general disbursements.

3.3 Harmonized Sales Tax (HST)

If the revenues from a law practice exceed a certain amount, the lawyer must register with the Canada Revenue Agency (CRA) to collect and remit HST on billings and disbursements. Depending on the firm's income, the lawyer or firm will be required to remit HST monthly, quarterly, or annually. HST is payable by clients on the lawyer's fees and some disbursements, as outlined by the CRA. To track the HST receivable on fee billings each month, all fee billings should be recorded in the *fees book*, which is explained further in the "Record keeping requirements" section of this chapter. Books and records regarding the HST must be up to date since lawyers may be subject to a HST audit by the CRA.

Where the lawyer has received a money retainer from the client and has billed the client for HST eligible services, the HST should be removed from trust and deposited to the general account or another account belonging to the lawyer or firm until the lawyer is required to remit it to the CRA. However, if the lawyer chooses to, the HST portion for a particular client matter may be left in trust as long as it remains as a credit to that client's trust ledger account.

4. Trust account

Lawyers have special obligations when handling client funds. Lawyers must preserve money held on the client's behalf. Mishandling of client funds may result in discipline by the Law Society. When a lawyer receives money that belongs to a client or is to be held on behalf of a client, the lawyer must deposit it into a trust account. Because client funds must be held *in trust* by the lawyer, they are also known as *trust funds*. Per r. 2.02(5.0.2) of the *Rules*, a lawyer may only use a trust account for purposes related to the provision of legal services; he or she must not hold money in trust if it is not directly related to the legal services he or she is providing to the client.

Part II of By-Law 9 prohibits the handling of client funds and property by a bankrupt lawyer within the meaning of the *Bankruptcy and Insolvency Act*, unless the Law Society provides the individual special permission to do so. That permission may be subject to any terms and conditions that the Law Society may see fit to impose.

4.1 Opening a trust account

To open a trust account, lawyers may need to provide their financial institution with proof that they are licensed by the Law Society to practise law. Each financial institution may have different requirements, which may involve obtaining a letter from the Law Society that confirms the lawyer's status or "good standing." When opening a trust account, the lawyer must ensure that

- the trust account is named and designated as a trust account and this is clearly indicated on the statements for the account;
- the account is in the lawyer's name or the name of the law firm where the lawyer is a partner or is employed;
- the financial institution returns cancelled trust account cheques or electronic images of cancelled cheques to meet the record keeping requirements under By-Law 9; and
- the financial institution will not withdraw money from the trust account without the lawyer's authorization, including service fees to operate the trust account.

Lawyers must provide written instructions to the financial institution to ensure that any banking fees or service charges associated with operating the trust account are withdrawn from the general account. These fees must not be taken from the trust account, because the money contained in the trust account belongs to the client. Though it is not required, lawyers may find it convenient to open their general account at the same financial institution as they have their trust account(s). This may reduce the number of trips to the financial institution and may reduce the likelihood of mistakenly debiting the trust account for operating fees or service charges.

4.1.1 Types of trust accounts

Lawyers may open a *mixed trust account* where funds belonging to different clients are pooled. As outlined in the *Law Society Act*, the interest earned on a mixed trust account must be remitted by the financial institution to the Law Foundation of Ontario (LFO) for the benefit of various law-related organizations and

projects. The mixed trust account must bear interest at a rate approved by the trustees of the LFO. Lawyers must provide their financial institution with a letter of direction authorizing them to forward the interest to the LFO.

If a client wishes to receive the interest earned on their funds, that client must instruct the lawyer to open a *separate interest-bearing trust account* for the client's funds. The account should still be in name of the lawyer or law firm in trust for the client and may only hold that client's funds. As part of the lawyer's fiduciary duties, the lawyer should discuss this option whenever holding client funds for an extended period of time. The lawyer must ensure that clients understand that he or she is not providing them with investment or financial advice.

If the client instructs the lawyer to put the funds in a separate interest-bearing account, the lawyer should

- ensure that the client's instructions to open a separate interest bearing trust account are in writing;
- obtain the client's Social Insurance Number or corporate number;
- discuss with the client how the interest is to be allocated for income tax purposes, since the lawyer will receive a T5 supplementary income slip from the financial institution for the interest earned; and
- check with the financial institution as to how much notice is required to have the funds released and whether earlier redemption will affect the interest paid.

Some examples of separate interest-bearing accounts include a passbook account, a guaranteed investment certificate (GIC), or a term deposit. The lawyer who opens a separate interest-bearing trust account for a client must still meet the record keeping requirements of By-Law 9. The requirements for placing money received in trust into any other type of income-generating investment (e.g., a money market fund and Treasury bills) are identical to the requirements for interest-bearing accounts.

4.1.2 Financial institutions for trust accounts

Lawyers may open trust accounts at any financial institution outlined in By-Law 9, such as a

- chartered bank;
- provincial savings office;
- registered trust company; and
- credit union or a league under the *Credit Unions and Caisses Populaires Act, 1994*.

Lawyers are not required to have all of their accounts at the same financial institution, but this may be more convenient for their practice. When selecting a financial institution for the general and trust account(s), the lawyer must make sure that the financial institution can provide the necessary source documents to meet the record keeping requirements outlined in By-Law 9. If the financial institution cannot or will not provide the source documents required, the lawyer may have to choose another financial institution that will allow him or her to meet these obligations. More information on *source documents* can be found later in this chapter.

4.1.3 Sharing trust accounts

A lawyer may only share a trust account with another lawyer or paralegal if they are partners or if one of them is employed by the other. A lawyer who is a sole practitioner and who shares office space with other sole practitioners may not share a trust account with those other legal service providers. To share a trust account, there must be a partnership or employment relationship between the lawyer and other licensees.

4.2 Depositing to the trust account (trust receipts)

Lawyers must deposit into a trust account all of the following:

- money provided to the lawyer by the client to secure legal services or as a deposit for the fees that will be charged for those services (i.e., a money retainer);
- money provided to the lawyer for payment of disbursements that will be incurred on behalf of the client by the lawyer;
- money provided to the lawyer by the client to be held by the lawyer pending the client's instruction;
- settlement funds that belong to the lawyer's client that are received by the lawyer from the opposing party in a matter;
- settlement funds that belong to the opposing party in a matter that are received by the lawyer from the lawyer's client;
- any money that is shared by the lawyer and the client where it is not practical to split the payment (e.g., the client overpays a bill rendered to the client by the lawyer); and
- any funds withdrawn from the trust account in error.

All deposits to the trust account must be entered in the *trust receipts journal*, and the deposits for each individual client must be recorded in the *clients' trust ledger*. These are discussed further in the "Record

keeping requirements” section of this chapter. All of the funds a lawyer holds in trust must be allocated to his or her clients. As previously stated, the lawyer must not deposit money to the trust account if it is not directly related to the legal services the lawyer is providing to the client. Lawyers may not have “miscellaneous” funds nor can they carry a float of their own money in the trust account.

Lawyers are not required to deposit into a mixed trust account funds that are received from or for a client if

- the client requests in writing that the lawyer does not deposit the money to the mixed trust account (e.g., if the client wants his or her funds kept in a separate interest-bearing account);
- the lawyer deposits the money into an account kept in the name of the client, a person named by the client, or an agent of the client (other than the lawyer); and
- immediately upon receiving it, the lawyer pays the money to the client or to a person on behalf of the client, following normal business practices.

Lawyers must include a description or a paper trail of the handling of such client moneys, in accordance with By-Law 9. Because client funds cannot mix with the lawyer’s funds, the lawyer must not deposit his or her funds into a trust account.

4.2.1 Methods for depositing to trust

Lawyers may make deposits to their trust account in person at their financial institution or by using an Automated Bank Machine (ABM). If using an ABM, the lawyer must ensure that convenience cards are coded for deposits only and that security is maintained as if the funds were dealt with in person through a teller. Where applicable, trust funds may be transferred to the trust account by wire transfer or electronic transfer (e.g., Internet banking). When making any deposit to trust, the lawyer must keep the duplicate deposit slip, the ABM receipt, or the confirmation provided by the electronic transfer. These are called *source documents* and are discussed further in the “Record keeping requirements” section of this chapter.

4.2.2 When to deposit to trust

Client funds should be deposited to a trust account on the day they are received and must be deposited by the end of the following banking day.

4.3 Withdrawing from trust (trust disbursements)

A lawyer must not withdraw money from trust with respect to a client matter in an amount larger than what he or she is holding in trust for that client. The lawyer must not take funds from trust that the client has not instructed him or her to withdraw or that do not belong to the lawyer for payment of fees or reimbursement of disbursements. To withdraw funds for any other reason may be considered *misappropriation of trust funds*, which is prohibited by the *Rules*. All withdrawals from the trust account must be recorded in the *trust disbursements journal*, discussed further in the “Record keeping requirements” section of this chapter.

4.3.1 Reasons for withdrawal from trust

Lawyers may only withdraw from the trust account

- money required to pay a client or a person on behalf of a client;
- money required to reimburse the lawyer for money spent on behalf of a client;
- money required to pay the lawyer for fees for services that the lawyer has performed and for which a bill was sent to the client; and
- money that does not belong in the trust account but was deposited to trust in error.

Lawyers may not withdraw money from the trust account for any other reason.

4.3.2 Methods for withdrawal from trust

The lawyer may withdraw money from the trust account only by the following means

- by cheque, signed by the lawyer or another lawyer or paralegal authorized to disburse funds from the lawyer’s trust account(s);
- by transfer to the lawyer or law firm’s general account, authorized by the lawyer in writing; and
- by electronic transfer in accordance with By-Law 9.

These methods for withdrawing from the trust account provide the necessary records to meet Law Society record keeping requirements. These methods should be used when withdrawing money from the trust account for any reason. Lawyers must never make a trust cheque payable to “cash” or “bearer” and should ensure that they limit who may access the above methods for withdrawal from trust.

There are special requirements when withdrawing trust funds by electronic transfer, which include the use of Internet or personal computer (PC) banking software.

The lawyer must start the process by completing an *Electronic Trust Transfer Requisition Form* (Form 9A) for his or her records. The software must require two persons to effect the transfer: one to input the transfer transaction details and one to authorize the transfer. These two people must be identified by passwords or other means and cannot share the same password. However, By-Law 9 provides an exception to the two-person requirement if the lawyer is a sole practitioner who practises alone without employees. In any case, the system must generate a confirmation of the transaction details, including all of the information required under By-Law 9. The lawyer must compare the system confirmation printout with the previously completed Form 9A, and must sign and date the confirmation printout to ensure that the transaction details were properly sent to and received by the financial institution. This comparison must be completed by the end of the second business day after the transfer. A sample completed Form 9A has been included in the final section of this chapter.

Lawyers may not use an ABM to withdraw funds from trust, since an ABM does not provide adequate papers or documents to meet the record keeping requirements of By-Law 9. Lawyers who use a convenience card to make deposits to trust through an ABM must ensure the card is coded for deposits only.

4.3.3 Individuals authorized to withdraw from trust

Lawyers must be in control of their trust account(s). A lawyer who practises alone is the only individual who may operate and disburse funds from his or her trust account. If a lawyer is at a law firm, the managing partners of the firm or the sole practitioner who employs the lawyer will likely be the lawyer(s) in control of the firm's trust account(s).

If there is only one lawyer with signing authority on the trust account(s), it would be prudent to make arrangements for another lawyer to have signing authority on the trust account(s) in case of an unexpected emergency (e.g., illness or accident) or planned absence (e.g., vacation). The chosen substitute must be insured and entitled to practise law or provide legal services in Ontario. The lawyer may arrange this through his or her financial institution by means of a power of attorney or by including a relevant clause in his or her will. In such cases, the lawyer may also want a person who knows his or her practice (e.g., law clerk, accountant, or bookkeeper) to co-sign any trust cheques. This will assure and assist the substitute

lawyer who may have to make payments of funds from the trust account.

Lawyers may wish to use the co-signature of a non-licencee employee (e.g., an office administrator or bookkeeper) on all trust cheques as an internal measure. Lawyers must not allow such an employee to be able to disburse trust funds alone. To ensure that no unauthorized withdrawals from trust are being made, the lawyer should limit access to blank trust account cheques and electronic banking software. The lawyer should never sign a trust check that is missing any information (e.g., payee, amount, date) or leave signed blank trust cheques to be filled in by anyone at a later time. The lawyer should use pre-numbered trust cheques and keep them secured when not in use.

4.3.4 Withdrawal from trust in error, corrections

If the lawyer's financial institution withdraws service fees from the trust account instead of the general account, the lawyer must ensure that the error is corrected and the funds are returned to trust. If necessary, the lawyer may have to correct this by depositing his or her own funds to trust. Though the lawyer's account statement may show this, lawyers should request something in writing from the financial institution for their records to confirm when the error occurred, that it was the fault of the financial institution, and when it was corrected.

If a lawyer mistakenly withdraws funds from trust, he or she must return those funds to trust as soon as the error is discovered. If a lawyer mistakenly disbursed funds on the client's behalf that the client did not have in trust, the lawyer should transfer funds from the general account to cover the shortfall as soon as possible. Correcting entries must also be made to the client trust ledger, trust receipts, and trust disbursements journals. To avoid confusing blank trust account cheques with blank general account cheques, lawyers should ensure that they are easily distinguished from each other (e.g., a different style or colour) and are stored separately.

4.4 Unclaimed trust funds

Lawyers should review the clients' trust ledger regularly to ensure there are no client funds sitting in trust that do not belong there. Once the client has been billed for services rendered, the lawyer should pay himself or herself from the client's funds in trust as soon as it is practical. If a trust cheque issued to the client or a third party has not yet been cashed, the lawyer must follow

up with the payee to ensure that they received the cheque or to find out why it was not cashed.

Trust cheques may become stale dated and non-negotiable if outstanding too long. Stale-date periods vary with the financial institution and may be anywhere from six months to a year. Once a trust cheque written by the lawyer becomes stale dated the lawyer should

- contact the financial institution to put a stop payment on the cheque;
- re-enter the amount of the cheque in the clients' trust ledger for that client; and
- reissue the trust cheque, if appropriate.

Where the lawyer has money in trust for a client for at least two years, the lawyer may apply to have these unclaimed trust funds transferred to the Law Society's *Unclaimed Trust Fund* if

- despite reasonable attempts to locate the client, the lawyer cannot find the client to whom the funds belong; or
- the lawyer does not know to whom the funds belong.

The fund is operated by the Law Society's Trustee Services department in accordance with By-Law 10, made under the *Law Society Act*, and information regarding the fund is available through the Law Society's website at www.lsuc.on.ca.

5. Receiving money from clients

Subject to the provisions of By-Law 9 that relate to cash transactions, a lawyer or law firm may choose to accept payment from clients using any method including

- electronic or wire transfer;
- cash;
- credit or debit card;
- personal cheque or certified personal cheque; and
- bank draft or money order.

Lawyers who accept payment by electronic or wire transfer will need to provide the trust or general account details to the party sending payment. Lawyers should confirm with their financial institution that these details may be used for deposit only. If a lawyer chooses to accept payment by cash, credit or debit card, and personal cheque, the lawyer must be aware of his or her responsibilities discussed below.

5.1 Restrictions on accepting cash

As part of its mandate to govern the paralegal profession in the public interest, the Law Society has

adopted provisions to assist in the prevention of money laundering. These address the handling and record keeping of cash transactions and are contained in Part III of By-Law 9. For the purposes of this by-law, *cash* means

- current coin within the meaning of the Currency Act;
- notes intended for circulation in Canada issued by the Bank of Canada pursuant to the Bank of Canada Act; and
- current coin or bank notes of countries other than Canada.

For any one client file, a lawyer may only accept less than \$7,500 Canadian in cash. Lawyers are forbidden to accept cash in the amount of \$7,500 Canadian or more with respect to any one file. The same restriction applies to foreign currency. If a lawyer accepts foreign currency, he or she must convert it to Canadian funds using the formula outlined in By-Law 9 to ensure the value of the funds is less than \$7,500 Canadian. Once converted, if the amount of foreign currency for any one client file is \$7,500 Canadian or more, the lawyer may only accept an amount less than \$7,500 and must tell the client that the remainder must be provided to the lawyer by some other method (for example, credit card, debit card, or cheque).

This rule applies when the lawyer engages in or gives instruction on behalf of the client with respect to the following activities:

- the lawyer receives or pays funds; and
- the lawyer transfers funds by any means.

There are some exceptions. The lawyer may accept \$7,500 cash or more on behalf of one client matter if the cash is received

- for future fees or disbursements (i.e., a money retainer), for fees or disbursements charged to the client, or for expenses or bail, provided that any refund out of such receipts is also made in cash;
- to pay a fine or penalty;
- pursuant to an order of a tribunal;
- from a peace officer, law enforcement agency, or other agent of the Crown acting in an official capacity; or
- from a public body, an authorized foreign bank within the meaning of s. 2 of the *Bank Act* in respect of its business in Canada or a bank to which the *Bank Act* applies, a cooperative credit society, savings and credit union, or *caisse populaire* that is regulated by a provincial Act, an association that is regulated by the Cooperative Credit Associations Act, a company to which the Trust and Loan Companies Act applies, a trust

company or loan company regulated by a provincial Act, or a department or agent of Her Majesty in right of Canada or of a province where the department or agent accepts deposit liabilities in the course of providing financial services to the public.

If the lawyer accepts a cash payment for fees, disbursements, expenses, or bail, there may be cases where he or she must refund some of those funds in cash. To refund money to the client in cash, the lawyer may withdraw funds from the general or trust account by

- completing a withdrawal slip for either the general or trust account; or
- issuing a general or trust cheque payable to the lawyer (noting the client file number and that it is a cash withdrawal), cashing the cheque, and giving the cash to the client.

Using a cheque will create a better paper trail. A lawyer who uses a withdrawal slip should request a duplicate copy of the withdrawal slip for his or her records. When the cash is refunded to the client, the lawyer should obtain a receipt from the client or have a witness present to document the transfer of cash. Whichever method of withdrawal, the lawyer should consider obtaining the client's written instructions prior to making the withdrawal.

Accepting cash payments to either the general or trust account will impose additional record keeping requirements upon the lawyer, as outlined in the "Record keeping requirements" section of this chapter. As with any method of payment, lawyers may refuse to accept cash from clients.

5.2 Use of credit and debit cards

Lawyers may accept credit card and debit card payments from clients. Payments for future fees and disbursements (i.e., a money retainer) must be deposited to the trust account. Payments for services rendered for which a fee bill has been sent to the client must be deposited to the general account. Lawyers must ensure that all merchant discounts and service charges associated with accepting credit and debit card payments are charged to the general account.

If the lawyer's financial institution will only allow one account to be designated for credit and debit card deposits, the account the lawyer chooses will dictate what methods of payment the lawyer may accept. That is,

- if the lawyer selects the general account, which holds funds that belong to the lawyer or the law firm, the lawyer may only accept payment by

credit or debit card for services already rendered and billed to the client; and

- if the lawyer selects the trust account, which holds funds that belong to clients, the lawyer may only accept payment by credit and debit card for payment of money retainers.

Lawyers may not make all deposits to one account and then transfer the appropriate amounts to the other account. If a lawyer wishes to accept client credit and debit card payments for both money retainers and bills, the lawyer may have to set up two point-of-sale (POS) machines: one for trust deposits and one for general deposits. If the lawyer's financial institution provides him or her with a POS machine linked to both the trust and general accounts that will allow the lawyer to select to which account the payment should be deposited at the time of the transaction, the lawyer must use internal controls so that the appropriate account is selected to receive the client's payment.

5.3 Clearance periods

When receiving funds in trust that must later be disbursed, the lawyer must be aware of the clearance period that applies to the method of payment received. The *clearance period* refers to the period of time it will take for the funds to actually be available for use and will be set by the lawyer's financial institution (i.e., the receiver of the funds). Clearance periods vary by method of payment and financial institution.

For example, a standard clearance period for an uncertified personal cheque is from five to 10 business days. Once the clearance period has passed and the funds are in the trust account and may be disbursed, the funds are considered "cleared." Certified cheques, bank drafts, and money orders are usually considered cleared as soon as they are deposited because the issuing financial institution has guaranteed or certified the funds. If the lawyer is unsure whether the funds deposited to the trust account have cleared, he or she should call the financial institution for confirmation.

When receiving funds from a client for deposit to the mixed trust account, the lawyer must ensure that the funds have cleared before he or she disburses any of those funds. If the lawyer disburses client funds before they have cleared and the client's original payment is returned because of non-sufficient funds (NSF),

- the lawyer's financial institution will debit the trust account to reverse the deposit (this is acceptable);
- the lawyer must ensure that any resulting service charges are not deducted from the trust account, as they must come from the general account;

- the lawyer must record the reversal of the NSF funds in the trust receipts journal and the clients' trust ledger, with a detailed explanation for the reversal;
- the lawyer will need to discuss the matter with any payees who received trust cheques disbursing those client funds to arrange for deferral of payment;
- if any of the payees have negotiated the trust cheques, the lawyer must reimburse the trust account from his or her own funds (i.e., the general account); and
- the lawyer must obtain replacement payment from the client whose cheque was returned "NSF."

If a lawyer has disbursed funds from trust with respect to a client that had insufficient funds in trust, the client trust ledger account is *overdrawn*. This represents a shortage of client funds, and the lawyer is responsible for fixing any such shortages that occur in the trust account. If the lawyer does not have enough funds of his or her own to correct an overdrawn client trust ledger account, the trust account will be short. In essence, the lawyer has misused or misapplied funds belonging to other clients. If the lawyer cannot correct an overdrawn client trust ledger account, he or she must report this to the Law Society.

In a situation where the lawyer must disburse client funds quickly after receiving them in trust from the client, the lawyer should request certified funds from the client. The lawyer should also review the client trust ledger accounts regularly to ensure that there are sufficient funds in trust for the client's future disbursements and to determine when those funds need to be replenished.

6. Record keeping requirements

Part V of By-Law 9 outlines the *minimum* requirements for books and records to be kept in a law or legal services practice. These requirements are designed to protect the public, and they focus on trust records, which are the records kept to track the handling of clients' money held by the lawyer. Lawyers who hold client funds must be able to account for those funds to their clients at any time. To do this, the lawyer must record the money received from each client, the money disbursed for each client, and what the unused trust balance is for each client. Lawyers must also keep their bank statements as an independent record or *source document* of trust transactions. Source documents are discussed later in this chapter.

Maintaining complete, accurate, and up-to-date records is in the lawyer's best interest as it will give him or her

the financial information needed to make sound financial decisions about the practice. Proper accounting records also help lawyers meet their obligations to file reports on time to the CRA for income tax and HST, to the professional liability insurer, and to the Law Society. Falling behind in record keeping may cost the lawyer time and money and may damage client relationships.

Lawyers who are not familiar with accounting practices or cannot devote the time and effort to maintaining their own books and records as required by By-Law 9 should consider delegating these duties. Lawyers may delegate bookkeeping tasks to trained support staff or to an independent bookkeeper or accountant who can be hired for this purpose. The lawyer must supervise staff to ensure that records are complete, current, and accurate.

6.1 Records must be current, permanent, available in paper copy

With the exception of the *monthly trust comparison* discussed later in this chapter, lawyers must keep their records current at all times. That means they must be up to date or updated daily. The best way to do this is to make or "post" their entries to all records on a daily basis. If the lawyer prepares any financial records by hand, these must also be permanent (i.e., in ink). Lawyers may keep their financial records electronically but must be able to produce paper copies of them promptly when requested by the Law Society. To avoid problems with computer crashes, data corruption, and software becoming outdated, lawyers may wish to print their journals and records monthly. By-Law 9 outlines the lawyer's financial record keeping requirements for both the general and trust accounts in a law practice.

6.2 General account

For his or her general account, a lawyer must keep

- a general receipts journal;
- a general disbursements journal;
- a fees book; and
- source documents for the above.

Together, the general receipts and general disbursements journal may be referred to as the *general cash journal*. The Law Society recommends that lawyers also maintain client general ledger accounts, but they are not required. As a rule of thumb, lawyers must keep most general account records for a period of six years. This means the most recent six years plus the current year. The information that must

be kept in each record is described below and sample documents are at the end of this chapter.

6.2.1 General receipts journal (6 years)

The general receipts journal tracks all of the money the lawyer receives, other than money received in trust for clients. This is money that belongs to the lawyer or law firm. For each amount of money received in the general account, the lawyer must record the

- date money was received;
- method by which money was received (e.g., cash, cheque, bank draft, and debit card);
- amount of money received; and
- person from whom money was received.

6.2.2 General disbursements journal (6 years)

The general disbursements journal records all of the money disbursed by the lawyer or law firm, other than money held in trust for clients. This is money that belongs to the lawyer or law firm. For each amount of money disbursed from the general account, the lawyer must record the

- date payment was made;
- method used to make payment (e.g., cheque, electronic transfer, money order);
- reference number of payment method (e.g., cheque number, Internet banking reference number, money order number);
- amount of payment; and
- person to whom payment was made.

6.2.3 Fees book (6 years)

The fees book contains entries for each bill or account issued to clients. Lawyers must keep either a fees book or a file containing copies of client bills, ordered by date. In the fees book, the lawyer must record the

- amount of fees charged to the client;
- amount of other billings to the client (e.g., disbursements and HST);
- date of billing; and
- name of client who was billed.

Lawyers may keep both a fees book and a file of client bills, if they wish. For convenience, lawyers should also keep a copy of the client's bills in the particular client's file. When a client billing is recorded in the fees book, it must also be entered into the client's general account.

The fees book is also where lawyers should track the total HST receivable on fee billings.

6.2.4 Client general ledger (optional)

The client general ledger is not required by the Law Society but is useful for tracking all the expenses, invoices, and payments made for each client. The balance in the individual client's general account shows the amount of money that the client owes the lawyer at any given time. The balance reflects fee and disbursement billings that have been sent to the client but have not yet been paid for and unbilled disbursements that the lawyer has paid but not yet billed to the clients. Lawyers should review this monthly to assist them to prepare bills for their clients.

Lawyers should review the client general ledger monthly to ensure there is not a negative balance in either the general receipts or general disbursements for any client. A negative balance in the client receipts journal would indicate the lawyer received an overpayment, payment for a bill not yet posted, or an amount was transferred from trust that exceeds the amount that was billed to the client. A negative balance in the client disbursement journal would indicate the client was billed for a disbursement not yet paid for by the lawyer or law firm.

6.2.5 Monthly general reconciliation (optional)

Lawyers may also wish to do a monthly reconciliation of their general account, although it is not required by the Law Society. The reconciliation involves checking all entries in the general account statement against the general account source documents, books, and records to ensure that they match. It allows the lawyer to confirm that the statement from the financial institution agrees with the general account records and to ensure that the financial institution has made no mistakes. It also allows the lawyer to track general account activities, to manage cash flow, and to prevent unauthorized spending. A monthly general reconciliation follows the same principles as a *trust reconciliation*, which is explained below.

6.3 Trust account

For his or her trust account, a lawyer must keep a

- trust receipts journal;
- trust disbursements journal;
- client trust ledger, with individual client accounts;
- trust transfer journal;

- monthly trust comparisons; and
- trust account source documents.

These are all required records. Together, the trust receipts and trust disbursements journal may be referred to as the *trust cash journal*. With the exception of the trust transfer journal, all trust records must be kept for a period of 10 years. This means the most recent 10 years plus the current year. The information that must be kept in each record is described below and sample documents appear at the end of this chapter.

6.3.1 Trust receipts journal (10 years)

The trust receipts journal tracks the amounts received from clients in trust. This is money the lawyer holds for clients. For each amount received in trust for a client, the lawyer must record the

- date money was received;
- method by which money was received (e.g., cash, cheque, bank draft, and debit card);
- person or institution from whom money was received;
- amount of money received;
- name of the client for whom money was received; and
- reason the money was received in trust (e.g., payment or replenishment of a money retainer).

6.3.2 Trust disbursements journal (10 years)

The trust disbursements journal tracks payments made out of trust on behalf of clients. This is client money the lawyer pays out on behalf of the client. For each amount disbursed from trust on behalf of a client, the lawyer must record the

- date payment was made;
- method used to make the payment (e.g., cheque, electronic transfer, and money order);
- reference number of payment method (e.g., cheque number, Internet banking reference number, and money order number);
- amount of payment;
- person to whom payment was made;
- name of the client on whose behalf payment was made; and
- reason the money was paid from trust (e.g., payment of a disbursement or fee invoice).

If withdrawing funds from trust by electronic transfer, lawyers must complete and keep a copy of the *Electronic Trust Transfer Requisition Form* and bank confirmation of the transfer.

6.3.3 Client trust ledger (10 years)

Lawyers must maintain records that show the amount that they hold in trust for each client separately. Each client “account” in the client trust ledger tracks the amount of money received in trust for that client, the amount of money paid from trust on behalf of that client, and any remaining balance that client has in trust. If representing a client in more than one matter, the lawyer will have more than one (client trust ledger) account grouped in that client’s client trust ledger.

The client trust ledger is an important accounting record because it helps the lawyer to avoid spending more money on the client’s behalf than the lawyer holds in trust for that client. It also helps the lawyer to identify whether the client should provide further funds to replenish the money retainer. If the lawyer is not holding any money in trust for a client, no trust ledger for that client is required.

6.3.4 Trust transfer journal (6 years)

Lawyers must also keep a record that shows any amounts of money transferred between client trust ledger accounts and explains the reason for each transfer. Such a transfer may occur when the lawyer has opened more than one client trust ledger account for a particular matter (i.e., the lawyer represents more than one party in a joint retainer). The lawyer would also use this journal when transferring money between client trust ledger accounts to correct any errors made in an original posting. For example, if funds received from Client A were supposed to be deposited to trust but they were incorrectly posted to Client B’s trust ledger account, the transfer from Client B to Client A to correct the client trust ledger accounts would be entered in the trust transfer journal.

6.3.5 Monthly trust comparison (10 years)

The monthly trust comparison is a required record. It consists of a detailed listing that shows how much money is held in trust for each client and a detailed monthly reconciliation of each trust account. The monthly trust comparison is performed to ensure that the lawyer’s trust accounting records agree with his or her trust bank account(s) statements. It allows the lawyer to identify any differences that may result from posting or financial institution errors. It must be completed by the 25th of each month for all trust funds the lawyer or law firm held at the previous month’s end. The trust comparison compares

- the reconciled trust bank balance; and

- the client trust listing total.

These two amounts must be the same. This is one of the most important trust records that the lawyer must maintain. The lawyer should correct any trust shortages immediately and correct any bank or posting errors before the next month end.

The *trust reconciliation* is a way to ensure that the amount of money held in trust according to the lawyer's trust account statements from the bank agrees with the amount recorded in the lawyer's books and records. Every month, the lawyer should receive a statement from his or her financial institution showing all transactions processed through the lawyer's trust account during the month and the balance at the end of the month. A trust account is "reconciled" by checking all the entries on the bank statement against the lawyer's source documents and trust records. This requires the lawyer to check the statement against deposit slips (i.e., trust receipts), returned cashed cheques (i.e., trust disbursements), and the trust receipts and disbursements journal.

The trust reconciliation will identify whether the lawyer's financial institution made any errors in processing payments made from and deposited to the trust account. It can also reveal amounts the lawyer may have forgotten to post to the trust receipts or disbursements journal, such as an electronic transfer of funds in or out of trust. Lawyers must also note any outstanding items, such as uncashed trust cheques or trust money received on the last day of the month but not deposited until the next day (i.e., the first of the following month).

To complete the trust reconciliation, the lawyer must follow all steps in the process outlined below:

1. Check off all returned cheques on the trust bank statement for the previous month, noting any discrepancies in the amounts.
2. From the trust disbursement journal, identify any cheques that were issued that have not yet cleared the bank.
3. List outstanding cheques by cheque number, issue date, and amount and total the amounts.
4. From the trust deposit book, check off all deposits on the trust bank statement noting any discrepancies in the amounts.
5. List any deposits for the previous month, by date and amount, that are not recorded on the trust bank statement; these are outstanding deposits.
6. List any bank errors and/or posting errors individually by date of occurrence and provide a brief explanation. A copy of any supporting

documentation, such as a bank memo, should be attached to the reconciliation.

7. From the ending balance on the trust bank statement subtract the amount of the outstanding cheques, add any outstanding deposits, and adjust for any bank and posting errors to calculate the reconciled trust bank balance.

The *client trust listing* is a monthly list of all clients for whom the lawyer or law firm holds money in trust. From the client trust ledger, make a list of all clients for whom money was held at the previous month end. Beside each client's name list the amount of funds held for that client at the previous month end. The list is added, and the total shows the total money held in trust on behalf of clients or owed to clients at that particular month end. These are the lawyer's *client liabilities*. The listing must include the names of all clients for whom the lawyer or law firm holds money in trust, either in the mixed trust account or separate interest-bearing accounts.

To complete the client trust listing, the lawyer must follow all steps in the process outlined below:

1. From the clients' trust ledger, identify any client for whom trust funds were held at the previous month end.
2. List the client names in a logical order, with the unexpended trust balance for each client as at the previous month end.
3. Include the last activity date for each client's trust balance on the client trust listing to help monitor inactive or dormant amounts.
4. Total the client trust listing.

Lawyers must compare the reconciled trust bank balance with the client trust listing total. This is the *monthly trust comparison* that must be completed by the 25th of each month. If these two amounts are not the same, the lawyer must find and correct the discrepancy. If the lawyer has only one mixed trust account, the trust reconciliation should agree with the total on the client trust listing. If the lawyer has more than one trust account, the lawyer should make a list that details each trust account balance to ensure that none of the trust account balances are missed.

Regardless of who prepares it, the lawyer should review the trust comparison and all supporting documentation by the 25th of the following month to ensure that

- the comparison has been completed on time;
- all client trust funds are included (e.g., mixed, pass book, GICs, term deposits, etc.);
- balances of bank statements, passbooks, GICs, term deposits, etc., are correct;
- the arithmetic is correct;

- items are reconciled (e.g., bank errors and posting errors) are cleared each month and are explained and supported by documentation;
- stale-dated cheques are reversed, the client liability reinstated in the clients' trust ledger, and if appropriate, stop payment orders are made and cheques reissued;
- client trust ledger accounts are not overdrawn;
- the amounts in trust for each client are correct; and
- any client trust ledger accounts that have not had any activity in the previous 12 months are reviewed.

6.4 Other record keeping requirements

In addition to the records lawyers must keep that are related to the general and trust account(s), By-Law 9 outlines some additional record keeping requirements. These include maintaining source documents, a duplicate cash receipts journal, and a valuable property record. The details on these records are described below and selected sample documents appear at the end of this chapter.

6.4.1 Source documents — general and trust accounts (10 years)

Lawyers are required to keep all copies of source documents for both the general and trust accounts of their law practice. *Source documents* refer to documents that are the source of the information entered into the lawyer's accounting books and records. Source documents may be in either paper or electronic form, and lawyers must keep all source documents for 10 years. Examples of source documents include

- cashed or cancelled general and trust cheques or electronic images of these;
- trust and general account statements from the lawyer's financial institution;
- general account passbooks and trust account passbooks;
- detailed duplicate deposit slips for both the general and trust accounts, either stamped by teller or with attached ATM receipt;
- copies of fee invoices to clients if the lawyer does not keep a fees book (lawyers should also keep copies of these invoices in the client files); and
- completed copies of the *Electronic Trust Transfer Requisition Form* (Form 9A) with signed confirmations attached if the lawyer withdraws from trust via electronic transfer (lawyers may also wish to keep a similar form and signed confirmations for electronic transfers from the general account).

There are special considerations for *cheque imaging*. Some financial institutions no longer return the original cashed cheques to customers, but instead provide an electronic image of cashed cheques. These are sent by email or can be accessed by the customer over the Internet. If the lawyer's financial institution provides cheque images instead of cancelled cheques, the lawyer must ensure that the images provided are of both the front and back of the cancelled cheque and can be easily read. Since there is no guarantee the financial institution will offer the images on the Internet indefinitely, lawyers should print hard copies for their records or save the images electronically in their own computer systems. If keeping them electronically, the method the lawyer chooses must allow him or her to reprint them throughout the required 10-year retention period.

To maintain *detailed duplicate deposit slips*, the lawyer should record on all copies of general and trust deposit slips the

- date the funds were deposited;
- lawyer or law firm's name if it is not pre-printed;
- bank account number if it is not pre-printed;
- source of each receipt;
- related client, if applicable; and
- amount of funds deposited.

Though not required by the Law Society, lawyers may also wish to keep copies of any invoices paid from the general account. These would include business expenses as well as payments made on behalf of clients that were later reimbursed by the client. If the lawyer's financial institution does not provide the source documents required by By-Law 9, the lawyer will be unable to meet his or her record keeping requirements and may need to switch to another financial institution that will accommodate these requirements.

6.4.2 Duplicate cash receipts book (6 years)

For every amount of cash the lawyer or law firm receives, the lawyer must prepare and keep a book of duplicate cash receipts. This is required every time a cash payment is accepted, whether it is deposited to the general or trust account. The duplicate cash receipt must contain the

- date cash was received;
- name of the person who gave the cash;
- amount of cash received;
- name of the client for whom the cash was received;

- file number, if any;
- the lawyer's signature or that of an authorized designate; and
- signature of the person who gave the cash.

Lawyers should number their accounting documents in sequence, including their duplicate cash receipts. One copy of the receipt should be given to the person who provided the cash to the lawyer, and one copy should be kept with the lawyer's accounting records. Lawyers may also want to prepare the receipt in triplicate and keep the third copy in the client file.

The lawyer must make reasonable efforts to get the signature of the person who provides the cash. The lawyer may need to explain to the individual offering cash why the signature is necessary, outlining his or her obligation under By-Law 9 and that the purpose is to prevent money laundering. Not being able to obtain that person's signature does not mean that the lawyer cannot accept the cash, but the lawyer should be wary of accepting cash from someone who does not want to sign a receipt. If the person refuses to sign the receipt after the lawyer has explained the requirements of the by-law, the lawyer should document his or her efforts to obtain a signature in accordance with By-Law 9.

A lawyer's support staff may be reluctant to accept responsibility for receipt of cash payments. A lawyer who decides to make it a policy not to accept cash or cash over a certain amount should notify prospective clients in writing before accepting retainers. Lawyers may not accept cash in the amount of \$7,500 or more, except as outlined in By-Law 9.

6.4.3 Valuable property record (10 years)

Lawyers are required to keep a record of all negotiable or valuable property (other than money) that they receive that is to be held in trust for clients. The main reason for the record is to protect the lawyer from any allegations from a client or third party that the lawyer misappropriated valuable property given to him or her for safekeeping. Lawyers should avoid holding valuable property for clients for an extended period of time and should only hold property related to the matter for which they were hired by the client. Apart from recording the valuable property, the lawyer must ensure the property is kept in a secure place, such as a safety deposit box at the financial institution. The valuable property record should

- show all property, other than money, held in trust for clients;

- describe each property and the date that the paralegal or lawyer firm took possession;
- indicate who had possession of the property immediately before the lawyer or law firm took possession;
- show the value of each property;
- indicate the client for whom each property is held in trust; and
- show the date each property is given away and to whom it is given.

7. Sample documents

The following pages show sample documents for the general and trust accounts. Examples of a duplicate cash receipts journal, the valuable property record, and a sample completed *Electronic Trust Transfer Requisition Form* have also been provided.

- Figure 1: General Receipts Journal, General Disbursements Journal, and Fees Book
- Figure 2: General Client Ledger
- Figure 3: Trust Receipts Journal, Trust Disbursements Journal, and Trust Transfer Journal
- Figure 4: Client Trust Ledger
- Figure 5: Monthly Trust Comparison
- Figure 6: Duplicate Cash Receipt
- Figure 7: Valuable Property Record
- Figure 8: Sample *Electronic Trust Transfer Requisition Form* (Form 9A)

Figure 1: General Receipts Journal, General Disbursements Journal, and Fees Book**Leslie Lawyer – General Receipts Journal**

Date 2011	Funds Received From	Amount	Method of Payment
Oct 1	ACME Bank re Bank Loan	2,5000.00	Bank Draft
Oct 7	Stephen Bell re Inv # 0116	5,000.00	Cheque
Oct 12	Angela Finelli re Inv # 0117	1,695.00	Cheque
Oct 30	Transfer from trust re Piper, Inv # 0118	2,825.00	ET # 0081
Nov 15	Stephen Bell re Inv # 0116	250.00	Cash
Nov 22	Transfer from trust re Said, Inv # 0119	1,130.00	ET # 0082
Nov 30	Stephen Bell re Inv # 0116	400.00	Cash

Leslie Lawyer – General Disbursements Journal

Date 2011	Method / Ref #	Paid To	Particulars	HST Paid	Amount
Oct 1	Cheque # 051	Lucy Landlord	Rent	130.00	1,130.00
Oct 12	ET # 0080	ABC Office Supplies	Stationery	26.00	226.00
Oct 25	Debit from account	Acme Bank	Service Fees	2.60	22.60
Nov 1	Cheque	Lucy Landlord	Rent	130.00	1,130.00

Leslie Lawyer – Fees Book

Date 2011	Inv #	Client	Fees Billed	Disburse. Billed	HST Billed	Total Billed
Oct 2	0116	Bell re small claim	5,000.00		650.00	5,650.00
Oct 10	0117	Finelli re traffic	1,500.00		195.00	1,695.00
Oct 25	0118	Piper re small claim	2,500.00		325.00	2,825.00
Nov 17	0119	Said re indictment charge	1,000.00		130.00	1,130.00

Figure 2: General Client Ledger

Leslie Lawyer – Client General Ledger

Account: BELL, Stephen re small claim						
Date 2011	Particulars	Expenses Paid	HST	Fees	Payments	Balance Owed
Oct 2	Fees – Inv # 0116		650.00	5,000.00		5,650.00
Oct 7	Client Payment				5,000.00	650.00
Nov 15	Client Payment				250.00	400.00
Nov 30	Client Payment				400.00	0.00

Account: FINELLI, Angela re traffic						
Date 2011	Particulars	Expenses Paid	HST	Fees	Payments	Balance Owed
Oct 10	Fees – Inv # 0117		195.00	1,500.00		1,695.00
Oct 12	Client Payment				1,695.00	0.00

Account: PIPER, Jane re small claim						
Date 2011	Particulars	Expenses Paid	HST	Fees	Payments	Balance Owed
Oct 25	Fees – Inv # 0118		325.00	2,500.00		2,825.00
Oct 30	From Trust				2,825.00	0.00

Account: SAID, Ali re indictment charge						
Date 2011	Particulars	Expenses Paid	HST	Fees	Payments	Balance Owed
Nov 17	Fees – Inv # 0119		130.00	1,000.00		1,130.00
Nov 22	From Trust				1,130.00	0.00

Account: SILVER, David re small claim						
Date 2011	Particulars	Expenses Paid	HST	Fees	Payments	Balance Owed
Nov 28	Filing defendant claim	175.00				175.00
Nov 28	From Trust				175.00	0.00

Account: SILVER, Susan re traffic						
Date 2011	Particulars	Expenses Paid	HST	Fees	Payments	Balance Owed
Nov 5	Parking Ticket Paymt	90.00				90.00
Nov 5	From Trust				90.00	0.00

Figure 3: Trust Receipts Journal, Trust Disbursements Journal, and Trust Transfer Journal**Leslie Lawyer – Trust Receipts Journal**

Date 2011	Funds Received From	Client	Amount	Method of Payment
Oct 12	Jane Piper	Piper re small claim	3,000.00	Cheque
Nov 1	Susan Silver	Silver re traffic	100.00	Credit Card
Nov 8	Jane Piper	Piper re small claim	1,250.00	Cheque
Nov 15	Ali Said	Said re indictment charge	21,130.00	Cert. Cheque
Nov 18	David Silver	Silver re small claim	200.00	Credit Card

Leslie Lawyer – Trust Disbursements Journal

Date 2011	Method / Ref #	Paid To	Client	Amount
Oct 30	ET # 0081	Leslie Lawyer	Piper re small claim	2,825.00
Nov 5	Cheque # 012	City of Toronto	Silver re traffic	90.00
Nov 15	Cheque # 013	Minister of Finance	Piper re small claim	100.00
Nov 22	Cheque # 014	Minister of Finance	Said re indictment charge	20,000.00
Nov 22	ET # 0082	Leslie Lawyer	Said re indictment charge	1,130.00
Nov 28	Cheque # 015	Minister of Finance	Silver re small claim	175.00

Leslie Lawyer – Trust Transfer Journal*

Date 2011	From Client	To Client	Amount	Reason
Nov 30	Susan Silver re traffic	David Silver re small claim	10.00	Unused retainer, completed matter; on Susan Silver's written direction

* In this example, Susan Silver's traffic matter is now over and she has already been fully billed for the services provided. She provided written instruction to Leslie Lawyer to transfer her remaining retainer balance from the traffic matter to her son's account for the small claim matter that Leslie Lawyer is also handling. A trust transfer entry is required for transfers between clients and not matters for the same client.

Figure 4: Client Trust Ledger

Leslie Lawyer – Client Trust Ledger

Account:	PIPER, Jane re small claim			
Date 2011	Particulars	Receipts	Disbursements	Balance in Trust
Oct 12	Retainer re small claim	3,000.00		3,000.00
Oct 30	Transfer to general Invoice # 0118		2,825.00	175.00
Nov 8	Retainer re small claim	1,250.00		1,425.00
Nov 15	Notice of garnishment		100.00	1,325.00

Account:	SAID, Ali re summary charge			
Date 2011	Particulars	Receipts	Disbursements	Balance in Trust
Nov 15	Bail advance	21,130.00		21,130.00
Nov 22	Bail payment		20,000.00	1,130.00
Nov 22	Transfer to general Invoice # 0119		1,130.00	0.00

Account:	SILVER, David re small claim			
Date 2011	Particulars	Receipts	Disbursements	Balance in Trust
Nov 18	Retainer re small claim	200.00		200.00
Nov 28	Filing defendant claim		175.00	25.00
Nov 30	Transfer from S. Silver	10.00		35.00

Account:	SILVER, Susan re traffic			
Date 2011	Particulars	Receipts	Disbursements	Balance in Trust
Nov 1	Retainer re traffic	100.00		100.00
Nov 5	Parking ticket payment		90.00	10.00
Nov 30	Transfer to D. Silver		10.00	0.00

* No trust ledger accounts were created for Angela Finelli or Stephen Bell since no money is being received in trust for them. Leslie Lawyer is simply billing these clients as services are being rendered, with no advance of a money retainer.

Figure 5: Monthly Trust Comparison

Leslie Lawyer		
<i>Trust Bank Reconciliation as at November 30, 2011</i>		
Mixed Trust Account:		
Balance per Bank Statement		\$3,533.00
Less: Outstanding Cheques (see list below)		2,175.00
Plus: Outstanding Deposits – 30Nov11		0.00
Plus: Bank Error- 11Nov11		2.00
Chq# 062 cleared as \$344.00 s/b 342.00, corrected 18Dec11 by credit memo		
Reconciled Mixed Trust Bank balance at November 30, 2011		<u>\$ 1,360.00</u>
Outstanding Cheques:		
<u>Cheque #</u>	<u>Date</u>	<u>Amount</u>
014	22Nov11	\$2,000.00
015	28Nov11	175.00
Total Outstanding Cheques:		<u>\$2,175.00</u>
Client Trust Listing as at November 30, 2011 (from clients' trust ledger balances)		
<u>File Name</u>	<u>Last Activity Date</u>	<u>Amount</u>
PIPER, Jane re small claim	15Nov11	\$1,325.00
SAID, Ali re summary charge	22Nov11	0.00
SILVER, David re small claim	28Nov11	35.00
SILVER, Susan re traffic	05Nov11	<u>0.00</u>
Total client funds in trust:		<u>\$ 1,360.00</u>
Total trust liabilities to clients at November 30, 2011		<u>\$ 1,360.00</u>
Trust Comparison as at November 30, 2011		
Total Reconciled Trust Bank Balance		\$ 1,360.00
Total of unexpended balances per Clients' Trust Ledger		\$ 1,360.00

Figure 6: Duplicate Cash Receipt

DUPLICATE CASH RECEIPT		# 0001
Date _____		
Received from _____ the amount of \$ _____		
On behalf of _____ for file # _____		
_____ Signature of Payor [person paying cash]	_____ Authorized signature on behalf of [name of firm]	

Figure 7: Valuable Property Record

Client	Description of Property	Date Received	Received From	Value of Property	Given To	Date Given
BELL, Stephen	pearl necklace	01Dec10	BELL, Stephen	530.00	BELL, Allison	02Jan11
SILVER, Susan	silver jewellery	01Jan11	SILVER, Susan	475.00		
FINELLI, Angela	collector plates	07Feb11	FINELLI, Angela	320.00		

Figure 8: Sample Electronic Trust Transfer Requisition Form (Form 9A)

[sample] FORM 9A		
ELECTRONIC TRUST TRANSFER REQUISITION Requisition #ET0081		
Amount of funds to be transferred: \$2,825.00		
Re:	PIPER small claim	
Client:	Jane Piper	
File No.:	10-47	
Reason for payment:	Fees (\$2,500.00) disbursements (\$0.00) and HST (\$325.00) billed to client	
Trust account to be debited:	Name of financial institution:	Bank of Ontario
	Account number:	123456789
	Name of Recipient:	Leslie Lawyer, General Account
Account to be credited:	Name of financial institution:	Bank of Ontario
	Branch name and Address	20 Downtown St., City, ON Z9Y 2T2
	Account number:	987654321
Person requisitioning electronic trust transfer:	Leslie Lawyer	
<u>October 30, 2011</u>	<u>Leslie Lawyer</u>	
Date	Signature	
Additional transaction particulars:		
Person entering details of transfer:		
Name:	Sandy Secretary	<u>Sandy Secretary</u>
		Signature
Person authorizing transfer at computer terminal:		
Name:	Bobby Bookkeeper	<u>Bobby Bookkeeper</u>
		Signature

Civil Litigation

Jurisdiction and organization of the courts of Ontario

1. Organization of the courts of Ontario

The *Courts of Justice Act (CJA)* establishes the organization of the courts in Ontario. The *CJA* is in eight parts (although Part III was repealed more than a decade ago), and these materials will focus on the first two parts, which address the Court of Appeal for Ontario and the Court of Ontario, respectively.

The administration and management of the court system is divided into the following eight regions:

Region	Judicial Centre
1. Northwest	Thunder Bay
2. Northeast	Sudbury
3. East	Ottawa
4. Central East	Newmarket
5. Toronto	Toronto
6. Central West	Brampton
7. Central South	Hamilton
8. Southwest	London

With the exception of Toronto, these eight regions are roughly the same size. The boundaries of the regions are fixed by *Designation of Regions*, R.R.O. 1990, Reg. 186, made under the *CJA*, and they can be adjusted from time to time as population changes require. Every judge has jurisdiction throughout Ontario although, for administrative reasons, judges of the Court of Ontario are assigned to sit in a particular region (*R. v. Feige*). A designated senior judge is responsible for administering the judiciary within his or her region. This regional senior judge works with the chief administrator of the region, the regional crown attorney, and representatives of the regional bar to try to respond to the specific needs within the particular region.

Although the populations may be roughly the same size, geographically the regions are quite different. Legal counsel should be aware of the local differences when travelling outside of his or her local area. Local bench and bar committees of the local law associations often have input to try to solve problems with the local regional judiciary, especially respecting scheduling and administrative matters.

1.1 Part I – Court of Appeal for Ontario

The Court of Appeal is a “superior” court of record, which means that it exercises inherent jurisdiction, that is, jurisdiction that arises from historical precedent and

does not depend on statutory enactment. However, the Court of Appeal has additional powers that are expressly conferred upon it by statute.

The Chief Justice of Ontario is the president of the court (s. 3(1)(a)) and has general supervision and direction over the sittings of the Court of Appeal and the assignment of the judicial duties of the court (s. 5(1)). In addition to the Chief Justice, the *CJA* provides for an Associate Chief Justice and 14 other judges to constitute the Court of Appeal (s. 3(1)). The number of judges may be increased by regulation (s. 3(2)). In 2008, for example, the Lieutenant Governor in Council increased the number of additional Court of Appeal judges to 21 (O. Reg. 72/08, made under the *CJA*, amending *Number of Judges*, O. Reg. 502/99, made under the *CJA*).

The Court of Appeal exercises the general appellate jurisdiction of the Superior Court of Justice under s. 6 of the *CJA*. An appeal lies to the Court of Appeal from a final order of a judge of the Superior Court of Justice (described below), except for an order from which the appeal lies to the Divisional Court (s. 6(1)(b)). Most Superior Court judges are also appointed *ex officio* Court of Appeal justices. The Court of Appeal also has jurisdiction to hear an appeal from an order of the Divisional Court on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules (s. 6(1)(a)). Finally, the Court of Appeal has original jurisdiction to determine any question referred to it by the Lieutenant Governor in Council (i.e., the provincial Cabinet), including constitutional references (s. 8).

Proceedings in the Court of Appeal are heard and determined by not fewer than three judges sitting together and always by an uneven number of judges (s. 7(1)). Motions in the Court of Appeal are heard and determined by one judge, with the exception of a motion for leave to appeal, a motion to quash an appeal, or any other motion specified by the *Rules of Civil Procedure (Rules) (CJA, ss. 7(2)–(3))*. However, these rules are not absolute. A single judge may adjourn a motion to a panel of the Court of Appeal, and where a motion is heard by one judge, a panel of the Court of Appeal may, on motion, set aside or vary the decision of the judge (ss. 7(4)–(5)).

The Court of Appeal issued a practice direction, last updated in November 2008, advising counsel to refer to

judges in the court in the gender neutral form of “Justice,” as opposed to “Mister/Madam Justice” (Practice Direction Concerning Civil Appeals in the Court of Appeal, issued October 2003).

1.2 Part II – Court of Ontario

The Court of Ontario consists of two divisions—the Superior Court of Justice and the Ontario Court of Justice (s. 10(2)).

1.2.1 Superior Court of Justice

The Superior Court of Justice is a superior court of both civil and criminal jurisdiction. It has all the jurisdiction, power, and authority historically exercised by courts of common law and equity in England and Ontario (s. 11).

The Superior Court of Justice consists of a Chief Justice (who is also its president), an Associate Chief Justice, a regional senior judge for each region, a senior judge for the Family Court, and such number of judges as is fixed by regulation (s. 12). O. Reg. 256/08, made under the *CJA*, fixed this number at 231, of whom 29 are appointed as members of the Family Court.

The various administrative responsibilities of the Chief Justice are set out in s. 14. Each region has a regional senior judge who exercises the powers and performs the duties of the Chief Justice in his or her particular region.

The Superior Court of Justice exercises original or trial jurisdiction in civil matters. Every proceeding in the Superior Court is heard and determined by one judge (s. 16). Judges of this court may be addressed as “Your Honour” or as “[Mister or Madam] Justice [last name]” (s. 86(1)). The terms “My Lord” and “My Lady,” formerly used to address judges, are now generally considered obsolete, although any judge appointed before September 1, 1990, may elect to be addressed in the prior manner (s. 86(2)).

In addition to its original or trial jurisdiction in civil matters, the Superior Court of Justice also has some jurisdiction in appeals, including an appeal from an interlocutory order of a master and an appeal from the assessment of costs in proceedings in the Superior Court of Justice on an issue in respect of which an objection has been served pursuant to the *Rules* (s. 17).

Judicial officials called “masters” also staff the Superior Court. While the Governor General in Council appoints judges under s. 96 of the *Constitution Act, 1867*, masters are appointed provincially and sit only in Toronto, Ottawa, and Windsor. There is no provision in the *CJA* for the appointment of new masters, with the exception of case management masters (s. 86.1). Masters have jurisdiction under r. 37.02(2) to hear most motions,

except a motion reserved to a judge by statute or rule; to set aside, vary, or amend the order of a judge; to abridge or extend time prescribed by an order that a master could not have made; for judgment on consent in favour of or against a party under disability; relating to the liberty of a subject; under s. 4 or 5 of the *Judicial Review Procedure Act (JRPA)*; or in an appeal. While judges have jurisdiction to hear any motion in a proceeding, in the centres where masters are present, a motion that is within the jurisdiction of the master is usually heard by a master. In such centres, a motion made “to the court” will be heard by a master. Case management masters have the jurisdiction of a master conferred by the rules of court, as well as the case management jurisdiction conferred by the rules of court (s. 86.1(6)).

Assessment officers are appointed pursuant to s. 90(1) of the *CJA* and have jurisdiction to assess costs of any court proceeding. Every master is also an assessment officer (s. 90(2)).

Registrars and other administrative officials are appointed under Part III of the *Public Service of Ontario Act, 2006*. Registrars now exercise considerable authority to make certain specified orders on consent, except where one of the parties is under a disability (r. 37.02(3)).

(a) Divisional Court

The Divisional Court is a branch of the Superior Court of Justice, and it exercises primarily appellate jurisdiction pursuant to s. 19 of the *CJA*. An appeal lies to the Divisional Court from a final order of a judge of the Superior Court of Justice for a single payment or periodic payments that amount to no more than \$50,000 exclusive of costs; an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the *Rules*; and a final order of a master or case management master. The \$50,000 limit is effective for appeals filed after October 1, 2007 (for appeals filed prior to that date, the previous monetary limit of \$25,000 applies under the transition provisions of s. 19(1.1)).

In addition to its appellate functions, the Divisional Court also exercises original jurisdiction in applications for judicial review of administrative action, pursuant to the *JRPA*.

The Chief Justice of the Superior Court of Justice is the Chief Justice and president of the Divisional Court (s. 18(2)). Every judge of the Superior Court of Justice is also a judge of the Divisional Court (s. 18(3)), and in practice, Superior Court judges rotate through the Divisional Court from time to time as the Chief Justice designates.

Proceedings in the Divisional Court are heard and determined by three judges sitting together, though in special circumstances set out in s. 21(2) one judge may preside. A motion in the Divisional Court must be heard by one judge (s. 21(3)), although the judge may adjourn the motion to a panel of the Divisional Court (s. 21(4)). Where the motion is heard by one judge, a panel of the Divisional Court may, on motion, set aside or vary the decision of the judge (s. 21(5)).

An appeal to the Divisional Court must be heard in the region in which the order appealed from was made, unless the parties agree otherwise or the Chief Justice of the Superior Court of Justice orders otherwise because it is necessary to do so in the interest of justice (s. 20(1)). Any other proceeding in the Divisional Court, such as a judicial review where it exercises original jurisdiction, may be brought in any region (s. 20(2)).

(b) Small Claims Court

The Small Claims Court is another branch of the Superior Court of Justice, and its jurisdiction is set out in s. 23 of the *CJA*. This court is meant to provide a more accessible and less formal way of litigating disputes, where the amount of money claimed or the value of personal property to be recovered does not exceed the amount prescribed by regulation, currently \$25,000 (*Small Claims Court Jurisdiction and Appeal Limit*, O. Reg. 626/00, made under the *CJA*). The Small Claims Court does not have jurisdiction to try actions that exceed this monetary limit, even with the consent of the parties. It does not have jurisdiction to grant equitable relief (s. 96(3)) or declaratory relief (s. 97).

Similar to the Divisional Court, the judicial head and the president of the Small Claims Court is the Chief Justice of the Superior Court of Justice (s. 22(2)), who is responsible for assigning the judges to the court. A proceeding in the Small Claims Court is heard and determined by one judge of the Superior Court of Justice (s. 24(1)). Every judge of the Superior Court of Justice is also a judge of the Small Claims Court (s. 22(3)). Deputy judges may also be appointed for a renewable three-year term pursuant to s. 32 of the *CJA*. A deputy judge is a lawyer who has been appointed by a regional senior judge of the Superior Court of Justice with the approval of the Attorney General (s. 32(1)).

The Small Claims Court has a statutory mandate to hear and determine all questions of law and fact in a summary way and to make such order as it considers “just and agreeable to good conscience” (s. 25). To ensure that the court meets this mandate, s. 27 relaxes the rules of evidence and empowers the court to admit any oral testimony and any document or other thing, so long as

the evidence is relevant to the subject matter of the proceeding. Thus, despite the common-law prohibition against hearsay evidence, it is admissible here as a matter of course, with two exceptions: the court will not admit testimony, documents, or other things that would otherwise be inadmissible by reason of any privilege under the law of evidence (i.e., lawyer-client or public interest privilege) or that are inadmissible by any statute (s. 27(3)).

In general, the *Rules of the Small Claims Court*, O. Reg. 258/98, made under the *CJA*, govern the procedure of the court.

An appeal lies to the Divisional Court from a final order of the Small Claims Court in an action for the payment of money in excess of \$2,500 (excluding costs) or the recovery of personal property exceeding \$2,500 in value; no appeal is permitted where the amount does not meet that minimum requirement (s. 31; *Small Claims Court Jurisdiction and Appeal Limit*, s. 2).

In the case of a counterclaim, the court can hear a case with a \$25,000 claim and a \$25,000 counterclaim, thereby putting \$50,000 in dispute in the Small Claims Court.

1.2.2 Ontario Court of Justice

The Ontario Court of Justice has as its head and president the Chief Justice of the Ontario Court of Justice (s. 35(a)). The court has a regional senior judge for each region. The court also includes the Associate Chief Justice and the Associate Chief Justice/Co-ordinator of Justices of the Peace, regional senior judges, provincial judges as appointed under s. 42(1), and provincial judges who were assigned to the former Provincial Court (Criminal Division) or the Provincial Court (Family Division) (s. 35).

The Chief Justice is responsible for directing and supervising the sittings of the court and the assignment of its judicial duties (s. 36(1)). The Chief Justice must assign every judge of the Ontario Court of Justice to a region and may re-assign judges from one region to another as required. Each regional senior justice exercises the powers of the Chief Justice in his or her region (s. 36(2)).

Judges of this court exercise the powers and perform the duties that any Act of the Parliament of Canada confers on a provincial court judge when sitting in the Provincial Division (s. 38(1)). The judges also perform any function assigned to them by or under the *Provincial Offences Act*, the *Family Law Act*, the *Children’s Law Reform Act*, the *Child and Family Services Act*, or any other statute (s. 38(2)). This court is also the youth court for the

purposes of the *Young Offenders Act* and a youth justice court for the purposes of the *Youth Criminal Justice Act* (s. 38(3)). Every proceeding in the Ontario Court of Justice is heard and determined by one judge (s. 39(1)). A justice of the peace may preside over the Ontario Court of Justice in a proceeding under the *Provincial Offences Act* (s. 39(2)). If no provision is made concerning an appeal from an order of the Ontario Court of Justice, the appeal generally lies to the Superior Court of Justice (s. 40).

1.2.3 Specialized courts: Toronto Region

As part of the trend towards greater efficiency in the civil justice system in Ontario, specialized procedures have been developed and adopted for particular types of proceedings in the Toronto Region. These procedures have been put in place by means of “practice directions,” which are directives issued by the court providing for specific procedures to be followed.

To date, specialized courts have been developed in Toronto for commercial, estates, and family law matters. Practice in relation to matters on the Commercial List or in the Estates List is briefly described below. Practice in the Family Court will be addressed in the Family Law materials.

(a) The Commercial List

The Commercial List is a specialized branch of the Superior Court of Justice in the Toronto region for the hearing of certain actions, applications, and motions involving issues of commercial law. Judges of that court who have an interest or expertise in commercial matters and preside continuously in monthly cycles over matters that qualify for the Commercial List administer it.

The Commercial List is governed by the frequently revised Practice Direction Concerning the Commercial List, Toronto, the current version of which came into force on June 10, 2010. One should refer to it for particulars of the procedure for matters on the Commercial List (R. 37).

The practice direction specifies the types of matters that may be listed on the Commercial List, including, but not limited to, applications and actions pertaining to the following provincial and federal legislation and subject matter:

- *Bank Act*;
- *Bankruptcy and Insolvency Act*;
- *Bulk Sales Act*;
- *Business Corporations Act* (Ontario);
- *Canada Business Corporations Act*;
- *Companies’ Creditors Arrangement Act*;

- *Credit Unions and Caisses Populaires Act, 1994*;
- *Limited Partnerships Act*;
- *Pension Benefits Act*;
- *Personal Property Security Act*;
- *Securities Act*;
- *Winding-up and Restructuring Act*;
- receivership applications and all interlocutory motions to appoint or give directions to receivers and receiver/managers;
- *Credit Unions and Caisses Populaires Act* relating to credit unions and caisses populaires under administration or that are being wound up or liquidated; and
- such other commercial matters as a judge presiding over the Commercial List may direct, including suitably complex cases under the *Arthur Wishart Act (Franchise Disclosure), 2000* and suitable commercial matters under the *International Commercial Arbitration Act, Arbitration Act, 1991*, and *Commercial Arbitration Act*.

A practice direction dated March 1, 2011, now provides for an Authorities Book for Commercial List matters, which obviates the necessity of reproducing or filing any authority listed in the Authorities Book as part of a party’s own book of authorities.

The objective of the Commercial List is the rapid resolution of cases having a significant commercial component and, in particular, cases in which the outcome can potentially affect persons who are not parties to the immediate action. Judges presiding over matters on the Commercial List are encouraged not to reserve judgments for a lengthy time. It has been suggested that, at least in theory, the Commercial List relies on an implicit contract between the bench and the bar to foster the expeditious disposition of complex corporate, commercial, and insolvency cases by commercially sophisticated judges.

(b) The Estates List

The Estates List is concerned with contested matters involving wills, powers of attorney, trust, estates, *Succession Law Reform Act* claims, applications relating to mental incompetency, and the like in Toronto. The Estates List is also governed by the Practice Direction Concerning the Estates List of the Superior Court of Justice in Toronto, the current version of which came into force on April 1, 2009. The practice direction prescribes the matters to be heard on the Estates List as follows:

- all matters arising under RR. 74 and 75 of the *Rules*.

- applications under r. 14.05 regarding estates, wills, and trusts, including applications for advice under s. 60 of the *Trustee Act*.
- applications relating to *inter vivos* trusts, whether under r. 14.05, the *Variation of Trusts Act*, or otherwise.
- proceedings involving the proof or validity of wills, including lost wills.
- proceedings concerning the administration of estates.
- summary procedures for claims against estates pursuant to ss. 44 and 45 of the *Estates Act*.
- passing of accounts of estate trustees or any other person acting in a fiduciary capacity, including guardianships and those acting under powers of attorney.
- applications under the *Succession Law Reform Act*.
- proceedings under the *Substitute Decisions Act, 1992*, including proceedings under that *Act* involving powers of attorney.
- applications for the appointment of a guardian of property of a child under s. 47 of the *Children's Law Reform Act* if brought in the Superior Court of Justice.
- appeals from the Consent Capacity Board under the *Health Care Consent Act, 1996* or the *Mental Health Act*.
- proceedings under the *Declarations of Death Act, 2002* or *Absentees Act*.
- proceedings under the *Charities Accounting Act, Charitable Gifts Act, or Religious Organizations' Lands Act*.
- applications for the extension of time to make an election under s. 6(1) of the *Family Law Act* regarding the interest of a spouse under s. 5(2) of that *Act*.
- such other matters concerning estate, trust, or capacity law as a judge may direct be heard on the Estates List. In considering whether to make such a direction, the judge may take into account the current and expected case load of matters on the Estates List.

Rule 74 governs the procedure for non-contentious estate matters; R. 75 governs the procedure for contentious estate matters.

1.2.4 Case management

Initially, Rule 77 on civil case management was introduced in 1997 with the express purpose of establishing a system throughout Ontario that

- reduces unnecessary cost and delay in civil litigation;
- facilitates early and fair settlements; and

- brings a proceeding expeditiously to a just determination while allowing sufficient time for the conduct of the proceeding.

The rule has now been repurposed to provide for case management of only those proceedings for which a need of the court's intervention is demonstrated and only to the degree that is appropriate, as determined by the criteria set out in R. 77 (r. 77.01(1)). Subject to certain exceptions set out in r. 77.02(2), the rule applies to actions and applications commenced in or transferred to Ottawa, Toronto, and Windsor (the County of Essex) on or after January 1, 2010, that have been assigned to case management by judicial order (r. 77.02(2(1))).

On consent, the proceeding may be assigned to case management if the court considers it an appropriate case to do so (r. 77.05(1)). Or, if there is no consent, after the first defence has been filed, a party, judge, or case management master may initiate an assignment of the proceeding to case management (r. 77.05(2)).

The factors the court is to consider in an assignment to case management are set out in r. 77.05(4):

- the purpose of the case management rule;
- the complexity of the issues of fact and law;
- the importance to the public of the issues of fact and law;
- the number and type of parties or prospective parties, and whether they are represented;
- the number of proceedings involving the same or similar parties or causes of action;
- the amount of court intervention that the proceeding is likely to require;
- the time required for discovery, if applicable, and for preparation for trial or hearing;
- in the case of an action, the number of expert and other witnesses;
- the time required for the trial or hearing; and
- whether there has been substantial delay in the conduct of the proceeding.

In appropriate cases, the Chief Justice or the Associate Chief Justice may assign a single judge to direct all case-managed steps in the proceeding (r. 77.06(1)). This judge cannot be the judge at the trial or hearing unless all parties consent in writing (r. 77.06(2)).

Motion procedure is governed by the practical requirements of the situation, and if appropriate, motions can be brought without supporting material or a motion record. They may be dealt with in writing, by personal attendance, by fax, or by telephone or video conference (r. 77.07(4)).

Another of the streamlined steps is that the judge or case management master may provide that the order on motion does not need to be formally prepared, signed, or entered, unless an appeal or motion for leave to appeal is brought (r. 77.07(6)).

The method for judicial control in case management is the case conference, which can be convened at the initiative of the judge or case management master or on the request of a party (r. 77.08(1)). In appropriate cases, the court may require the attendance of the parties at the case conference or that they be available by telephone (r. 77.08(2)).

At the case conference, the court has broad powers to manage the proceeding, including establishing or amending a timetable (r. 77.08(3)). Although the formerly prescribed form of timetable, the old Form 78A, is no longer required, it remains a useful guide to the preparation of a timetable.

If notice has been given, the court may make procedural orders, convene a pre-trial conference, or give directions. A judge may also grant interlocutory relief or convene a hearing (r. 77.08(5)).

Although the *Rules* apply to all case management cases, R. 77 prevails in the event of a conflict with any other rule of the *Rules* (r. 77.02(4)).

The court also has powers to require the parties to appear or participate in a conference call to deal with any case management issue or a failure to comply with a case management order or the *Rules* (r. 77.04(2)).

There are transitional rules that preserve the former practice for actions commenced under the dramatically different prior case management regimes in Ottawa, Toronto, Windsor, and Algoma (r. 77.09). In particular, timetables established under the former RR. 77 and 78 remain in effect and are fully enforceable (r. 77.09(4)).

1.2.5 Simplified procedure

Under R. 76, a simplified procedure applies on a mandatory basis to any action where the plaintiff is claiming \$100,000 or less (exclusive of interest and costs) for money or real or personal property (r. 76.02(1)). It does not apply to class proceedings and construction liens (although trust claims under the *Construction Lien Act* can be brought under the simplified procedure) and case-managed actions under R. 77 (r. 76.01).

It also can be used on an optional basis where the amount claimed by the plaintiff exceeds \$100,000 if the defendant does not object to the simplified procedure in the statement of defence. Even if the defendant objects, the plaintiff can continue under the simplified procedure by abandoning the amount of the claim in excess of \$100,000 in the reply (r. 76.02(5(a))).

The purpose of the rule is to reduce the cost of litigating such claims.

Simplified procedure motions use a specific form (Form 76B). No cross-examination on affidavits filed is permitted (r. 76.04(1)2) nor can witnesses be examined for the motion under r. 39.03 (r. 76.04(1)3).

There is also a timed requirement that mandates that there be a settlement discussion between the parties (usually between counsel) and a discussion as to whether all documentary evidence has been produced within 60 days after the filing of the first defence (r. 76.08).

The party's affidavit of documents must have a completed Schedule D, listing the names and addresses of persons who might reasonably be expected to have knowledge of the matters in issue in the proceeding (r. 76.03(2)).

Oral examinations for discovery were initially prohibited in proceedings subject to the simplified procedure. Now a party can conduct a total of up to two hours of discovery, regardless of the number of parties (r. 76.04(2)). Written discovery is not permitted (r. 76.04(1)).

A party who sets the action down for trial can choose to have the trial conducted under the ordinary procedure by delivering a trial record in accordance with r. 48.03. Alternatively, the party can choose a summary trial by delivering a trial record in accordance with r. 76.11(4).

Summary trial is a unique feature of the simplified procedure. The parties must introduce their evidence by way of affidavit and are given 10 minutes to examine the deponent, at the summary trial. A party adverse in interest may cross-examine the deponent, and the producing party may re-examine for a maximum of 10 minutes. All of a party's cross-examinations of all witnesses must be completed within 50 minutes (r. 76.12(1)6). Argument is limited to 45 minutes for each party (r. 76.12(1)9). These times can be adjusted at the pre-trial (r. 76.10(7)) or by the trial judge (r. 76.12(2)). Judgment is to be given by the judge at the conclusion of the trial (r. 76.12(4)).

The lawyer-client relationship

1. Introduction

This chapter will introduce certain fundamental principles of the lawyer-client relationship that will be expanded on in subsequent chapters.

2. The retainer

While a formal written retainer is not generally required to establish a lawyer-client relationship, it is always recommended. The written retainer provides clear evidence of the relationship and of the lawyer's authority to act for the client. The nature of the lawyer-client relationship may change over time. The written retainer should be amended as circumstances dictate in order to accurately evidence the current relationship.

The term "retainer" is, however, used to describe more than a formal written agreement between a lawyer and client. "Retainer" may refer to

- the act of authorizing or employing a lawyer;
- the document by which such employment is evidenced;
- a fee given to secure the services of a lawyer; or
- a deposit to be held on account of future fees and disbursements.

On occasion a lawyer may accept a joint retainer. A joint retainer is when a lawyer accepts employment from more than one client in a matter or transaction (*Rules of Professional Conduct*, r. 2.04(6)).

When a lawyer is retained to provide his or her professional services to a client, the lawyer is required by Part III (client identification and verification) of By-Law 7.1, made under the *Law Society Act*, to obtain information about the identity of the client and any third party directing or instructing the client or with the authority to do so (By-Law 7.1, s. 23). When the lawyer engages in or gives instructions in respect of the receiving, paying, or transferring of funds, the lawyer is required to verify the identity of the client and any third party (s. 23(4)).

Once the lawyer-client relationship is established, the lawyer must perform any legal services undertaken on a client's behalf to the standard of a competent lawyer. "Competent lawyer" means a lawyer who has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client, including communicating at all stages of a matter

in a timely and effective manner that is appropriate to the age and abilities of the client (*Rules of Professional Conduct*, rr. 2.01(1)–(2)).

3. Authority to act

As a lawyer, you must ensure that you have authority to act for your client before taking any steps on the client's behalf. By commencing or continuing a legal proceeding, a lawyer is deemed to have the authority of the client. The lawyer will face certain consequences if he or she acts without the client's authority even if the lawyer does so unknowingly.

Subrule 15.02(1) of the *Rules of Civil Procedure* enables a person served with an originating process to deliver a request requiring the lawyer named in the originating process to deliver a notice declaring whether the lawyer commenced or authorized the commencement of the proceeding or the client authorized the commencement of the proceeding. If a lawyer has commenced a proceeding without the authority of his or her client, a motion may be brought to stay or dismiss the proceeding pursuant to r. 15.02(4). In addition, the court may order the lawyer to personally pay the costs of the proceeding. Finally, if the lawyer acted without authority, the lawyer may be liable in an action for damages for breach of warranty of authority.

4. Status of client

A lawyer-client relationship presumes that the client has the necessary mental ability to make decisions about his or her legal affairs and give instructions to the lawyer. Every lawyer must ensure that the client is in fact capable of giving instructions and has status to appear before and be heard by the court. The client must be at least 18 years old, mentally capable, and not an undischarged bankrupt.

Where a lawyer is retained by someone or something other than an individual plaintiff or defendant, particular concerns must be addressed. For example, if the client is a corporation, the lawyer must be satisfied that the company was incorporated and that a legitimate board of directors authorized the lawyer's retainer. The lawyer may accept instructions from a duly authorized officer or employee of the corporate plaintiff without need for the corporation to pass a resolution expressly authorizing the litigation. If an agent representing a principal retains the lawyer, the lawyer must ensure that the agent has his or her principal's authorization to do so. Similarly, a lawyer

retained by trustees to represent an estate must ensure that he or she has the authorization of all the trustees to act. Lawyers must be especially careful in situations where an individual dies after the litigation is commenced; the lawyer's client no longer "exists," and the lawyer may only continue acting if the estate (through the legal representative) authorizes the lawyer.

5. Communicating with clients

Counsel must communicate to the client that litigation is very expensive, time consuming, and stressful. Before commencing a proceeding, counsel must understand the client's interests, priorities, and desired outcomes. For example, does the client have a long-standing business relationship with the person he or she proposes to sue, and does the client prefer to continue this business relationship? The answer to these questions may alter the lawyer's course of conduct.

Counsel must explain that the litigation process does not start with the issuance of a statement of claim and end with a trial. There are several intermediate steps before trial. For example, the client will be an active participant in the production of a discovery plan; the collection of documents, including e-discovery; discoveries; and mediation.

6. Encourage compromise or settlement and awareness of ADR

A lawyer should keep the client informed of alternatives to litigation at all stages of a proceeding. The fact that litigation is an expensive and lengthy process in which it is possible no party will achieve what it desires should be discussed with the client from the outset. All lawyers have a duty, pursuant to r. 2.02(2) of the *Rules of Professional Conduct*, to discourage the client from commencing useless legal proceedings and to encourage settlement. Lawyers are also required to consider the appropriateness of alternative dispute resolution (ADR) and, if appropriate, inform their clients of the availability of ADR options. This duty is expressly set out in r. 2.02(3) of the *Rules of Professional Conduct*. Since ADR is now mandatory in some areas of practice, the

lawyer may on occasion have both a statutory obligation as well as an ethical duty to advise on these options.

7. Withdrawal of service

Unlike the client who is entitled to terminate the lawyer-client relationship at any time and for any reason, a lawyer shall not withdraw from representation of a client unless there is justifiable cause for terminating the relationship. While there are limited circumstances where a lawyer must withdraw his or her services (*Rules of Professional Conduct*, r. 2.09(7); By-Law 7.1, ss. 24 and 27), a lawyer is prohibited from withdrawing from representation of a client without good cause and notice to the client as appropriate in the circumstances and as provided for in r. 2.09 of the *Rules of Professional Conduct*. Subject to particular considerations that apply to the withdrawal from criminal proceedings, the circumstances in which a lawyer may withdraw from representation of a client include where

- there has been a serious loss of confidence between the lawyer and the client; or
- after reasonable notice, the client fails to pay disbursements or fees, unless serious prejudice to the client would result.

In practice, it is essential that the client be given enough reasonable notice to retain another lawyer, especially if a trial date is pending. This perhaps is the most important aspect with regard to the withdrawal of service. The court may not allow an "eleventh hour" withdrawal without sufficient cause.

Rule 15.04 of the *Rules of Civil Procedure* sets out the process to follow in bringing a motion for removal as lawyer of record, which should only be pursued by a lawyer after the requirements of r. 2.09 of the *Rules of Professional Conduct* have been satisfied. Upon withdrawal, the lawyer shall also comply with rr. 2.09(8)–(9) of the *Rules of Professional Conduct*. These subrules deal with the manner of withdrawal including delivering the client's papers and property, rendering an account for outstanding fees and disbursements, and related matters.

Preliminary matters to be considered before commencing proceedings

1. Introduction

This chapter addresses preliminary matters that should be considered before commencing proceedings, including

- elements of a cause of action;
- demands that must be made before an action can be commenced;
- notices that must be given before an action can be brought;
- notices of a constitutional question that are required;
- the limitation period within which the action must be commenced;
- statutory limitations on liability;
- claims for interest; and
- the appropriate manner and forum for proceeding.

2. Causes of action

A cause of action is a set of facts and legal elements that justifies the right to sue to obtain damages, property, or the enforcement of a right.

There are a number of causes of action that are usually based in contract law or in tort law (non-intentional torts and intentional torts). Each cause of action has a required set of elements. For example, in negligence, the plaintiff must prove five elements:

- duty of care;
- breach of the duty of care;
- causation;
- proximity; and
- damages.

Other examples of causes of action include assault, abuse of process, defamation, interference with economic relations, and misfeasance of public office.

New causes of action can be established by the common law. For example, in 2012, the Ontario Court of Appeal created a new tort for intrusion upon seclusion in *Jones v. Tsige*. This new tort is capped by a \$20,000 award of damages and consists of three elements:

- The conduct must be intentional.
- The defendant must have invaded the plaintiff's private affairs without justification.

- A reasonable person would regard this invasion of privacy as highly offensive and causing distress, humiliation, or anguish.

Proof of economic loss is not an element of this cause of action, but factors to consider in awarding damages include the nature of the intrusion; the effect on the plaintiff's health, welfare, or financial position; and whether the defendant has offered to make amends.

3. Demand before action

In certain cases, an action brought before a demand is made will be premature since there has not been an accrual of the cause of action. The following are examples of cases where the right to commence a proceeding is contingent upon a demand being made:

- Where the defendant is chargeable on a collateral promise to pay on demand, e.g., on a covenant by a surety, a demand must be made before an action can be brought.
- After a demand is made against it, the beneficiary of an agreement to indemnify (wherein one party agrees to hold another party harmless for any damages suffered) can commence an action to enforce the agreement even before the beneficiary has been required to pay out any money, because the liability to indemnify arises when a demand is made.
- Demand is also necessary in order to obtain the return of goods in the possession of a bailee, unless the property was wrongfully taken out of the possession of the claimant.
- Demand for payment of a bill of exchange or promissory note is necessary in order to obtain recourse against the endorsers or, in the case of a bill, against the drawer.
- Production for payment of a cheque is essential in order to prove dishonour of the cheque (unless excused by s. 91 of the *Bills of Exchange Act*). The plaintiff has no cause of action against the maker until the cheque has been presented for payment at the bank on which it was drawn and dishonoured by non-payment.

Certain statutes also require that a demand be made before a right to commence an action arises. For example, s. 2 of the *Solicitors Act* requires that a lawyer wait at least one month after delivery of his or her bill for payment before commencing an action for recovery of fees, charges, or disbursements.

4. Notice required by statute

Several statutes require notice to be given before an action or proceeding can be brought. The following are some examples:

- Any person who would be affected by a proposed distribution to creditors of the debtor's money and property may object to the sheriff's proposed allocation by advising the sheriff in writing of the objection and the facts and reasons on which the person relies in objecting. An objection must be received by the sheriff within 10 days after all copies of the schedule of the proposed distribution have been served, or within such longer period as the judge may allow. No more than eight days after filing an objection, the objector shall apply to the judge for an order resolving the matter in dispute and obtain from the court an appointment for a hearing on the matter (*Creditors' Relief Act, 2010*, ss. 11(4)–(5) and 12(1)).
- The registered owner of lands subject to a plan for expropriation may elect to have the compensation to which the owner is entitled assessed, by serving notice in writing upon the expropriating authority within 30 days after the owner was served with the notice of expropriation (*Expropriations Act*, ss. 10(1)–(2)).
- Written notice of any claim and the injury complained of due to the failure of the Ministry to keep a King's Highway in repair must be served within 10 days after the happening of the injury before an action for damages can be commenced (*Public Transportation and Highway Improvement Act*, ss. 33(2) and (4)).
- A right of re-entry or forfeiture in a lease is not enforceable unless the lessor serves notice specifying the particular breach complained of and, provided the breach can be remedied, requiring the lessee to remedy the breach (*Commercial Tenancies Act*, s. 19(2)).
- No action for libel in a newspaper or in a broadcast may be initiated unless the plaintiff serves written notice specifying the matter complained of within six weeks after learning of the alleged libel (*Libel and Slander Act*, s. 5(1)).
- Notice of the failure of a municipality to keep a highway or bridge in repair must be sent within 10 days after the happening of the injury. The same notice requirement applies to any person who wants to sue a municipality for injuries caused by ice or snow on a sidewalk. In both instances, the municipality must be given written notice of the claim and the injury complained of within 10 days after the occurrence of the injury (*Municipal Act, 2001*, s. 44(10)).
- Certain proceedings against the Crown cannot be commenced until at least 60 days after the claimant has served notice of the claim on the Crown with sufficient particulars to identify the occasion out of

which the claim arose (*Proceedings Against the Crown Act*, s. 7).

- No action shall be commenced against certain public authorities, including a police officer, in relation to the execution of a warrant issued by a justice of the peace or clerk of a small claims court until at least six days after service of the notice of demand (*Public Authorities Protection Act*, s. 6).
- A proceeding for damages arising from the construction, operation, or maintenance of main pipes or conduits for carrying or conveying any public utility cannot be commenced unless written notice of the claim and its particulars is given within one month after the expiration of the calendar year in which the injury was sustained (*Public Utilities Act*, s. 56(6)).
- An injured worker entitled to receive benefits under the *Workplace Safety and Insurance Act, 1997* or to receive compensation under the laws of another jurisdiction must give notice of the option elected within three months. An employer must give notice to the Workplace Safety and Insurance Board within three days after learning of an accident to a worker if the accident necessitates health care or results in the worker not being able to earn full wages. A worker must file a claim for benefits as soon as possible and within six months after the accident, or after the worker learns that he or she suffers from an occupational disease (*Workplace Safety and Insurance Act, 1997*, ss. 20(3), 21(1), and 22(1)).
- No action may be made against a carrier unless written notice of damage is sent within three days of the receipt of the baggage and within seven days of the receipt of the cargo or, in case of delay, within 14 days after the baggage or cargo has been placed at the complainant's disposal (*Carriage by Air Act*, Sch. I, arts. 26(2) and (3)).

The lawyer will want to review the applicable statute and corresponding case law in each case in order to determine the form and content of the notice. Generally, the notice should be clear and specific, setting out the nature of the complaint, the claims being asserted, and the intention to bring an action. Otherwise the lawyer may have to respond to a claim that the notice was defective. A lawyer's letter claiming compensation for an injury and stating that he or she has been instructed to commence proceedings if no satisfactory arrangements are made is generally not sufficient, and in some cases, the governing statute provides that such a letter is generally not sufficient. In other cases, a governing statute will reference a prescribed form. A judge may waive the notice requirements in appropriate circumstances.

5. Notice of constitutional question

Certain steps must be taken if the proceeding the lawyer will commence raises constitutional issues.

If the constitutional validity or applicability of any Act of Parliament or the Legislature, any regulation or by-law made under such an Act, or any rule of common law will be raised in any action or other proceeding, notice must be given to the Attorney General of Canada and the Attorney General of Ontario (*Courts of Justice Act (CJA)*, s. 109(1)). In Ontario, s. 109(6) of the *CJA* dictates that the requirement for notice of constitutional issues applies to proceedings before boards and tribunals as well as to court proceedings. Furthermore, the notice requirement applies not just to questions of constitutional validity or applicability but also to proceedings where a remedy is claimed under the *Canadian Charter of Rights and Freedoms (Charter)* (*CJA*, s. 109(1)–(2)).

The *Charter* applies to the Parliament and government of Canada and to the legislature and government of each province in respect of all matters within their authority. Anyone whose rights or freedoms guaranteed by the *Charter*, such as freedom of conscience and religion (s. 2(a)), freedom of thought, belief, opinion, and expression (s. 2(b)), mobility rights (s. 6), legal rights (ss. 7–14), or equality rights (s. 15), have been infringed or denied may apply to a court and obtain such remedy as the court considers appropriate and just in the circumstances (s. 24(1)).

Notice must be served by Form 4F pursuant to r. 4.11 of the *Rules of Civil Procedure (Rules)* and shall be served at least 15 days before the day when the question is to be argued (*CJA*, s. 109(2.2)). Each Attorney General is then entitled to adduce evidence and make submissions to the court in respect of the constitutional question (*CJA*, s. 109(4)). The statutory requirement of giving the Attorneys General notice of a constitutional question is mandatory (*CJA*, s. 109(2)). A decision made regarding the constitutionality of any Act, regulation, by-law, or rule of common law will be invalid if the required notice is not served (*CJA*, s. 109(2)).

6. Limitation of actions

When commencing any proceeding, it is critical to verify the limitation period within which the lawyer, on behalf of the client, is required to bring an action. The lawyer must ensure that the statement of claim or notice of action is issued before the expiry of that limitation period, or else the proceeding will be time barred.

Until recently, numerous statutes, both of the provincial legislatures and of Parliament, imposed limitation periods for various causes of action. The *Limitations Act, 2002 (LA, 2002)*, however, introduced a basic two-year limitation period for most causes of action in Ontario and an ultimate limitation period of 15 years. The bill

received Royal Assent on December 9, 2002, and came into force on January 1, 2004.

The *LA, 2002* repeals Parts II and III of the old *Limitations Act (LA)*; Part II dealt with trusts and trustees, and Part III dealt with personal actions. The remaining portion of the *LA* (the definitions and Part I, which dealt exclusively with real property limitations) continues in force and has been renamed the *Real Property Limitations Act*.

The following are highlights of the *LA, 2002*:

- The *LA, 2002* applies to all claims pursued in court proceedings other than proceedings commenced under certain statutes listed in s. 2. The claims that are excluded from application of the *LA, 2002* include claims based on aboriginal rights (s. 2(1)(e)).
- Section 4 imposes a new basic limitation period of two years running from the day when a claim is discovered.
- The concept of “discoverability” is central to the operation of the *LA, 2002*. Subsection 5(1) provides:

5.—(1) A claim is discovered on the earlier of,

 - (a) the day on which the person with the claim first knew,
 - (i) that the injury, loss or damage had occurred,
 - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
 - (iii) that the act or omission was that of the person against whom the claim is made, and
 - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
 - (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
- Subsection 5(2) introduces a rebuttable presumption that the plaintiff discovered the matters referred to in s. 5(1)(a) on the day the act or omission on which the claim is based took place. In the case of a demand obligation created on or after January 1, 2004, the day on which injury, loss, or damage occurs in relation to the demand obligation is the first day on which there is a failure to perform the obligation once demand for the performance is made (ss. 5(3)–(4)).
- Section 15 imposes an “ultimate limitation period” of 15 years running from the day on which the act or omission on which the claim is based took place.
- The basic and ultimate limitation periods do not run during any time in which the person with the claim
 - (i) is a minor and not represented by a litigation guardian (ss. 6 and 15(4)(b)); or
 - (ii) is incapable of commencing a proceeding because of a physical,

mental, or psychological condition and is not represented by a litigation guardian (ss. 7 and 15(4)(a)). Clause 15(4)(c) further provides that the ultimate limitation period does not run during any time in which the person against whom the claim is made

- wilfully conceals from the person with the claim the fact that injury, loss, or damage has occurred, that it was caused by or contributed to by an act or omission, or that the act or omission was that of the person against whom the claim is made; or
 - wilfully misleads the person with the claim as to the appropriateness of a proceeding as a means of remedying the injury, loss, or damage.
- The basic two-year limitation period does not run in assault or sexual assault cases during any time in which the claimant is incapable of commencing the proceeding because of his or her physical, mental, or psychological condition (s. 10(1)). The *LA, 2002* introduces a rebuttable presumption that a person with a sexual assault claim was incapable of commencing the proceeding earlier than it was commenced (s. 10(3)). The *LA, 2002* imposes a similar rebuttable presumption for claims based on an assault. An individual will be presumed to have been incapable of commencing an assault claim earlier than the date it was commenced provided one of the parties to the assault had an intimate relationship with the plaintiff or was someone on whom the plaintiff was dependent, whether financially or otherwise, at the time of the assault (s. 10(2)).
 - Section 11 of the *LA, 2002* provides for the suspension of the basic and ultimate limitation periods where the parties have agreed to have an independent third party resolve the claim or assist them in resolving it. If the claim is not resolved, time starts to run again when the dispute resolution process is terminated or a party terminates or withdraws from the agreement (s. 11).
 - The *LA, 2002* identifies certain proceedings with respect to which there is no limitation period at all, such as claims for support under the *Family Law Act* and undiscovered environmental claims (ss. 16(1)(c) and 17).
 - In tort, a defendant has two or 15 years, as the case may be, from the time he or she is served with a statement of claim to commence a claim for contribution and/or indemnity against a co-defendant under the *Negligence Act (LA, 2002, s. 18)*.
 - While the *LA, 2002* introduces significant changes to limitation laws in Ontario, not all pre-existing limitations were replaced. Section 19 refers to the Schedule to the *LA, 2002*, which contains a list of special limitation periods contained in other statutes that remain in force.

- The *LA, 2002* includes rules governing the coming into force of the new legislation (s. 24).

7. Limitation of liability

A further matter to consider in commencing a claim is whether damages may be limited by statutory enactment. Some examples of statutes that contain provisions limiting liability include the following:

- Section 4 of the *Innkeepers Act* restricts an innkeeper's liability to a guest for loss or injury to goods brought to the inn to \$40 except where the loss was occasioned through the wilful act, default, or neglect of the innkeeper or the innkeeper's employee or where the goods were deposited expressly for safe custody with the innkeeper.
- Part 3 (ss. 28–30) of the *Marine Liability Act* imposes limits on the damages that can be recovered where loss of life, personal injury, or other claim arises on any distinct occasion involving a ship.
- Schedule I, art. 22 of the *Carriage by Air Act* contains similar provisions limiting the liability of a carrier with respect to proceedings commenced in relation to the death of a passenger.

8. Interest on judgments

In Ontario, the *CJA* specifies when interest may be included in judgments and at what rate.

Section 128 of the *CJA* provides that a person entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest on the monetary award at the prejudgment interest rate. Prejudgment interest is calculated from the date when the cause of action arose to the date of the order (*CJA*, s. 128(1)). The “prejudgment interest rate” as defined in s. 127(1) is the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced, rounded to the nearest 10th of a percentage point.

There are exceptions to the general rule that the prejudgment interest rate is the bank rate defined in s. 127(1). In an action for personal injury, the rate of interest on damages for non-pecuniary loss is determined by the Civil Rules Committee (*CJA*, ss. 128(2) and 66(2)(w)). Under r. 53.10 of the *Rules*, the prejudgment interest rate on damages for non-pecuniary loss in an action for personal injury is currently 5% per year. If the order includes an amount for past pecuniary loss, otherwise known as special damages, prejudgment interest is calculated on the total past pecuniary loss at the end of each six-month period and at the date of the order (*CJA*, s. 128(3)).

The *CJA* also contains provisions governing the award of and rate at which postjudgment interest shall be paid. Interest accrues on any money owing under an order, including costs, at the postjudgment interest rate, calculated from the date of the order (s. 129(1)). The “postjudgment interest rate” as defined in s. 127(1) is the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the date of the order falls, rounded to the next higher whole number where the bank rate includes a fraction, plus 1%.

Previously prejudgment and postjudgment interest rates for each quarter were calculated and published in a table in the *Ontario Gazette*. As of October 1, 2007, prejudgment and postjudgment interest rates are published on the Ministry of the Attorney General’s website.

Subsection 130(1) of the *CJA* provides that the award of prejudgment or postjudgment interest is at the discretion of the court. Thus, the court may, where it considers it just to do so, in respect of all or part of an amount on which interest is payable, disallow interest, allow interest at a higher or lower rate, or allow interest for a period other than that provided in s. 128 or 129. Factors the court shall consider in determining whether to exercise the discretion pertaining to the award of prejudgment and postjudgment interest are set out in s. 130(2).

The prejudgment interest rate provisions of the *CJA* apply to causes of action arising after October 23, 1989. The interest provisions in s. 138 of the former *Courts of Justice Act, 1984* govern prejudgment interest claims where the cause of action arose prior to October 23, 1989.

A notice provision in the *Insurance Act* has implications for any claim for prejudgment interest in an action for damages for bodily injury or death arising from the use or operation of an automobile. Subsection 258.3(8) of the *Insurance Act* provides that in an action for damages for bodily injury or death arising from the use or operation of an automobile, no prejudgment interest shall be awarded under s. 128 of the *CJA* for any period of time before the plaintiff gave notice of the action to the defendant in accordance with s. 258.3(1)(b). This provision requires that written notice of the intention to commence the action be served on the defendant within

120 days after the incident that gives rise to the claim or within such longer time as a court may authorize.

The value of a person’s claim for prejudgment interest will vary greatly depending on the circumstances of the case, the size of the monetary award, and the length of time between the date the cause of action arose and the date of the order.

While there are authorities that suggest that a claim for prejudgment interest is inherently included in the claim itself and also in part of a claim for “further and other relief” and therefore prejudgment interest does not have to be specifically pleaded, this is something the lawyer should turn his or her mind to at the outset of any case. If there is any doubt about when the cause of action arose, this is a matter that should be explored on discovery to assist with calculation of the interest claim once an order is made.

9. Choice of procedure

Pursuant to R. 76 consideration must be given before any action is commenced as to the desirability of proceeding by way of the simplified procedure, whether or not a claim exceeds \$100,000.

10. Small Claims Court

For any claim that does not exceed \$25,000, consideration must also be given prior to commencing the proceeding as to whether the proceeding should be brought in the Small Claims Court, which has its own rules of procedure. Otherwise, cost consequences may result.

11. Constitutional issues

The lawyer should ensure the proceeding is commenced in the correct forum given the substantive issue or issues to be adjudicated. For instance, in certain specialized claims, such as those arising from boating accidents, there may be a federal/provincial issue. Generally speaking, provincial courts have jurisdiction to hear cases involving breaches of federal statutes (such as the *Marine Liability Act*). On the other hand, it is important to note that the federal statute governs. The lawyer should identify if there is a constitutional issue that applies to marine liability or to marine insurance issues.

Parties: persons who can sue and be sued

1. Introduction

This chapter covers issues lawyers may face when determining who can sue and who can be sued in claims involving parties under disability, persons charged with the administration of the estate of a deceased person, corporations, or partnerships.

2. Parties under disability

A person or party under legal “disability” is defined in r. 1.03 of the *Rules of Civil Procedure (Rules)* as a minor, an absentee within the meaning of s. 1 of the *Absentees Act*, or a person mentally incapable within the meaning of s. 6 or 45 of the *Substitute Decisions Act, 1992*. The term “minor” is not defined in the *Rules*, but is defined in s. 1 of the *Age of Majority and Accountability Act* as a person under the age of 18 years.

A person under a legal disability is mentally incapable

- of retaining and instructing legal counsel; and
- of suing or being sued in his or her own name.

It is important that lawyers undertaking the representation of such a person be familiar with the applicable rules and statutes.

Rule 7 addresses the procedures that must be followed in proceedings by or against parties under disability. With the exception of respondents in applications under the *Substitute Decisions Act, 1992*, proceedings on behalf of a person under a disability must be commenced, continued, or defended by a litigation guardian unless the court orders or a statute provides otherwise (rr. 7.01(1)–(2)).

The powers and duties of a litigation guardian are set out in r. 7.05. A litigation guardian must diligently attend to the interests of a party under disability and take all steps necessary for the protection of those interests, including the commencement and conduct of a counterclaim, crossclaim, or third party claim (r. 7.05(2)). A litigation guardian other than the Children’s Lawyer or the Public Guardian and Trustee must be represented by a lawyer and cannot act in person (rr. 7.05(3) and 15.01(1)).

The requirement that a litigation guardian must represent persons under disability is designed to protect not only the party under disability, but also other parties and the court. The parties are protected by the presence of a competent person, vested with the duty to attend to the interests of the party under disability, to instruct the

lawyer, to take steps in the proceedings, to be responsible for costs, and to ensure that judgments are performed. The litigation guardian also protects the court through efforts to prevent an abuse of the court’s process by or against a party under disability and to ensure that court orders are honoured.

Issues relating to disability and the need for representation by a litigation guardian commonly arise where minors sue as plaintiffs in proceedings such as personal injury actions. While the minor’s parent or other relative often acts as litigation guardian in such cases, this may not be possible because of possible conflicts of interest, where the parent or other relative is involved in the incident that gives rise to the claim. If, for instance, a parent was driving a car involved in a collision in which the child sustained injuries, the child may have both a claim against the driver of the automobile that ran into the car in which the child was riding and a claim for negligence against the child’s own parent. This gives rise to a conflict of interest that would bar the parent from acting as litigation guardian for the child (rr. 7.02(2)(g) and 7.03(10)(i)(iii)). This would also prevent one lawyer from acting for both the parent and the child, unless a waiver was obtained after both parent and child (through a litigation guardian other than the driver parent) had obtained independent legal advice.

2.1 Litigation guardian for plaintiff or applicant

2.1.1 Appointment of the litigation guardian

Any person who is not under disability may act as litigation guardian for a plaintiff or applicant without court appointment, provided that the affidavit referred to in r. 7.02(2) is filed. Only the Children’s Lawyer or the Public Guardian and Trustee can act as litigation guardian for a plaintiff under disability without filing this affidavit. In the affidavit, the person must consent to act as litigation guardian, confirm the retention of a lawyer, set out his or her relationship to the person under disability, state that he or she has no adverse interest in the proceeding to the person under disability, and acknowledge the possible liability for costs. Subrule 7.02(2) also requires the litigation guardian to give evidence regarding the nature of the disability, provide the minor’s birth date in the case of a minor, and state whether he or she and the person under disability are ordinarily resident in Ontario.

The *Rules* do not expressly require that a person must be ordinarily resident in Ontario in order to act as a litigation guardian. They simply require that the litigation guardian state in the r. 7.02 affidavit whether he or she and the person under disability are ordinarily resident in Ontario (rr. 7.02(2)(e) and 7.03(10)(h)). It appears that a person residing outside Ontario is not disqualified from acting as a litigation guardian, although non-residency may give rise to an order for security of costs.

In general, anyone who is capable of suing may act as litigation guardian. There are situations in which a person cannot act as litigation guardian. The following situations are examples:

- The litigation guardian cannot have an interest adverse to the party (rr. 7.02(2)(g) and 7.03(10)(i)(iii)). This is understood to mean an interest in the lawsuit that is adverse to the party.
- A person under disability may not act for another person under disability (r. 7.02(1)).

Rule 7.04 provides that if there is no proper person willing and able to act as litigation guardian, the court shall appoint the Children's Lawyer where the person under disability is a minor. The same rule requires that the court appoint the Public Guardian and Trustee where the person is mentally incapable within the meaning of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding and there is no guardian or attorney under a power of attorney with authority to act as litigation guardian. Where a person is both a minor and mentally incapable, the court may appoint either the Children's Lawyer or the Public Guardian and Trustee (r. 7.04(1)(c)).

A litigation guardian is an officer of the court, is not a party to the action, is not *dominus litis* (master of the suit), and represents the party under disability only in a limited sense. Although the litigation guardian's intervention is merely a matter of procedure, he or she may be examined for discovery in place of the person under disability (r. 31.03(5)(a)). Where the Children's Lawyer or the Public Guardian and Trustee is the litigation guardian, leave of the court is required to examine the litigation guardian.

A party's litigation guardian may do anything in a proceeding that the party would ordinarily be required or authorized to do (r. 7.05(1)). Before a litigation guardian consents to any departure from the ordinary course of practice, he or she should obtain approval of the court.

Any money payable to a person under disability pursuant to an order or settlement must be paid into court, unless a judge orders otherwise (r. 7.09(1)). The litigation

guardian is not entitled to receive any compensation, and both the litigation guardian and the lawyer involved are liable to account for any money they receive. The litigation guardian can have no interest in the party's cause of action or the fruits of the action.

2.1.2 Failure to appoint a litigation guardian

Failure to appoint a litigation guardian is an irregularity and does not invalidate the proceedings. This irregularity may be cured through the appointment of a litigation guardian even after a limitation period has expired. If an action has been commenced and subsequently it appears that one of the parties is a minor, the action should not proceed further until a litigation guardian is appointed.

Where an action is commenced without a litigation guardian, the lawyer commencing the action may be personally liable to pay the defendant his or her costs even if the lawyer was unaware of the legal disability of the plaintiff. The courts appear reluctant to award costs against a lawyer who acted with a *bona fide* belief and was not negligent. When a partnership brings a proceeding in the firm name and one or more of the partners are minors, a litigation guardian does not have to be appointed if the partnership is duly registered.

2.1.3 Limitations Act, 2002

Section 8 of the *Limitations Act, 2002* provides that where a person under disability is represented by a litigation guardian in relation to the claim, the basic two-year limitation period will run from the day when the litigation guardian "discovered" the claim.

The basic (two-year) and ultimate (15-year) limitation periods imposed by the *Act* do not run during any time in which the person under disability is not represented by a litigation guardian. Under ss. 6 and 15(4)(b), the limitation periods do not run where the party under disability is a minor and is unrepresented by a litigation guardian. Similarly, ss. 7 and 15(4)(a) state that these limitation periods shall not run during any time when the person with the claim is incapable of commencing a proceeding because of a physical, mental, or psychological condition and is not represented by a litigation guardian.

Section 9 of the *Act* deals with the effect of the appointment of a litigation guardian where the running of a limitation period is postponed or suspended by s. 6 or 7. Subject to s. 9(4) and provided the conditions in s. 9(3) are met, the appointment of a litigation guardian ends the postponement or suspension of the running of the limitation period (ss. 9(3)–(4)). Before a litigation guardian is appointed and the postponement or

suspension of the running of the limitation period is lifted, the judge must be satisfied that the litigation guardian has consented to the appointment, has knowledge of the matters referred to in s. 5(1)(a), does not have an adverse interest in the proceeding to the party under disability, and will diligently attend to the interests of the party under disability and take all necessary steps for their protection (s. 9(3)).

2.1.4 Approval of settlement

Settlement of a claim made by or against a person under disability is not binding on the person without the approval of a judge (r. 7.08(1)). In the absence of court approval, the settlement will not be illegal or improper, but r. 7.08(1) renders such a settlement unenforceable. If the settlement is to be enforceable, a judge's approval is required even if a settlement is reached before a proceeding has been commenced in respect of the claim (r. 7.08(3)). Even if an offer is accepted after the minor reaches the age of majority, provided the initial offer was made while the party was a minor, it must be approved by the court to be enforceable.

A judge's approval of a settlement may be obtained by way of an application or on a motion. An application for approval is appropriate when an agreement for the settlement of a claim made by or against a person under disability is reached before a proceeding is commenced (r. 7.08(3)). If a proceeding has been commenced, a motion for approval should be brought. Subrule 7.08(4) sets out what must be filed with the court on a motion or application for approval. The judge hearing the motion or application may direct that the required material be served on the Children's Lawyer or the Public Guardian and Trustee and may also direct these representatives to make oral or written submissions stating any objections and making recommendations with reasons with respect to the proposed settlement (r. 7.08(5)).

The lawyer should consider whether the court will allow dispensing of service on the Children's Lawyer or Public Guardian since this is not always necessary. Any money payable to a person under disability by either order or settlement must be paid into court, unless a judge orders otherwise (r. 7.09(1)). All money paid to the Children's Lawyer on behalf of a person under disability must also be paid into court, unless a judge orders otherwise (r. 7.09(2)).

2.1.5 Liability for costs

A litigation guardian may be personally liable for costs awarded against him or her or against the person under disability (r. 7.02(2)(h)). A litigation guardian who has been ordered to pay costs is generally entitled to recover them from the person under disability (r. 57.06(2)). If the

action is frivolous, vexatious, or brought for an improper purpose, or if proceedings were unnecessary, the litigation guardian may be personally liable and unable to recover any of his or her costs from the party under disability. Where the litigation guardian sues on behalf of a party under disability and himself or herself, the liability to pay costs should be proportionate to the benefit received.

2.2 Litigation guardian for defendant or respondent

2.2.1 Court appointment

A person under legal disability is not permitted to defend until a litigation guardian is appointed. While a litigation guardian for a plaintiff or applicant may act without appointment, generally no person may act as a litigation guardian for a defendant or respondent under disability until appointed by the court (r. 7.03(1)). There are, however, exceptions to the general rule requiring court appointment:

- Where the proceeding is against a minor in respect of the minor's interest in an estate or trust, the Children's Lawyer shall act as the litigation guardian unless the court orders otherwise (r. 7.03(2)).
- Unless the court orders otherwise, where a person is mentally incapable and has a guardian with authority to act as litigation guardian in the proceeding, the guardian shall act as a litigation guardian for a defendant or respondent (r. 7.03(2.1)(a)). If a person is mentally incapable, does not have a guardian with authority to act as litigation guardian in the proceeding, but has an attorney under a power of attorney with that authority, the attorney shall act as litigation guardian whether the person is a plaintiff, defendant, applicant, or respondent (rr. 7.02(1.1)(b) and 7.03(2.1)(b)). While leave of the court is not required before persons falling within rr. 7.03(2.1)(a)–(b) may act as a litigation guardian for a defendant, such persons must file an affidavit containing the information referred to in r. 7.03(10) (r. 7.03(2.2)).
- Where the person under disability is a plaintiff who has been named as a defendant to a counterclaim, the litigation guardian may represent the person without being appointed by the court (r. 7.03(3)).

A motion seeking court appointment must be brought by a person who wishes to be a litigation guardian for a defendant or respondent (r. 7.03(4)). If no such motion has been made and an originating process has been served on the party under disability, the plaintiff or applicant must bring its own motion for appointment of a litigation guardian before taking any further step in the proceeding (r. 7.03(5)). The plaintiff or applicant must

serve a request for appointment of a litigation guardian (Form 7A) on the party under disability at least 10 days before bringing the motion (r. 7.03(6)).

Rule 7.03(10) sets out the evidence to be filed with the court on the motion, which may be made without further notice to the party under disability (r. 7.03(8)). A co-defendant may be a litigation guardian if he or she has no interest in the proceeding adverse to that of the party under disability, follows the procedure required by r. 7.03, and is appointed by the court. In circumstances where the parent of a minor refuses to act as litigation guardian or is not considered a fit person to be appointed, the Children's Lawyer may act as litigation guardian (*Courts of Justice Act*, s. 89; r. 7.03(9)). If the plaintiff or applicant moves for appointment of the Children's Lawyer or Public Guardian and Trustee as litigation guardian, r. 7.03(9) requires that these parties must also be served with the notice of motion and material required by r. 7.03(10).

2.2.2 Service of the originating process

Rule 16 provides guidelines regarding how documents are to be served. In general, every "originating process" (defined in r. 1.03) is to be served personally or by an alternative to personal service (r. 16.01(1)). Rule 16.02(1) provides guidance as to how personal service is to be made on various persons including an absentee, minor, or mentally incapable person.

Personal service on an absentee shall be made by leaving a copy of the document with the absentee's litigation guardian if there is one or, if not, with the Public Guardian and Trustee (r. 16.02(1)(i)). The originating process must be served on a minor by leaving a copy of the document with the litigation guardian if one has been appointed or, if not, by leaving a copy with the minor and a second copy with a parent or other person residing with and having care or lawful custody of the minor (r. 16.02(1)(j)). Where the proceeding is in respect of the minor's interest in an estate or trust, the minor must be served by leaving a copy of the document bearing the name and address of the minor with the Children's Lawyer (r. 16.02(1)(j)). Pursuant to r. 16.02(1)(k), a mentally incapable person may be served by leaving a copy of the document with the guardian or an attorney acting under a validated power of attorney for personal care with authority to act in the proceeding. If there is no such guardian or attorney but there is an attorney under a power of attorney with authority to act in the proceeding, the mentally incapable person may be served by leaving a copy of the document with the attorney and leaving an additional copy with the person. If there is neither a guardian nor an attorney with authority to act in the proceeding, the mentally incapable person may be

served by leaving a copy of the document bearing the person's name and address with the Public Guardian and Trustee and leaving an additional copy with the person.

Only with leave of a judge may a plaintiff note a party under disability in default under r. 19.01 for failure to deliver a defence or where the defence has been struck out (rr. 7.07(1) and 19.01(4)). The plaintiff may bring a motion seeking leave to note the party under disability in default pursuant to r. 7.07. The plaintiff must serve the notice of motion on the litigation guardian of the party under disability and on the Children's Lawyer unless the Public Guardian and Trustee is the litigation guardian or a judge orders otherwise (r. 7.07(2)).

2.2.3 Liability for costs

The litigation guardian is not liable for and will not generally be ordered to pay the costs of a proceeding that he or she has defended unsuccessfully. In cases where the plaintiff is successful against a party under disability, the plaintiff will generally be ordered to pay the costs of the litigation guardian for the defendant, but the plaintiff is then permitted to add those costs to the costs that he or she is entitled to recover against the person under disability. The court may also order that the plaintiff is only to pay the costs of the litigation guardian to the extent that the plaintiff is able to recover these costs from the party liable for the costs (r. 57.06(1)).

2.3 Removal of litigation guardian

Although a litigation guardian acting for a plaintiff or applicant does not require a court order to act, he or she cannot retire without an order from the court. The litigation guardian will not be relieved of the position on his or her own application unless the court is fully informed of the circumstances and a suitable replacement is provided. Regardless of whether the litigation guardian is being removed at his or her own request or at the request of another party, the litigation guardian will usually be required upon removal to give security for the costs already incurred. The defendant may then obtain a stay until a new litigation guardian is appointed.

Rule 7.06 provides for the removal or substitution of a litigation guardian in three situations:

- When a minor reaches the age of majority, the minor or litigation guardian may file an affidavit stating that the minor has reached the age of majority and obtain an order to continue (Form 7B), authorizing the minor to continue the proceeding without the litigation guardian (r. 7.06(1)(a)). If a minor attains full age while the litigation is pending and abandons the suit, the minor must pay the costs

of the litigation guardian unless he or she can establish that the action was improperly brought.

- Where a party under any other disability ceases to be under disability, the party or the litigation guardian may move without notice for an order to continue the proceeding without the litigation guardian (r. 7.06(1)(b)).
- Where the court determines that a litigation guardian is not acting in the best interests of the party under disability, the court may substitute the Children’s Lawyer, the Public Guardian and Trustee, or any other person as the litigation guardian (r. 7.06(2)). Examples of cases where this discretion has been exercised include where the litigation guardian would not post security for costs and where the court concluded that the litigation guardian had a conflict of interest.

3. Executors, administrators, and trustees

3.1 Proceedings by or against executors, administrators, and trustees

Executors and administrators are persons charged with the administration of the estate of a deceased person. The main factor distinguishing an executor from an administrator is that an executor is named by the deceased in his or her will, while the court appoints an administrator. An executor is named in the will to carry out its provisions. An administrator is appointed by the court to administer the estate where the deceased’s will names no executor, the named executor is unwilling or unable to act, or the will is invalid. An administrator “with will annexed” is appointed when the will does not appoint an executor or the proposed executor has already died or has refused to act. Finally, a trustee is a person in whom some estate or property is vested for the benefit of others.

Rule 74 came into force on January 1, 1995, and introduced changes to the terminology used in estate cases. Pursuant to Rule 74, “executor,” “administrator,” and “administrator with will annexed” became “estate trustee”; and “letters probate,” “letters of administration,” and “letters of administration with will annexed” are now “certificate of appointment of estate trustees” (r. 74.01). Despite the introduction of the new term “estate trustee,” as a matter of substantive law, there may be significant differences between executors and administrators. Furthermore, the *Estates Act* still uses many of the old terms.

The general rule is that a proceeding may be brought by or against an executor, administrator, or trustee as representative of an estate or trust and its beneficiaries without joining the beneficiaries as parties (r. 9.01(1)). There are situations, however, where it would be inappropriate for the representatives alone to be parties

and the beneficiaries must be joined. According to r. 9.01(2), the exceptions to the general rule include cases involving internal strife among the beneficiaries, such as proceedings

- to establish or contest the validity of a will;
- for the interpretation of a will;
- to remove or replace an executor, administrator, or trustee;
- against an executor, administrator, or trustee for fraud or misconduct; or
- for the administration of an estate or the execution of a trust by the court.

Ordinarily, the executor, administrator, or trustee (“personal representative”) of an estate is the proper person to sue or be sued (r. 9.01(1)). It now appears that an action can be brought to set aside a conveyance made by a deceased person during his or her lifetime without naming the personal representative of the deceased as either plaintiff or defendant, if there is no contest regarding the deceased’s will and as long as all persons beneficially entitled are before the court. If proceedings have been taken to contest the validity of the will, any action brought before those proceedings have been finally determined will be stayed pending the final disposition.

If there are several executors, administrators, or trustees, they must all join in bringing the action. Where a proceeding concerning the rights of the deceased is commenced by executors, administrators, or trustees, any executor, administrator, or trustee who does not consent to be joined as a plaintiff or applicant must be made a defendant or respondent (r. 9.01(3)).

Subrule 9.01(4) gives the court the discretion to order that any beneficiary, creditor, or other interested person be made a party to a proceeding by or against an executor, administrator, or trustee.

3.2 Where a deceased person has no personal representative

In cases where the deceased has died without an executor or administrator, a question arises as to the person or persons who can sue or be sued. Subrule 9.02(1) establishes a procedure for commencing or continuing a proceeding against the estate of a deceased person who has no executor or administrator. The rule provides that a person seeking to commence or continue a proceeding against the estate of a deceased person who has no executor or administrator may bring a motion for an order appointing a litigation administrator to represent the estate for the purposes of the proceeding.

The *Rules* also provide for the appointment of a representative for the estate of a deceased person with no

executor or administrator, at the court's initiative. A judge may appoint a representative for the estate pursuant to R. 10 where it appears that the estate of a deceased person has an interest in or may be affected by legal proceedings.

A litigation administrator should be distinguished from an "estate trustee during litigation" appointed pursuant to the provisions of s. 28 of the *Estates Act* (see also r. 74.10). The court has jurisdiction to appoint an administrator of the property of a deceased person to ensure the property of the estate is preserved and protected pending resolution of an action concerning the validity of a will, or where probate or a grant of administration is sought to be obtained, recalled, or revoked. An "estate trustee during litigation" has all the rights and powers of a general administrator other than the right of distributing the residue of the property and is subject to the immediate control and direction of the Superior Court of Justice.

3.3 Remedial provisions

Rule 2.01 is the general rule dealing with the effect of non-compliance with the *Rules*. According to r. 2.01, a failure to comply with the *Rules* is an irregularity that is not fatal to the proceeding. The court may grant all necessary amendments or other relief and only in very limited circumstances will it set aside the proceeding. The same general principles apply to r. 9.03, which deals expressly with procedural defects in estate litigation. Procedural defects are cured pursuant to r. 9.03 to ensure that proceedings can be properly constituted without being treated as nullities.

Subrule 9.03(5) states that any proceeding by or against a deceased person or an estate shall not be treated as a nullity merely because it was not properly constituted; it also provides a general power to the court to reconstitute the proceeding. The remedial provisions in r. 9.03 allow for procedural defects and grant relief in the following circumstances:

- If a proceeding is commenced by or against a person as executor or administrator before a grant of probate or administration has been made and a grant is subsequently made, the proceeding shall be deemed to have been properly constituted from its commencement (r. 9.03(1)).
- Where a proceeding is commenced but incorrectly identifies the personal representative, the court may order the proceeding be continued by or against the proper executor or administrator of the deceased or against a litigation administrator appointed for the purpose of the proceeding, and the title of the proceeding shall be amended accordingly (r. 9.03(2)).
- Where a proceeding is commenced in the name of or against a person who has died before its

commencement, the court may order that the proceeding be continued by or against the executor or administrator or a litigation administrator appointed for the purpose of the proceeding, and the title of the proceeding shall be amended accordingly (r. 9.03(3)).

- If a deceased person for whom a litigation administrator has been appointed already had an executor or administrator, the court may order that the proceeding be continued against the executor or administrator with the appropriate change to the title of the proceeding (r. 9.03(4)).

Subrules 9.03(6)–(7) provide that where r. 9.03(2), (3), (4), or (5) apply, the proceeding is stayed until it is properly constituted, and if the remedy is not addressed within a reasonable time, the court may dismiss the proceeding or impose such terms as are just.

At common law, the general principle is that a right of action survives death and is transmissible automatically to the personal representative. Personal actions that were founded on any obligation, contract, covenant, or other duty upon which the testator or intestate might have sued in his or her lifetime survived the deceased's death and were transmitted to the deceased's personal representative. Similarly, claims upon any obligation, contract, covenant, or other duty on which the deceased might have been sued in his or her lifetime survived and was enforceable against his or her personal representative. While the general rule was that on the death of a party to a contract, rights and liabilities under the contract passed to his or her personal representatives, actions in tort did not survive death at common law. If an injury was done to either the person or property of another for which only damages could be recovered, the action died with the person to or by whom the wrong was done. The common-law position has been altered by s. 38 of the *Trustee Act*, which permits the executor or administrator of the deceased to maintain and defend such actions, except in cases of libel and slander.

3.4 Foreign administrators and executors

While the *Rules* do not give separate treatment to the status of foreign administrators and executors, the courts have held that a foreign administrator cannot sue in Ontario on the strength of his or her foreign grant. There are, however, certain exceptions to the general rule prohibiting claims by foreign administrators, including the following instances:

- The administrator may sue in respect of a bill of exchange that has a *situs* in the jurisdiction from which the administrator obtained his or her grant.
- An administrator who has a right of action conferred upon him or her in his or her capacity as administrator, by statute, may bring action in Ontario. Thus, a foreign administrator could sue in

Ontario in an action brought under the provisions for dependants' claims for damages under ss. 61–63 of the *Family Law Act*.

Foreign executors have been determined to be in a different position than foreign administrators and are entitled to sue in Ontario since they derive their title from the will itself.

3.5 Defences that may be raised by personal representatives

An executor or administrator can defend an action on behalf of an estate on any ground that may have been relied upon by the deceased. In addition, where there are insufficient assets in the estate to satisfy the plaintiff's claim if it is established, the executor or administrator should plead

- *plene administravit* ("fully administered")—no assets remain out of which the plaintiff's claim could be satisfied; or
- *plene administravit praeter* ("nearly fully administered")—there are not sufficient assets to satisfy the plaintiff's claim.

In the absence of a plea of no assets or insufficient assets, the executor or administrator will be deemed to have admitted that he or she has assets to satisfy the judgment. The executor or administrator will then be personally liable for the debt if it cannot be levied on the assets of the deceased.

Failure to plead the defence of *plene administravit* will not necessarily render the executor or administrator personally liable for an order as to costs. The court has a discretion to award costs against him or her personally if the behaviour of the executor or administrator warranted such an award. Costs are approached separately on the basis that it will not always be possible for an executor to know at the outset of litigation whether the estate has sufficient assets to satisfy a costs award that might be levied against it.

3.6 The Estates List

In the Toronto Region, a specialized Estates List has been created. Specific types of estate-related litigation in the Toronto Region are now heard and determined by this court. The Practice Direction Concerning the Estates List of the Superior Court of Justice in Toronto, effective April 1, 2009, governs the conduct of matters on the Estates List.

4. Representation of an interested person who cannot be ascertained

The power of the court to make a representation order pursuant to R. 10 is not limited to estates matters. Subrule 10.01(1) provides a judge with discretion to appoint a representative for a person or class that cannot

be readily ascertained, found, or served and who has a present, future, contingent, or unascertained interest in or who may be affected by a proceeding. Such a representation order may be made in a proceeding concerning

- the interpretation of a deed, will, contract, or other instrument or the interpretation of a statute, order-in-council, regulation, or municipal by-law or resolution;
- the determination of a question arising in the administration of an estate or trust;
- the approval of a sale, purchase, settlement, or other transaction;
- the approval of an arrangement under the *Variation of Trusts Act*;
- the administration of the estate of a deceased person; or
- any other matter where it appears necessary or desirable.

According to case law, a court-appointed representative has the same rights or status as the person or group he or she represents. Furthermore, unless a judge decides there is some reason, such as a finding that the order was obtained by fraud or non-disclosure of material facts or the interests of the person or estate were different from those represented at the hearing, the order or settlement in such a proceeding is binding on the person or class represented (rr. 10.01(2) and 10.03).

A settlement affecting persons who are not parties may be approved by a judge with the consent of the representative appointed under r. 10.01(1) or with the consent of persons with the same interest who are parties, if the judge is satisfied that the settlement is for the benefit of the persons who are not parties and that to require service on them would cause undue expense or delay (r. 10.01(3)).

5. Corporations

The corporation is the only proper plaintiff in any proceeding brought to redress a wrong done to the corporation, to recover moneys or damages alleged to be due to the corporation, or to enforce the rights of the corporation. Therefore, the lawyer must be careful to distinguish between a cause of action held by a corporation and a cause of action held by an individual stakeholder in a corporation, such as a shareholder, officer, or director. Even when a corporation is in the course of winding-up, actions on behalf of the corporation must be brought or continued in its corporate name by the official liquidator. Official approval of the shareholders of a corporation is not required before the directors may commence an action in the name of the corporation. The directors of a corporation have a *prima facie* right to use the name of

the corporation in an action without the sanction of the shareholders. The corporation may, however, in a general meeting, refuse to allow the directors to continue to use its name.

Under r. 15.01(2), unless leave of the court is obtained, a lawyer must represent a corporation that is a party to a proceeding.

Two key statutes contain specific provisions governing proceedings involving corporations: Ontario's *Business Corporations Act (OBCA)* and the *Canada Business Corporations Act (CBCA)* (*OBCA*, s. 191 and following; *CBCA*, s. 207 and following). The following sections of each statute should be considered when commencing an action on behalf of a corporation:

- Section 246 of the *OBCA* and s. 239 of the *CBCA* allow for derivative actions to be brought, with leave of the court, in the name of and on behalf of a corporation to enforce the rights of the corporation where the directors refuse to authorize such proceedings. When an interested stakeholder brings a derivative action, it must be recognized that the cause of action is still held by the corporation and that the individual who brings the action does so on behalf of the corporation.
- Section 247 of the *OBCA* and s. 240 of the *CBCA* empower the court to permit intervention by interested parties in proceedings to which a corporation is a party and further enable the court to give directions for the conduct of the proceeding.
- Section 248 of the *OBCA* and s. 241 of the *CBCA* provide an “oppression remedy” pursuant to which the court is empowered to grant extensive relief where the affairs of the corporation are being carried out in a manner that is oppressive of or unfairly prejudicial to or that unfairly disregards the interests of, among others, shareholders and creditors. This type of lawsuit involves a claim on behalf of a “complainant,” who may be a shareholder, an officer, a director, or a proper person rather than on behalf of the corporation.

The *Extra-Provincial Corporations Act* regulates proceedings brought in Ontario by corporations incorporated or continued outside of Canada. Such corporations are prohibited from carrying on business in Ontario unless they have obtained a licence (s. 4(2)). Section 19 of that *Act* requires these corporations to appoint an agent for service in Ontario and update and submit to the Director a prescribed form. If a foreign corporation does not comply with these requirements, it is not capable of maintaining any action or other proceeding in any court or tribunal in Ontario in respect of any contract made by it (s. 21(1)). Where such a default has been corrected, however, an action or other proceeding may be maintained as if the default had been corrected before the institution of the action or other proceeding (s. 21(2)).

6. Partnerships and sole proprietorships

6.1 Partnerships

Section 2 of the *Partnerships Act* defines a partnership as the relationship that subsists between persons carrying on business in common with a view to profit.

Rule 8 of the *Rules* regulates proceedings by or against a partnership using the firm name and by or against a sole proprietorship using a business name. Under r. 8.01(1), a proceeding by or against two or more persons as partners may be commenced using the firm name of the partnership. This extends to a proceeding between partnerships having one or more partners in common (r. 8.01(2)). When handling a proceeding involving a partnership, the lawyer must choose whether the action will be brought in the name of the partnership or in the name of the individual partners (either as plaintiff(s) or as defendant(s)). It is improper to name both the partnership and the individual partners as parties unless the individual partners owe duties to the plaintiff over and above the duty owed by the partnership. This rule is frequently violated, and the violation is rarely contested.

There are certain advantages to bringing an action in the firm name rather than in the name of the individual partners:

- Proof of the cause of action is usually easier.
- An action can be brought against a member of a firm or a firm in which there is a partner in common.
- If one partner dies or the composition of the partnership changes, an action in the firm name can still continue.
- If one of the partners is a minor, it is not necessary to have the minor partner represented by a litigation guardian.

Subsection 2(3) of the *Business Names Act* requires registration of the name of a partnership with the Ministry of Government Services before business can be carried on under the firm name. This requirement does not apply to limited partnerships carrying on business in accordance with the *Limited Partnerships Act (Business Names Act, s. 2(3.3))*. Section 7 of the *Business Names Act* bars persons who have not complied with s. 2(3) from maintaining a proceeding in an Ontario court in connection with that business except with leave of the court.

Where an action is brought against the partnership (rather than against the individual partners), service on the firm is made by leaving a copy of the originating process with any one or more of the partners or with a person at the principal place of business of the partnership who appears to be in control or management of the place of business (r. 16.02(1)(m)), or by an

alternative to personal service (r. 16.03). Rule 8.02 requires partners to deliver a common defence in the firm name, and no person who admits he or she was a partner at any material times may defend the proceeding separately, except with leave of the court. A person must defend separately where the person denies he or she was a partner at the material time. The person then becomes a party to the proceeding, and the title of the proceeding is amended (r. 8.04(a)).

An order obtained against a partnership using the firm name may be enforced against the property of the partnership (r. 8.06(1)). If a plaintiff or applicant seeks an order that will be enforceable against one or more partners personally, the originating process should be served on that person together with notice to the alleged partner in the prescribed form (Form 8A) (r. 8.03(1)). The person is then deemed to have been a partner at the material time, unless he or she denies it in a separate defence (r. 8.03(2)). An order against the partnership is enforceable against any person served as a partner who is deemed to be a partner or admits or is adjudged to have been a partner at the material time (r. 8.06(2)).

Since many partnerships have no assets (other than any applicable insurance policy) or such assets are quickly distributed to the partners, it is generally wise for a plaintiff who sues a partnership in the partnership's name to serve on all partners of whom the plaintiff is aware a notice to an alleged partner. This will permit the plaintiff to maximize the prospect of being able to locate eligible assets that may be available to satisfy a judgment against the partnership. Alternatively, a plaintiff who obtains judgment in the firm name may move for leave to enforce the order against individual partners. A judge may grant leave to enforce such an order against a person not served as an alleged partner where the liability of the person as a partner is not disputed or the judge has ruled on liability (r. 8.06(3)).

Subrule 8.05(1) permits any party to require a partnership that is suing or being sued to disclose forthwith the names and addresses of all of the partners constituting the partnership at a specified time. If the partnership fails to provide this information, its claim may be dismissed or the proceeding stayed or defence struck out (r. 8.05(2)). A party has 15 days from the date the list of names and addresses is disclosed to serve any partners who have not previously been served (r. 8.05(3)).

If an action is brought in the name of or against the firm, consideration should be given to whether a partnership is a "person" within the meaning of other statutes that may be relevant to the proceeding.

6.2 Sole proprietorships

A sole proprietorship exists whenever a person (an individual or a partnership) carries on business for his, her, or its own account.

Subrule 8.07(2) provides that rr. 8.01–8.06 concerning partnerships apply, with necessary modifications, to a proceeding by or against a sole proprietor using a business name, as though the sole proprietor were a partner and the business name were the firm name of the partnership.

The restrictions governing proceedings by or against a sole proprietorship are similar to those imposed on proceedings by or against a partnership:

- Subrule 8.07(1) permits a proceeding to be commenced in the business name where a person carries on business in a business name other than his or her own name.
- Subsection 2(2) of the *Business Names Act* prohibits any individual from carrying on business or identifying his or her business to the public under a name other than his or her own name unless the name is registered by that individual.
- Section 7 of the *Business Names Act* prohibits a person carrying on business that has not registered its name as required from maintaining a proceeding in an Ontario court in connection with the business except with leave of the court.
- A sole proprietor may be served by leaving a copy of the document with the sole proprietor or with a person at the principal place of the sole proprietorship's business, provided that the person appears to be in management or control of the place (r. 16.02(1)(n)), or by an alternative to personal service (r. 16.03).

7. What to do when your client dies

Rule 11.01 provides that where at any stage of a proceeding, an interest or liability of a party is transferred or transmitted to another person by, among other things, death, the proceeding shall be stayed until an order to continue has been obtained. The order to continue may be obtained from the registrar on an over-the-counter basis with a supporting affidavit and, once obtained, shall be served forthwith on every other party (r. 11.02 and Form 11A).

8. Bankrupt parties

Undischarged bankrupts must obtain approval from the trustee-in-bankruptcy before continuing any litigation. Rule 11.01 states that such proceedings are stayed until an order to continue is obtained.

Joinder and interventions

This chapter considers the subject matter of RR. 5 and 6 of the *Rules of Civil Procedure (Rules)*, which includes the joinder of multiple parties and multiple claims together in one legal proceeding, as well as R. 13, which addresses interventions.

1. Joinder of parties

1.1 Territorial jurisdiction: actions in personam and in rem

In determining which persons should be made parties to a proceeding, it is important to distinguish between actions and judgments *in rem* (“in the subject”) and actions and judgments *in personam* (“in person”).

An action *in personam* is an action in which judgment is sought against a person involving his or her personal rights and in which the court may acquire jurisdiction over the defendant personally, rather than over the defendant's property. A judgment *in personam* is conclusive proof only of the matters actually decided in that proceeding between the parties and their privies. An action *in rem* is a proceeding which determines a right in specific property against all the world and is equally binding on everyone, whether or not one is a party to the proceeding.

The only purely *in rem* action that exists in Anglo-Canadian law is that of admiralty. Quasi *in rem* actions include an adjudication on the status of the subject matter of the litigation, such as an adjudication in bankruptcy, a declaration of mental incompetency, a judgment as to the validity of a patent, a divorce and nullity of marriage, and a grant of administration. In such subjects, the public is assumed to have an interest beyond the purely private interests of the parties.

Jurisdiction over the person is, with few exceptions, synonymous with territorial jurisdiction. In actions *in personam*, jurisdiction depends upon the right of a court to summon the defendant before it. The court will ordinarily accept jurisdiction where the defendant can legally be served with the originating process by which the proceeding was commenced.

One of the attributes of a proceeding *in rem* is that a default judgment cannot be obtained for failure to plead or failure to appear since the judgment will bind more than the parties to it and it is, therefore, essential that there be a determination of the matter by the court.

In this chapter, only parties to actions *in personam* are considered.

1.2 Necessary and proper parties

Generally, a person commencing a legal proceeding has the right to decide which persons he or she wishes to name as parties. In some cases, however, either the *Rules* or the substantive law require that certain persons be named.

Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues must be made a party to any legal proceeding (r. 5.03(1)). Certain other persons may be made parties to a proceeding at the option of the plaintiff/applicant. Several general propositions apply:

- A person cannot be both a plaintiff and a defendant in the same action, even if acting in different capacities.
- Two or more plaintiffs or applicants who wish to commence a proceeding together must have the same lawyer of record (r. 5.02(1)). Once the proceeding is commenced, there is some authority suggesting that if one claimant wishes to change lawyers after the originating process has been issued, the claimant may do so (*Ryan et al. v. Hoover*). Generally, two plaintiffs who wish to be represented by different lawyers should commence suit individually, and the proceedings may later be consolidated or tried together. Consolidation is discussed below.
- The court has no jurisdiction over any person who is not a party to the action, but a non-party may be bound by the court's decision, e.g., if, being fully cognizant of the proceeding, the person stands by and takes a benefit under the judgment, or if the person participates in a breach of an injunction granted against a party to the proceeding. For a detailed discussion about the court's authority to pronounce judgments that bind non-parties, see the Supreme Court of Canada's decision in *MacMillan Bloedel Ltd. v. Simpson*.
- Subject to R. 13 provisions regarding interventions, no person should be a party who does not have an interest in the dispute.

The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding must be added as a party (r. 5.03(4)). Subject to these principles, a plaintiff has the option of deciding who should be sued,

and a defendant will generally not be added against the plaintiff's wishes.

1.2.1 Necessary parties and mandatory joinder

Rule 5.03 sets out the circumstances in which persons are "necessary parties" to a proceeding:

- The presence of the person is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding.
- The plaintiff/applicant claims relief to which any other person is jointly entitled, in which case each person so entitled shall be made a party to the proceeding.
- The proceeding is commenced by the assignee of a debt or other chose in action, in which case the assignor shall be joined as a party unless both of the following are true:
 - The assignment is absolute and not by way of charge only.
 - Notice in writing has been given to the person liable in respect of the debt or choses in action that it has been assigned to the assignee.

1.2.2 Proper parties and permissive joinder

The circumstances in which it is permissible to have multiple plaintiffs/applicants or multiple defendants/respondents are set out in r. 5.02, which provides as follows:

5.02—(1) Two or more persons who are represented by the same lawyer of record may join as plaintiffs or applicants in the same proceeding where,

- (a) they assert, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;
- (b) a common question of law or fact may arise in the proceeding; or
- (c) it appears that their joining in the same proceeding may promote the convenient administration of justice.

—**(2)** Two or more persons may be joined as defendants or respondents where,

- (a) there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;
- (b) a common question of law or fact may arise in the proceeding;
- (c) there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief;
- (d) damage or loss has been caused to the same plaintiff or applicant by more than one person,

whether or not there is any factual connection between the several claims apart from the involvement of the plaintiff or applicant, and there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief or the respective amounts for which each may be liable; or

- (e) it appears that their being joined in the same proceeding may promote the convenient administration of justice.

1.3 Curative provisions and the importance of proper joinder

Rules 5.03 and 5.04 deal with the problems of misjoinder or non-joinder of parties. The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues must be added as a party (r. 5.03(4)).

Where a person who is required to be joined as a necessary party under r. 5.03 does not consent to be joined as a plaintiff or applicant, that person shall be made a defendant or respondent (r. 5.03(5)). This does not mean that the plaintiff or applicant will be asking the court to make any order or grant any relief against that person. Rather, the person is being added as a defendant or respondent only so that the person

- will have notice of the legal proceeding in which his or her rights may be affected;
- has the right to make representations before the court; and
- will be legally bound by any decision the court makes.

In appropriate circumstances, the court may grant relief from joinder in these circumstances (r. 5.03(6)).

The rule also provides that no proceeding shall be defeated by reason of misjoinder or non-joinder of any party. It gives the court authority to determine the issues in dispute as far as they affect the rights of the parties to the proceeding and to pronounce judgment without prejudice to the rights of persons who are not parties (r. 5.04(1)). The court can also add, delete, substitute, or correct the name of a party at any stage, so long as doing so would not cause prejudice that could not be compensated by costs or adjournment (r. 5.04(2)).

A person may not be added as a plaintiff or applicant in a proceeding that has already been commenced unless the person's consent is filed (r. 5.04(3)).

Note that while the *Rules* make these allowances, a mistake as to joinder of parties will necessarily cause trouble, expense, and delay, and the court's power in many of these aspects is discretionary. In some

circumstances, the court may refuse to grant an order relieving against the requirement of joinder as, for example, when an amendment would deprive a defendant of the defence of a limitation period.

In other words, one cannot rely on this rule as a way to get around a missed limitation period. Subsection 21(1) of the *Limitations Act, 2002* specifically prohibits adding a party if the limitation period has expired against that party, but the court does have discretion to correct a misnaming or misdescription of a party (s. 21(2)).

1.4 Parties in particular cases

1.4.1 Proceedings in contract

Whether a person is a necessary or proper party to a proceeding in a contract depends on whether the contract sued upon is joint, several, or joint and several. Persons may join in the making of the same promises

- jointly, as a unit;
- severally (i.e., separately), with each one individually making the same promise to do the same act; or
- both jointly and severally, promising both as a unit and individually.

At the same time, if there is more than one promisee, the contract may be made in favour of those promisees either jointly to them as a unit or to each one of them individually.

(a) Joint contracts

Where a proceeding relates to a joint contract, the following considerations apply:

- All of the joint promisees must join in the proceeding either as plaintiffs or applicants or, if a joint promisee does not consent to be added, then instead as a defendant or respondent (rr. 5.03(2) and (5)). In the case of death or bankruptcy of one of the joint promisees, the rights of that person pass to the survivor and not to the personal representative of the deceased or bankrupt. If all persons originally entitled to sue are dead, the personal representative of the last surviving creditor may sue.
- At common law, in cases of joint liability, a release of one joint debtor discharges all others, and a judgment against one joint debtor releases all others. This common-law position is changed by s. 139(1) of the *Courts of Justice Act (CJA)*, which provides that a judgment against or release of one of two or more persons jointly liable does not preclude judgment against any other in the same or a separate proceeding.
- In the case of joint obligations at common law, liability rested on the survivor alone. The estate of the deceased could not be sued because liability

ceased on death except in the case of the last survivor, whose estate was liable. The common-law position was changed by s. 4 of the *Mercantile Law Amendment Act*, which permits an action to be brought against the representative of the deceased joint obligor.

- Where liability is joint, all promisors are necessary parties (r. 5.03(1)). In an action against joint promisors, a successful plea by one will inure to the benefit of the others even if they do not raise the defence in their pleadings.

(b) Several contracts

In the case of several rights and obligations, it is not necessary that all persons having rights or all persons owing obligations sue or be sued in one action. At common law, there could be no such joinder. By virtue of r. 5.02, joinder in such cases is permissive but not compulsory.

Where rights and obligations are several, there is no right of survivorship, and the release of one debtor does not affect the others. Nevertheless, payment by one absolves the others to the extent of such payment.

(c) Joint and several contracts

Where liability is joint and several, a plaintiff may sue some or all of the promisors jointly or any one or more of them separately. A judgment against one joint and several promisor does not bar a judgment against the others. Joinder in such circumstances is at the option of the plaintiff.

(d) Alternative claims

Where contractual liability is in the alternative (there is a provision that the promisee may pursue only one of a number of promisors), joinder may be permitted under r. 5.02(2)(a). Judgment taken against one defendant in such situations is an irrevocable election and a bar to further proceedings against the other promisors, even if the parties are unaware of their rights.

1.4.2 Proceedings in tort

At common law, where several persons were joint tortfeasors, the following rules applied:

- The plaintiff could sue as many (or as few) of them as they wished.
- The plaintiff could not be compelled to add as a defendant any person whom he or she did not wish to sue.
- There was no contribution between joint tortfeasors.
- There was no contributory negligence.

- A judgment against one joint tortfeasor released all others.
- A release of one joint tortfeasor released the others.

The *Negligence Act* made the following changes:

- A plaintiff's recovery can be reduced due to their own contributory negligence (s. 3).
- There can be contribution between joint tortfeasors or between two or more persons whose fault or neglect caused or contributed to the plaintiff's damages (s. 2).
- A defendant can commence a third party proceeding against that person (s. 5).
- Joint tortfeasors are jointly and severally liable (s. 1).
- One tortfeasor may settle an action with the plaintiff and proceed against another tortfeasor (s. 2).

If several persons are joint owners of a chattel that the defendant has injured by trespass, conversion, or negligence, all joint owners should be joined as plaintiffs (r. 5.03(2)), although the court may not allow a wrongdoer to complain of non-joinder in such circumstances. If one co-owner does sue alone, damages may be recovered proportionate to the co-owner's interest (r. 5.04(1)). Thus, one of several co-owners of a patent, trademark, or copyright may sue for infringement of its rights.

1.4.3 Actions for possession of land

A person who is wrongfully dispossessed of land (whether the defendant wrongfully takes possession or retains the land after the right to possession has ceased) may sue for its recovery. The plaintiff in the action is the person who is entitled to immediate possession, and the defendant is the person in actual possession.

All persons who have the right to immediate possession should be joined as plaintiffs (r. 5.03(2)). Although an equitable title is sufficient if the plaintiff has the right to possession, it is advisable to join as plaintiff the person holding the legal estate. If there is a joint tenancy, all the joint tenants must sue, and the absence of any of them may be fatal, subject to the relieving provisions of rr. 5.03(5)–(6) and 5.04(1).

A person in possession of land can maintain an action for trespass; but in an action for conversion, the plaintiff must have the right to immediate possession, and the property must be vested in the plaintiff. Ordinarily, a landlord cannot sue for trespass to land in the occupation of a tenant. However, where the trespass is not merely of a temporary nature and is injurious to the reversion, the landlord may sue for the injury done to the reversionary interest.

A mortgagor can maintain an action for breach of covenant against a lessee so long as the mortgagee has not taken possession. If the mortgagor is in possession, the mortgagor is considered to be the beneficial owner. After entry by a mortgagee, the mortgagee's right of possession relates back to the time at which his or her legal right of entry accrued. Therefore, the mortgagee can maintain an action for trespass committed after the legal right of entry accrued but before entry was actually made.

All persons in possession of land should be joined as defendants. Unless a mortgagee is in possession, the mortgagee is not a necessary defendant. Where many persons are in possession under a lease from the same lessor, the rule may be relaxed to allow the plaintiff to make only the lessor the defendant.

1.5 Relief against joinder

The court has the power to relieve against unduly prejudicial or complicating joinder of either claims or parties (r. 5.05). Under this rule, the court may

- order separate hearings;
- require one or more of the claims to be asserted, if at all, in another proceeding;
- order that a party be compensated by costs for having to attend, or be relieved from attending, any part of a hearing in which the party has no interest;
- stay the proceeding against a defendant or respondent pending the hearing of the proceeding against another defendant or respondent, on condition that the party against whom the proceeding is stayed is bound by the findings made at the hearing against the other defendant or respondent; or
- make such other order as is just.

1.6 Intervention

Under R. 13, a person who is not a party to a proceeding may seek to intervene either as an added party or as a friend of the court ("*amicus curiae*"). Intervention may be sought in motions and applications at trials, in the Divisional Court, as well as at the Court of Appeal level.

1.6.1 Intervention as an added party

Leave to intervene as an added party may be granted by the court pursuant to r. 13.01, on motion, where a person who is not a party to a proceeding claims

- an interest in the subject matter of the proceeding;
- that they may be adversely affected by a judgment in the proceeding; or
- that there exists between them and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

In deciding whether to grant leave, the court must consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding, and the court may make such order as is just, i.e., leave to intervene as an added party usually includes a right to adduce evidence and participate as a party throughout the proceeding. However, in some cases, intervenors are limited to presenting argument (r. 13.01(2)).

The following case is cited simply as an example. In *Halton Community Credit Union Ltd. v. ICL Computers Canada Ltd.*, a lawyer, having been retained by the defendant corporation, failed to file the statement of defence, following which the pleadings were noted closed and default judgment was awarded to the plaintiff. The defendant retained new lawyers and unsuccessfully applied to set aside the default judgment. The defendant appealed and also sued the lawyers based on negligence and/or breach of contract and sought indemnification for any judgment and costs incurred as a result of the appeal. The lawyer was granted leave to intervene as a party in light of his interest in the subject matter, the quantum of damages, the issue of whether default judgment was proper, and the fact that he could be adversely affected by the judgment.

1.6.2 Intervention as a friend of the court

With leave of a judge or at the invitation of the presiding judge or master, any person may also be permitted to intervene, without becoming a party to the proceeding, as a friend of the court for the purpose of rendering assistance to the court by way of argument (r. 13.02). This can be an important tool for public interest organizations or others who wish to ensure the court considers their perspective before making a decision that will have an impact beyond the immediate parties. The Court of Appeal in *Bhajan v. Ontario (Children's Lawyer)* allowed a legal clinic to intervene in an appeal by the Children's Lawyer in which there was no respondent, since otherwise, the affected children would have had no voice.

The leading cases identify the following factors to be considered in deciding whether leave should be granted:

- the nature of the case;
- the issues that arise; and
- the likelihood the applicant will be able to make a useful contribution to the appeal without causing injustice to the immediate parties.

2. Consolidation or hearing together

The court's power to consolidate or order proceedings to be heard together may be exercised where the

proceedings have a question of law or fact in common, where relief is claimed arising out of the same transaction or occurrence or series of transactions or occurrences, or where for any other reason such an order ought to be made (r. 6.01(1) for proceedings in the same court; *CJA*, s. 107(1) for proceedings in different courts). Actions cannot be consolidated if they could not have been joined properly in the first instance.

The court is specifically empowered to make any of five distinct orders under rr. 6.01(1)(d)–(e). These five remedies are different, and not all of them will be applicable in all cases. The court may order that

- the proceedings be consolidated;
- the proceedings be heard at the same time;
- the proceedings be heard one immediately after the other;
- any of the proceedings be stayed until the determination of any other of them; or
- one of them be asserted by way of counterclaim in any other of them.

Where two actions are consolidated, their separate identities disappear, and they proceed as one action, with one title of proceeding, one court file number, and one set of pleadings, examinations for discovery, and trial record. Where two actions are ordered to be heard together or one after the other, they retain their separate identities, with separate titles of proceeding, court file numbers, pleadings, examinations for discovery, and trial records.

Consolidation may be appropriate where one plaintiff commences separate actions against the same defendant in respect of the same or related subject matter. It is generally not appropriate, however, when the defendant in one action commences a second action against the plaintiff in the first action. In such a case, it may be appropriate for the court to order that one of the actions be stayed and asserted by way of counterclaim in the first action.

Where the proceedings are in different courts, consolidation and related powers may be exercised under s. 107 of the *CJA*. The latter provision becomes relevant when the proceedings to be consolidated or heard at the same time are in different courts. However, a proceeding in the Small Claims Court will not be transferred to the Superior Court of Justice without the consent of the plaintiff in the Small Claims Court proceeding (*CJA*, s. 107(2)). (Despite this rule, in *Vigna v. Toronto Stock Exchange*, the Divisional Court exercised an inherent jurisdiction to transfer an action from the Small Claims Court to the Ontario Court (General Division) (now the Superior Court of Justice).) Similarly, a proceeding in the

Small Claims Court will not be required to be asserted by way of a counterclaim in a proceeding in the Superior Court of Justice without the consent of the plaintiff in the proceeding in the Small Claims Court (*CJA*, s. 107(3)). A motion to transfer is made to a judge of the Superior Court of Justice (*CJA*, s. 107(4)).

An order for consolidation or hearing together is discretionary. Courts have traditionally had regard to the following considerations:

- the general convenience and expense.
- whether a jury notice has been served in one action but not in the other. The court will not deprive a party of the right to a jury trial by consolidating an action in which a jury notice has been delivered with another action where no jury notice has been served.
- how far the actions have progressed. Since the purpose of consolidation is to save expense and avoid multiplicity of pleadings and proceedings, a motion for consolidation should be launched as soon as facts sufficient to justify the motion are indicated. Consolidation is inappropriate when actions are ready for trial.
- consolidation should not be ordered when the plaintiffs are represented by separate lawyers and cannot agree on a common representative.
- actions should not be consolidated where matters relevant in one action have arisen after commencement of the other and the actions have proceeded to a considerable extent.
- where consolidation is otherwise proper, the fact that on examination for discovery, questions that

would be unobjectionable in one action might be privileged in the other action is not a sufficient reason for refusing an order consolidating the actions.

As an example, if a personal injury plaintiff has multiple lawsuits, all in regard to his or her injuries (multiple accidents or tort claims with a contractual accident benefits claim), the courts will usually require that these actions be tried together to avoid a multiplicity of proceedings involving the same evidence. These claims are quite common.

Where there has been an order before trial that the proceedings be heard together or one after the other, the judge at the hearing retains discretion to order otherwise (r. 6.02).

3. Separate hearings

The court has a specific power to order that distinct issues in the proceeding be heard separately (r. 6.1.01). Usually, this occurs where an inquiry of damages before the determination of the question of liability would prejudice one of the parties. This is commonly referred to as a bifurcated trial so that discovery on damages is deferred until the plaintiff has established a right to recover against the defendant. While this was sometimes granted by the court under a common-law power prior to the enactment of this rule, its use was limited because of the then prevailing judicial attitude that the most efficient use of court resources was to have all issues determined at once in any given proceeding.

Commencement of proceeding

1. Place of commencement

The *Rules of Civil Procedure (Rules)* provide that if a statute or rule requires a proceeding to be commenced, brought, tried, or heard in a particular county, the proceeding must be commenced in that county, and the county must be named in the originating process. Otherwise, the proceeding may be commenced at any court office in any county named in the originating process (r. 13.1.01). The *Rules* further provide for when and how a proceeding may be transferred to another county in various circumstances where it is likely that a fair hearing cannot be obtained in the county in which the proceeding was commenced or where it is otherwise in the interest of justice to transfer the proceeding to another county (r. 13.1.02).

2. Action or application?

The *Rules* contemplate two different types of civil proceedings: actions and applications. An action (defined in r. 1.03(1)) is a proceeding in which the parties exchange pleadings (i.e., statement of claim, statement of defence, and reply), produce documents, and conduct examinations for discovery. If it does not settle, an action usually ends in a trial. The trial proceeds either before a judge alone, who hears oral testimony and legal argument and decides the issues of fact and law, or before a judge and jury, in which case the judge decides issues of law and the jury decides the issues of fact.

An application (also defined in r. 1.03(1)) is a proceeding in which a judge alone determines questions of law or mixed questions of fact and law based on affidavit evidence, almost always without live witnesses giving oral testimony. Applications are made for the specific kinds of relief set out in rr. 14.05(3)(a)–(g.1) for such things as the legal interpretation of a contract or other written instrument, an oppression remedy under business corporations legislation, or a remedy under the *Canadian Charter of Rights and Freedoms*. There is also a residual provision (or “basket clause”) allowing applications in cases where it is unlikely that there will be material facts in dispute (r. 14.05(3)(h)).

Every proceeding in the court is to be brought by action, except where a statute or the *Rules* provide otherwise (r. 14.02). Accordingly, there must be specific provision for commencement of a proceeding by application, failing which it is necessary to proceed by action. The *Rules* provide specifically that a proceeding may be commenced

by application to the Superior Court of Justice or to a judge of that court, if a statute so authorizes (r. 14.05(2)).

In addition to the specific proceedings enumerated in r. 14.05(3), proceedings may be commenced by application where other provisions of the *Rules* themselves authorize the commencement of a proceeding by application (r. 14.05(3)), e.g., an application for the approval of a settlement involving a party under a disability where the settlement is reached before a proceeding is commenced in respect of the claim (r. 7.08(3)) or an application for an interpleader order (r. 43.03(1)).

Sometimes the nature of the matter to be determined or the factual basis for the matter may allow the proceeding to take the form of either an action or an application. It is important to think strategically and thoroughly when deciding which procedure to use to achieve the results sought by the client. Factors such as the cost, time to hearing, and other strategic advantages, if any, of using one form over the other must be carefully weighed. A court may deny relief if an application is improperly brought or, alternatively, may order a change in the proceeding from application to action, with potentially severe cost consequences to the party who improperly initiated the proceeding by application.

3. Originating process

Generally, all civil proceedings must be commenced by the issuance of an originating process (r. 14.01(1)). An originating process is a document whose issuing commences a proceeding under the *Rules* (r. 1.03). A proceeding is defined in r. 1.03 as being an action or an application, and an action is defined as including a proceeding commenced by statement of claim, notice of action, counterclaim, crossclaim, or third or subsequent party claim. An application is defined as a proceeding commenced by notice of application.

There are a few specific exceptions. It is unnecessary to issue an originating process for counterclaims or crossclaims involving only persons who are already parties to the action (r. 14.01(2)). As well, it is unnecessary to issue an application for appointment of an estate trustee under R. 74 (r. 14.01(2.1)). In the case of a third party claim or a counterclaim against a person who is not already a party to the main action, the appropriate originating process must be issued (r. 14.01(2)); for counterclaim, see r. 27.03; for third

party claim, see r. 29.02(1). As a general principle, where one seeks to bring into a proceeding a party who is not already a party to an existing proceeding, an originating process must be issued.

The issuance of an originating process is a matter of right, although in some instances leave is required to commence proceedings, e.g., the current equivalent of a shareholder's derivative action pursuant to s. 246(1) of Ontario's *Business Corporations Act*. Where leave to commence a proceeding is required, it must be obtained by motion to the court (r. 14.01(3)).

An originating process has certain attributes that distinguish it from other pleadings (such as a statement of defence or a reply). As the name implies, it originates the process. Therefore, it must be issued in the court office before being served (rather than merely being served and filed). Further, it contains standard form warning language directed to the defendant, respondent, or other party who is being brought into the overall litigation for the first time. This language informs the defendant, respondent, or other party about their obligations to defend or respond, outlines the applicable time periods, etc. Also, it must be served personally or by an alternative to personal service.

4. Types of originating process

4.1 Actions

Actions may be commenced in a number of ways, most commonly by issuing a statement of claim in Form 14A or, in respect of mortgage actions, Form 14B (r. 14.03(1)). The statement of claim notifies the defendant of several important details, which are standard in all claims:

- the fact that a legal proceeding has been commenced;
- the appropriate method and the required time frame for responding to the claim;
- the possible availability of legal aid; and
- the consequences of failing to defend.

Where the simplified procedure applies, an additional paragraph is added before the heading "Claim," which specifically advises the defendant the action is being brought under the simplified procedure provided in r. 76.02(4).

More specifically, the statement of claim sets out the precise relief claimed and the material facts relied upon by the plaintiff to substantiate the claim. It lets the defendant know the case to be met.

An action must be commenced by issuance of a statement of claim except where another means of commencement

is provided by the *Rules*. Other means, where appropriate, include the following:

- **Notice of action:** r. 14.03(2) (Form 14C). An action may be commenced by notice of action where there is insufficient time to prepare a statement of claim. It must contain a short statement of the nature of the claim. It allows the plaintiff 30 more days in which to file a modified format of the statement of claim (Form 14D) (rr. 14.03(2)–(3)). The notice of action must not be served separately from the statement of claim (r. 14.03(4)).
- **Counterclaim against a person not already a party:** r. 27.03 (Form 27B).
- **Crossclaim:** r. 28.02 (Form 28A).
- **Third party claim:** r. 29.02(1) (Form 29A).
- **Fourth (and subsequent) party claim:** r. 29.11.

4.2 Applications

Every application is commenced by issuing a notice of application in Form 14E (r. 14.05(1)), which notifies the respondent that a legal proceeding has been commenced for certain specific relief. It gives notice of the date, place, and time for the hearing of the application, the court or judge before whom the proceeding will be argued, the grounds for the application, and the evidence that will be relied upon. Rule 38 governs jurisdiction and procedure for applications. There is a specific kind of notice of application for use in applications for judicial review to the Divisional Court (Form 68A). Part of the general heading of all documents filed on applications is a statement of the statutory provision or rule under which the application is made (r. 14.06(3) and Form 4B). The simplified procedure (r. 76.02(1)) does not apply to applications. Applications may be case managed, as provided for in r. 77.02(1).

5. Form and content of court documents

Rule 4 describes the formatting details and required content for court documents. Court documents consist of a heading (r. 4.02(1)), a body (r. 4.02(2)), and a backsheet (r. 4.02(3) and Form 4C). Except for certificates of appointment, a backsheet is not required for documents in non-contentious estate matters under R. 74 (Practice Direction, Ontario Court (General Division), New Rules for Estate Proceedings, November 16, 1994).

Every document in a proceeding must have a heading in accordance with Form 4A (actions) or 4B (applications) that sets out the name of the court, the court file number, and the "title of the proceeding" (r. 4.02), except for

- estate proceedings under RR. 74–75 (which have their own specific forms of title of the proceeding as part of the document) (r. 4.02(1.1));

- counterclaims against a party not already a party to the main action (Form 27B);
- third or subsequent party claims in an action (Form 29A);
- garnishment proceedings (Form 60H);
- mortgage actions in which defendants are added on a reference (Form 64N); and
- appeals (Form 61B).

The term “style of cause” has not appeared in the *Rules* since 1984 and is no longer used in proceedings in the Superior Court of Justice.

The title of the proceeding must set out the names of all the parties and the capacity in which they are made parties, if other than their personal capacity (r. 14.06). For example, where an executor or estate trustee is a party to a proceeding in that capacity, he or she should be so described in the title of the proceeding: e.g., “Rajit Singh, Estate Trustee of the Estate of Sanjiv Singh, Deceased.” Another example is an action involving a minor or other person under a disability (defined in r. 1.03); in such case, the accepted wording is “Sherry Marks, by her litigation guardian, Karen Marks.”

The parties are described differently in the title of proceedings in different proceedings. In all actions commenced by notice of action or statement of claim, the party commencing the action is named the plaintiff, and the opposite party is the defendant (r. 14.06(2)). In an application or an application for judicial review, the parties are the applicant and the respondent (r. 14.06(3)). In an appeal, the designations of the parties in the originating court are retained (i.e., plaintiff or applicant, defendant or respondent) and their status on appeal (i.e., appellant or respondent in appeal) is added underneath in parentheses (Form 61B).

Where a third or subsequent party claim is made, Form 4A makes it clear that the title of the proceeding, not only in such third party claims but also in all subsequent documents in the main action, must be amended so as to follow Form 29A.

Subrule 4.02(2) sets out requirements for information that must be contained in the body of every document in a proceeding:

- the title of the document;
- its date;
- where the document is filed by a party and not issued by a registrar or is an originating process, the name, address, and telephone number of the lawyer filing the document or, where a party acts in person, his or her name, address for service, and telephone number; and

- where the document is issued by a registrar, the address of the court office in which the proceeding was commenced or, in the case of an application to the Divisional Court, the address of the court office in the place where the application is to be heard.

The backsheet (r. 4.02(3) and Form 4C) must include the short title of the proceedings; court name and court file number; location of the court office in which the proceeding was commenced; name, address, telephone, fax number, and Law Society registration number of the lawyer filing the document; and, if known, the fax number of the person on whom the document was served (r. 4.02(3)).

6. Issuance of originating process

An originating process is issued by the registrar’s act of dating, signing, and sealing it with the seal of the court and assigning a court file number to it (r. 14.07(1)). A copy of the originating process must be filed in the court file when it is issued (r. 14.07(2)). The date of issuance of an originating process is considered to be the date of commencement of the proceeding. Subrules 4.05(1.1) and (4.1) provide for the issuance and filing electronically of certain documents, including originating processes, by using the authorized software.

In addition to filing a copy of the statement of claim in an action, a plaintiff is required to file Form 14F (Information for Court Use) (r. 14.03(4.1)), which identifies the type of claim being instituted.

A statement of claim must be served within six months after it is issued. Where a notice of action commenced the action, both the notice of action and the statement of claim must be served together within six months after the notice of action is issued (rr. 14.08(1)–(2)). Failure to serve a statement of claim within the required six-month period is an irregularity that may be remedied by an order under r. 3.02, extending the time for service. The jurisprudence generally requires the plaintiff to establish that some attempt had been made to serve the document in the required timeframe and to demonstrate some sufficient reason for the failure to do so.

If 180 days has elapsed after the date of issue of the statement of claim or notice of action, and neither a notice of intent to defend nor statement of defence has been filed or a motion (other than a motion challenging the court’s jurisdiction) has been brought, the registrar may give 45 days’ notice that the action will be dismissed as abandoned. Therefore, it is dangerous to wait until near the end of the six-month period to serve the statement of claim. These administrative dismissals can be set aside for sufficient reason, including a lawyer’s inadvertence.

7. Representation by lawyer

Most individual litigants are permitted to act in person rather than through a lawyer; however, there are some exceptions. A party who is under disability or who acts in a representative capacity must be represented by a lawyer (r. 15.01(1)). A lawyer must represent a corporation, except with leave of the court (r. 15.01(2)). The lawyer or law firm who acts for a party is referred to as the party's "lawyer(s) of record," meaning the lawyer who is shown in the records of the court office in which the proceeding was commenced as representing the party.

Rule 15.02 provides parties with a mechanism to determine whether a lawyer with the authority of the client commenced an action. If a lawyer has commenced a proceeding without the authority of his or her client, the court may stay or dismiss the proceeding and order the lawyer to pay the costs of the proceeding (r. 15.02(4)). If a corporation has commenced an action, a directors' resolution might be necessary to authorize the commencement of the proceeding if the action is not in the ordinary course of its business.

A party may change its lawyer of record by serving on the former lawyer and every other party a notice of change of lawyer (r. 15.03(1) and Form 15A), a notice of appointment of lawyer (r. 15.03(2) and Form 15B), or a notice of intention to act in person (r. 15.03(3) and Form 15C) and filing the form with proof of service in the court office. Subrule 15.03(3) may be used by a corporation to remove its lawyers of record, provided that the notice is amended to make it subject to r. 15.01(2). The case law indicates that a separate motion under r. 15.01(2) for leave for the corporation to act in person is also required.

Where the *Rules* provide that some action is to be done by a lawyer, a party acting in person in accordance with r. 15.01(2) or (3) can perform that action (r. 1.04(3)).

A lawyer may be the one to initiate a motion for an order removing him or her as lawyer of record (r. 15.04). Service of the notice of motion must be made by serving the client personally, by using an alternative to personal service under r. 16.03, or by mailing a copy to the client at the client's last known address and to another address, if any, where the lawyer believes the copy is likely to come to the client's attention. The order removing a

lawyer from the record must include the client's last known address and client address for service (if different), any other address where the lawyer believes a copy of the order will come to the party's attention, the client's telephone and fax number, and either the text of rr. 15.04(8)–(9) if the party is an individual or the text of rr. 15.04(6)–(7) where the party is a corporation (r. 15.04(4)). Care must be taken so as not to breach lawyer-client privilege when getting off the record. Sufficient evidence must be given to allow the motions court judge to decide the motion, but counsel should preserve confidentiality and not breach his or her client's privilege.

A lawyer of record must continue to act until the client delivers a notice of change under r. 15.03 or an order removing the lawyer from the record has been entered, served on the client and all other parties, and filed with the court with proof of service (r. 15.05).

Where the lawyer asserts a lien on the client's property in the lawyer's possession, r. 15.03(4) allows the client to bring a motion to determine whether the lawyer has a lien and the extent of it. The court is given wide discretionary powers to impose such terms as may be just in the disposition of the motion (r. 15.03(5)).

Where a lawyer has ceased to practise and the party for whom the lawyer acted has not served a notice of change of lawyer or intention to act in person, another party to the proceeding can serve documents on that party at the party's last known address or may move for directions (r. 15.06).

If a party is represented by an out-of-province lawyer, any other party to the proceeding may move for directions for the conduct of the proceeding (r. 15.07).

8. Proportionality

The *Rules* have always been guided by the general principle that they are to be construed liberally to secure the just, most expeditious and least expensive determination of every proceeding on its merits (r. 1.04(1)). In addition, there is a specific requirement that orders and directions be proportionate to the importance and complexity of the issues and the amount involved in the proceeding (r. 1.04(1.1)). Similarly, a proportionality rule (r. 29.2) has been added to the discovery process in RR. 30–35.

1. Introduction

1.1 Parties to application

The person who makes an application is referred to as the “applicant” (r. 1.03 of the *Rules of Civil Procedure (Rules)*), and the person against whom an application is made is referred to as the “respondent” (rr. 1.03 and 14.06(3)).

1.2 Notice of appearance and factum

A respondent who has been served with a notice of application does not file a “defending” document; there is no statement of defence in an application. The respondent must serve and file a notice of appearance and a factum. In addition, if the respondent thinks that the applicant’s application record, once served on the respondent, is incomplete, the respondent may serve on every other party a respondent’s application record.

1.3 Examinations

There is no documentary discovery or examination for discovery in an application, although witnesses may be examined or cross-examined under R. 39.

1.4 Hearing of application

A judge, never a jury, hears an application. Witnesses rarely give oral evidence on an application; rather, the evidence on which the argument of the application proceeds consists of affidavits and transcripts of examinations and cross-examinations of witnesses that were conducted out of court and not in the presence of a judge.

After being commenced, an application may be heard and disposed of within a few weeks (or days, if it is urgent) or months, rather than years.

2. Authority to commence application

2.1 Application authorized by statute

A proceeding may be brought by way of application, rather than by way of action, where a statute authorizes it (r. 14.02). For example, a proceeding may be commenced by application under one of the following statutes:

- *Conveyancing and Law of Property Act*;
- *Evidence Act*;
- *Land Titles Act*;
- *Mortgages Act*;

- *Residential Tenancies Act, 2006*;
- *Vendors and Purchasers Act*;
- *Ontario’s Business Corporations Act*;
- *Canada Business Corporations Act*;
- *Securities Act*; and
- *Bankruptcy and Insolvency Act*.

2.2 Application authorized by the Rules

A proceeding may also be brought by way of application, rather than by way of action, where the *Rules* authorize it (r. 14.02). For example, the *Rules* authorize the commencement of a proceeding by application

- for the administration of the estate of a deceased person or for the execution of a trust (r. 65.01);
- for partition or sale of land under the *Partition Act* (r. 66.01);
- for approval of the sale, mortgage, lease, or other disposition of property of a minor (r. 67.01);
- for judicial review under the *Judicial Review Procedure Act* (r. 68.01);
- for approval of a settlement of a claim involving a person under a disability reached before a proceeding is commenced with respect to the claim (r. 7.08(3)); or
- to appoint an arbitrator under the *Arbitration Act, 1991*, a common use of an application.

2.2.1 Applications under r. 14.05(3)

Subrule 14.05(3) also authorizes the commencement of a proceeding by application where the relief claimed in the proceeding is for

- the opinion, advice, or direction of the court on a question affecting the rights of a person concerning the administration of the estate of a deceased person or the execution of a trust (r. 14.05(3)(a));
- an order directing executors, administrators, or trustees to do or abstain from doing any particular act concerning an estate or trust for which they are responsible (r. 14.05(3)(b));
- the removal or replacement of one or more executors, administrators, or trustees, or the fixing of their compensation (r. 14.05(3)(c));
- the determination of rights that depend on the interpretation of a deed, will, contract, or other instrument, or on the interpretation of a statute, order-in-council, regulation, or municipal by-law or resolution (r. 14.05(3)(d));

- the declaration of an interest in or charge on land, including the nature and extent of this interest or charge or the boundaries of the land, or the settling of the priority of interests or charges (r. 14.05(3)(e));
- the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease, or variation of a trust (r. 14.05(3)(f));
- an injunction, mandatory order, or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application (r. 14.05(3)(g)); or
- a remedy under the *Canadian Charter of Rights and Freedoms* (r. 14.05(3)(g.1)).

An application may also be brought in respect of any matter where it is unlikely that there will be any material facts in dispute—the so-called basket clause (r. 14.05(3)(h)).

Most applications under r. 14.05(3) are brought under clauses (d) or (h), which are wide enough to allow a great many disputes to be adjudicated by application, rather than by action.

2.2.2 Trial of an issue

If, at the hearing of an application properly brought under r. 14.05(3), it appears clear to the judge that there are material facts in dispute, the judge can direct a trial of the issue, and the proceeding may continue as an action, in whole or in part (r. 38.10).

This is because where material facts are in dispute, the resolution of the dispute will require an assessment of the credibility of witnesses. Such assessment cannot safely be done on an application where the judge cannot see the witnesses or hear them give evidence orally.

3. Procedure on an application — R. 38

3.1 Case management and applications — R. 77

Rule 77 establishes a case management system that applies to most (but not all) actions and applications commenced in (or transferred to) the City of Ottawa, the City of Toronto, and the County of Essex.

3.2 Practice directions for applications

In certain regions, practice directions governing the filing requirements and the conduct of applications are in effect. These practice directions are published in the *Ontario Reports* and must be consulted before commencing an application. They also appear online on the Ontario Courts website and in the commercially available consolidated and annotated versions of the *Rules*.

In the Toronto Region, applications may be placed on the Commercial List pursuant to the Practice Direction Concerning the Commercial List, Toronto of June 10, 2010. There are specialized rules under this practice direction that govern the requirements for such proceedings.

3.3 Commencement of application

A “notice of application” is the originating process that commences an application and must be issued by the registrar of the court in which the application is to be heard (rr. 1.03, 14.01, 14.05, and 14.07).

3.4 Form of notice of application

A notice of application must be in one of the following forms as applicable:

- Form 14E, the general form;
- Form 68A (Notice of Application to Divisional Court for Judicial Review);
- Form 73A (Notice of Application for Registration of United Kingdom Judgment); and
- the forms under RR. 74 and 75 for estate matters.

Rule 38.04 provides that every notice of application must state

- the precise relief sought;
- the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and
- the documentary evidence to be used at the hearing of the application.

3.5 Service and filing of notice of application

3.5.1 Who should be served

Since a notice of application is an originating process, it must be served personally on all parties as specified in r. 16.02 or by an alternative mode of service as specified by r. 16.03 or in accordance with an order for substituted service (rr. 16.01(1) and 38.06(1)).

Where there is uncertainty about whether anyone else should be served, the applicant may make a motion to a judge for an order for directions about service (r. 38.06(1)).

Service may be dispensed with by order if it is in the interest of justice to do so, such as where the relief sought is urgently needed (r. 16.04(1)).

3.5.2 Consequences where no notice

Subrule 38.06(2) provides that where it appears to a judge hearing an application that the notice of application ought to have been served on a person who has not been served, the judge may

- dismiss the application or dismiss it only against the person who has not been served;
- adjourn the application and direct that notice of the application be served on the person; or
- direct that any judgment made on the application be served on the person.

3.5.3 When service to be effected

A notice of application must be served at least 10 days before the date of the hearing of the application, except where the notice is served outside of Ontario, in which case at least 20 days' notice must be given (r. 38.06(3)).

The court may extend or abridge the time for such service by order (r. 3.02(1)). Note that despite the minimum notice period prescribed, the applicant should consider giving considerably more notice (some weeks or even months) to the respondent.

A respondent who has been provided only the minimum notice required by the *Rules* invariably will ask for an adjournment of the hearing of the application to retain a lawyer, prepare responding evidence, and cross-examine the deponents of the affidavits filed on behalf of the applicant.

Except in unusual circumstances, the court will grant such an adjournment almost as of right. This means that the applicant will have to secure another hearing date for the application. In most cases, the relief sought by the applicant will not be so urgent that greater and more sensible notice could not be given.

3.5.4 Filing of notice

The notice of application must be filed with proof of service in the court office where the application is to be heard at least seven days before the hearing date (r. 38.06(4)). Form 14F (Information for Court Use) must be filed along with the notice of application (r. 14.05(1.1)).

3.6 Confirmation of application — r. 38.09.1

Rule 38.09.1 provides that a party who is making an application on notice to another party must

- confer (or attempt to confer) with the other party;
- not later than 2 p.m. three days before the hearing date, provide the registrar a confirmation of application (Form 38B) by fax or email or by leaving the confirmation at the court office; and
- send a copy of the confirmation to the other party by fax or email.

The application will not be heard if the confirmation is not provided, except by order of the court (r. 38.09.1(2)). Note that the applicant must ensure that the confirmation is kept up to date (r. 38.09.1(3)).

3.7 Notice of appearance

A respondent who has been served with a notice of application must forthwith deliver a notice of appearance (Form 38A) (r. 38.07(1)).

A respondent who fails to file a notice is not entitled to receive notice of any step in the application or any further documents in the application; file material; examine a witness; cross-examine on any affidavit filed on the application; or be heard at the application, except with leave of the presiding judge (r. 38.07(2)).

Note that r. 38.07(2) does not apply to a motion to set aside service of a notice of application outside Ontario or to an application to pass accounts (rr. 38.07(3)–(4)).

3.8 Jurisdiction and forum

All applications are to be made to a judge of the Superior Court of Justice (r. 38.02). A master has no jurisdiction to hear an application.

Applications for judicial review are brought in the Divisional Court (*Judicial Review Procedure Act*, ss. 2 and 6(1)). Note that in certain circumstances, such applications may be made to a single judge of the Superior Court of Justice with leave of a judge of that court under s. 6(2) of the *Judicial Review Procedure Act*.

In either case, the notice of application commences the application. However, in an application to the Divisional Court, the notice must be in Form 68A.

3.9 Place and date of hearing

In the notice of application, the applicant must name the place of commencement in accordance with r. 13.1.01 (r. 38.03(1)). Unless the court orders otherwise, the application shall be heard in the county in which the proceeding was commenced or to which the proceeding has been transferred under r. 13.1.02 (r. 38.03(1.1)).

An application may be set down for hearing on any day on which a judge is scheduled to hear applications at any place where there is no practice direction concerning the scheduling of applications in effect (r. 38.03(2)).

Where a lawyer estimates that the hearing will be more than two hours long, a hearing date must be obtained from the registrar before the notice of application is served, unless the application is urgent and a satisfactory date cannot be obtained (r. 38.03(3)).

In such a case, the application may be brought on for hearing on any day that a judge is sitting for the hearing of applications (r. 38.03(3.1)).

3.9.1 Counter-application

Where a notice of application has been served and the respondent wishes to make an application against the applicant or against the applicant and another person, the respondent must make the application at the same place and time and to the same judge as in the original application, unless the court orders otherwise (r. 38.03(4)). This proceeding is referred to as a “counter-application.” It is roughly the equivalent of a counterclaim in an action.

3.9.2 Divisional Court

In an application to the Divisional Court for judicial review, the notice of application must state that the application is to be heard on a date to be fixed by the registrar at the place of hearing (r. 68.03).

4. Material on an application

4.1 Application record and factum

At least seven days before the hearing of an application, the applicant must serve on every respondent who has served a notice of appearance an application record and a factum.

The factum is to consist of a concise argument of the facts and law relied on by the applicant. The record and factum must be filed, with proof of service, at least seven days before the hearing (r. 38.09(1)).

Likewise, the respondent must serve on every other party and file, with proof of service, a respondent’s factum at least four days before the hearing (r. 38.09(3)).

If the respondent is of the opinion that the application record is incomplete, the respondent may serve on every other party a respondent’s application record at least four days before the hearing (r. 38.09(3.1)).

Note that at or before the hearing of the application, a judge may dispense with, in whole or in part, the requirement to serve and file records and factums (r. 38.09(4)).

4.2 Contents of application record

Subrule 38.09(2) provides that an application record must contain, in consecutively numbered pages,

- a table of contents describing each document, including each exhibit, by its nature and date;
- a copy of the notice of application;
- a copy of all affidavits and other material served by any party (i.e., both applicant(s) and respondent(s)) for use on the application;
- a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and

- a copy of any other material in the court file that is necessary for the hearing of the application.

4.3 Filing of copy of transcript

It is the responsibility of a party who intends to refer to a transcript of evidence at the hearing of an application to file a copy of the transcript with the court (rr. 34.18 and 38.09(6)).

5. Evidence on an application — R. 39

All of the evidence to be used by a party on an application is to be listed (or a copy thereof provided) in the application record, in accordance with r. 38.09(2). (Recall that there may be both an applicant’s application record and a respondent’s application record).

Rule 39 governs the evidence to be used on both motions and applications.

6. Disposition of an application

On the hearing of an application, the judge may grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms (r. 38.10(1)(a)).

6.1 Application treated as action

The judge also has jurisdiction to order that the whole application or any issue in the application to proceed to trial and to give such directions as are just (r. 38.10(1)(b)). In such case, the proceeding is thereafter treated as an action.

6.2 Trial of an issue

Where the trial of an issue is directed in an application, the order may provide that the proceeding be treated as an action for the issue to be tried (rr. 38.10(2)–(3)). Trials are usually ordered where there is a serious conflict in the evidence that can only be resolved by findings of credibility of witnesses or of fact made after witnesses give evidence before a judge at a trial.

6.3 No summary judgment or determination of law

Neither summary judgment under R. 20 nor determination of a point of law under R. 21 is available in an application. An application is summary in nature. A respondent to an application who takes the position that, as a matter of law, the applicant is not entitled to the relief that the applicant seeks or the notice of application discloses no reasonable cause of action may make that argument on the hearing of the application, rather than on a preliminary motion as in an action.

1. Service of documents generally

The general rule is that an originating process (i.e., a statement of claim, notice of action, notice of application, counterclaim against a person who is not already a party to the main action, and a third party or subsequent party claim) must be served personally in accordance with r. 16.02 of the *Rules of Civil Procedure (Rules)* or by one of the alternatives to personal service set out in r. 16.03. No other document has to be served personally or by an alternative to personal service unless a specific rule or order requires it (r. 16.01(3)). For instance, a summons to a person to be examined who is not a party must be served personally (r. 34.04(4)), and a notice of motion for a contempt order is required by r. 60.11(2) to be served personally on the person against whom the order is sought, and not by an alternative to personal service, unless the court orders otherwise.

Documents that are not required to be served personally or by an alternative to personal service must be served on a party's lawyer of record in accordance with r. 16.05 or, in the case of a party acting in person or a person who is not a party, by

- mailing a copy of the documents to the last address for service provided by the party or person or, if no such address has been provided, to the party's or person's last known address; or
- personal service or by an alternative to personal service (r. 16.01(4)).

An originating process need not be served on a party who, without being served, has delivered a defence, notice of intention to defend, or notice of appearance (r. 16.01(2)).

Certain documents need not be served in the formal manner prescribed by R. 16. Where a particular provision of the *Rules* intends that R. 16 is not to be engaged, the provision will not use the word "serve" but another expression. The provision may require that a lawyer "give" a copy of a status notice (r. 48.14(3)), a lawyer "send" a draft order to the parties (r. 59.03(1)), the sheriff to "give" notice of claim by mail (r. 60.13(2)), or the registrar to "mail" a notice of listing for hearing (r. 61.09(5)).

As with many of the other rules, the details with respect to service can be quite specific, so it is important to read carefully through the relevant rule(s) to ensure compliance.

2. Manner of service in particular cases

Personal service in a variety of particular contexts (such as on minors, persons who are mentally incapable, corporations, partnerships, sole proprietors, municipalities, and the Crown) is specifically described in r. 16.02(1)(a)–(n). Consult the rule to ensure proper service is effected on those parties. Three examples are highlighted below to demonstrate the different practices for different kinds of parties.

2.1 Service on an individual

Personal service on an individual other than a person under disability is made by leaving a copy of the relevant document with the individual (r. 16.02(1)(a)). Personal service is typically made by delivering a copy of the document into the hands of the person to be served and bringing the document to the person's attention. Where a person to be served refuses to accept the document, one may resort to the common-law rule that service is effected by touching the person with the document to be served and then letting the document fall to the ground.

It is open to the court to find that personal service has been effected, even though the document was not handed to the person to be served. In order for personal service to be effective in these circumstances, the case law provides that the person to be served must be positively identified, the document to be served must be brought to the person's attention, and the person must be made aware or shown to be generally aware of the nature of the document. Where the person already knows the general nature of the plaintiff's claim, the person attempting service is not required to describe the contents of the document.

It is not necessary for a person effecting personal service of a document to produce the original document or to have it in his or her possession—a copy will suffice (r. 16.02(2)). If the document comes to the knowledge of or into the possession of the person to be served, either directly or indirectly from a third party, a court may find that there has been personal service.

2.2 Service on a partnership

Service on a partnership may be effected by leaving a copy of the document with any one or more of the partners or with a person at the principal place of business of the partnership who appears to be in control or management of the place of business (r. 16.02(1)(m)).

Where the plaintiff or applicant seeks an order or judgment that will be enforceable against the personal assets of a partner, he or she should also serve a “notice to alleged partner” (Form 8A) stating the person was a partner at the material time specified in the notice (r. 8.03(1)).

Unless a claimant is sure that the partnership itself (as opposed to the individual partners) has, and in the future will continue to have, sufficient assets to satisfy any judgment that the claimant may obtain in the proceeding, service of both the originating process and the notice to the alleged partner should be made on as many members of a firm as possible. This will ensure that once judgment is obtained against the firm, the personal assets of these partners may be taken in execution, whereas such property cannot be taken without leave of the court if the individual partners have not been so served.

2.3 Service on a municipality

Service of a document on a municipality may be effected by leaving a copy of the document with the chair, mayor, warden, or reeve of the municipality. Alternatively, the document may be left with the clerk or deputy clerk of the municipality or a lawyer for the municipality (r. 16.02(1)(b)).

3. Alternatives to personal service

Where the *Rules* or an order of the court permit service by an alternative to personal service, service may be made in accordance with one of the four options set out in r. 16.03.

3.1 Acceptance of service by a lawyer

Service on a party who has a lawyer may be made by leaving a copy of the document with the lawyer or an employee in the lawyer’s office, but service under this rule is effective only if the lawyer endorses on the document or a copy of it an acceptance of service and the date of acceptance (r. 16.03(2)). A lawyer who accepts service on behalf of a client shall be deemed to represent to the court that he or she has the authority of the client to accept service (r. 16.03(3)). Accordingly, the lawyer should endorse the document served to indicate acceptance of service of the document on behalf of the client.

Service on a lawyer does not deprive the party served of the right to question the regularity of the document served, and to that extent, the person served is in no different position than if the document had been served personally.

Acceptance of service is different from admission of service. Both terms are used in r. 16.09(3), and they should not be confused. An acceptance of service is a voluntary agreement of a lawyer (which should be only on instructions from the client) to be served on the client’s behalf with an originating process. An admission of service is merely an acknowledgment that a document, other than an originating process, has been served on the lawyer of record (i.e., a lawyer whose name appears in the court’s records as representing a party in a legal proceeding) for a party under r. 16.05.

Great caution should be exercised by legal counsel in accepting service of an originating process. All counsel should have written instructions from his or her client to accept service of any originating process.

3.2 Service by mail to last known address

Service of a document may be made by sending a copy of the document together with an acknowledgment of receipt card (Form 16A) by registered mail or regular letter mail to the last known address of the person to be served (r. 16.03(4)). The person to be served is then expected to mail the acknowledgement of receipt card back to the solicitor or party serving the document. Service under this rule is deemed to be effective on the date on which the solicitor or party serving the document actually receives the receipt card from the person to be served. It is not effective service if the person to be served does not mail back or deliver the acknowledgement of receipt card.

3.3 Service at place of residence

Where an attempt is made to effect personal service at a person’s place of residence and for any reason personal service cannot be effected, the document may be served by leaving a copy, in a sealed envelope addressed to the person, at the place of residence with anyone who appears to be an adult member of the same household and, on the same day or the following day, mailing another copy of the document to the person at the place of residence. Service in this manner is effective on the fifth day after the document is mailed (r. 16.03(5)).

3.4 Service on a corporation

If personal service on a corporation cannot be effected under r. 16.02(1) because the head office, registered office, or principal place of business of a corporation cannot be found at the last address recorded with the Ministry of Government Services, service may be made on the corporation by mailing a copy of the document to the corporation at that address. Similarly, where the attorney for service in Ontario cannot be found at the last address recorded with the Ministry of Government

Services, service may be effected on an extra-provincial corporation by mailing a copy of the document to the attorney for service in Ontario at that address (r. 16.03(6)).

4. Substituted service, dispensing with service, or validating service

The rule permitting substituted service exists to provide a mechanism for the service of documents upon a person who is inaccessible for service. It prevents a person from evading service, but it is not designed to simply allow the party trying to effect service to avoid the trouble, time, or expense that may arise in the course of effecting personal service or an alternative to personal service, if such service can be made. Where it is necessary in the interest of justice, the court may make an order dispensing with service altogether (r. 16.04(1)).

A motion for an order allowing for substituted service or dispensing with service should be supported by an affidavit showing that proper efforts have been made to serve the party personally and that prompt service is impossible. In the case of a motion for an order providing for substituted service, the affidavit should demonstrate that the proposed method of substituted service will probably bring the document to the notice of the person to be served.

Rule 16.04 allows the court a wide discretion with respect to the manner of service to be employed where an order for substituted service is made. The method selected should be reasonably likely to bring the document to the knowledge of the person to be served. The court may relax this principle to some extent when the refusal of an order would result in a party being deprived of his or her right to relief and the evidence indicates that the document may possibly reach the defendant if served by substituted service. In this situation, substituted service will be permitted by a method through which it is reasonably possible, rather than reasonably probable, that the proceeding will be brought to the knowledge of the person to be served.

The following methods of substituted services have been endorsed by the courts:

- by service on some other person:
 - an agent;
 - lawyers, if they have acted on behalf of the defendant in connection with the subject matter of the action; or
 - any person with whom the court is satisfied the defendant is in communication;
- by regular lettermail; and

- by advertising: this may be allowed where there is no evidence that any person is likely to be in communication with the defendant.

A court order for substituted service must specify when service in accordance with the order is effective (r. 16.04(2)). However, when an order is made dispensing with service of a document, the document is deemed to have been served on the date the order dispensing with service was made (r. 16.04(3)); this detail is important in terms of the computation of time and other time limits under the *Rules*. It has been held in Ontario that an order for substituted service must impose a time limit for taking the steps that are to be good and sufficient service, and if those steps are not completed by the date named in the order, service is not effective on that date.

An order for substituted service does not preclude personal service of a statement of claim. If there has been both substituted and personal service, case law establishes that the time limit for delivery of a statement of defence runs from the earlier of the effective dates of service.

A person served under an order for substituted service has status to move to set aside the order. A motion to set aside the service of a document served substitutionally on the ground that such service should not have been permitted should also request an order setting aside the order pursuant to which service was effected.

Where a document has been served in a manner other than one authorized by the *Rules* or a court order, the court may make an order validating service if it is satisfied of either of the following (r. 16.08):

- The document came to the notice of the person to be served.
- The document was served in such a manner that it would have come to the person's notice except for the person's own attempts to evade service.

A very common use of substituted service is service upon a defendant's insurer in a tort case. On occasion, a plaintiff cannot locate a tort defendant, but the plaintiff is aware that the tort defendant was insured and knows the identity of the insurance company.

The court will usually allow service upon the insurer in lieu of serving the defendant personally, provided that there is some reasonable probability that notice of the action would come to the defendant's attention in this manner.

5. Service of documents not requiring personal service

Generally, only the originating process must be served personally. However, a summons to a person to be examined who is not a party must also be served personally (r. 34.03(4)), and a notice of an examination in aid of execution does require personal service or an alternative to personal service (r. 60.18(7)). Notice of a contempt motion can only be served personally (r. 60.11(2)).

Subrule 16.05(1) outlines six ways in which service of a document may be made on a party's lawyer of record. The specific wording of the provisions in r. 16.05(1) and the remainder of r. 16.05 often require compliance with other subrules and various qualifications. Generally, service may be made by

- mailing a copy to the lawyer's office;
- leaving a copy with the lawyer or an employee in the lawyer's office;
- depositing a copy at a document exchange of which the lawyer is a member or subscriber;
- faxing a copy to the lawyer's office;
- sending a copy to the lawyer's office by courier; or
- emailing a copy to the lawyer's office.

Where a document may be served by mail pursuant to the *Rules*, a copy of the document must be sent by regular lettermail or registered mail, and the service of the document by mail is deemed to be effective on the fifth day after the document is mailed (r. 16.06) (except for service by mail as an alternative to personal service under r. 16.03(4), where the date of service is deemed to be the date on which the person mailing the documents receives a signed acknowledgment back from the recipient of the document).

To serve by depositing a copy of the document at a document exchange, service is effective only if the document or a copy of it and the copy deposited are date stamped by the document exchange in the presence of the person depositing the copy (r. 16.05(1)(c)).

Documents served by fax must include a cover page that indicates

- the sender's name, address, and telephone number;
- the name of the lawyer to be served;
- the date and time of transmission;
- the total number of pages transmitted, including the cover page;
- the fax number of the sender; and

- the name and telephone number of a person to contact in the event of transmission problems (r. 16.05(3)).

There are limitations imposed upon the length and nature of the documents permitted to be served by fax. Any document that is 16 pages or more in length may be served by fax only between the hours of 4 p.m. and 8 a.m. the following day, unless the party to be served gives prior consent. A fax sent between 4 p.m. and midnight is deemed to have been served on the following day. A motion record, application record, trial record, appeal book, and compendium or book of authorities may not be served by fax at any time without the prior consent of the party to be served (rr. 16.05(3)–(3.2)).

Service by courier is deemed to be effective on the second day following the day on which the courier was given the document (r. 16.05(2.1)).

Service by email is effective only if the lawyer of record provides by email an acceptance of service and the date of acceptance (note the unusual use of the term "acceptance" of service in this rule). Where the email acceptance is received between 4 p.m. and midnight, service shall be deemed to have been made on the following day. Subrule 16.05(4) requires that the email message to which a document served by email is attached must include

- the sender's name, address, telephone number, fax number, and email address;
- the date and time of transmission; and
- the name and telephone number of a person to contact in the event of transmission problems.

6. Where document does not reach person served

A person who has been served with a document in accordance with the *Rules* or an order of the court may, on a motion to set aside the consequences of default or on a motion for an extension of time or in support of a request for adjournment, show that the document did not come to his or her notice or came to his or her notice only some time later than when it was served or deemed to have been served (r. 16.07).

7. Proof of service

Rule 16.09 provides that service of a document can be proved in a variety of ways:

- Service may be proved by an affidavit of the person who served the document (r. 16.09(1) and Form 16B). The affidavit of service may be printed on the backsheet or on a stamp or sticker affixed to the backsheet of the document served (r. 16.09(5)).

- Personal service or service at a place of residence by a sheriff or sheriff's officer may be proved by a certificate of service (r. 16.09(2) and Form 16C). The certificate of service may be printed on the backsheet or on a stamp or sticker affixed to the backsheet of the document served (r. 16.09(5)).
- A lawyer's written admission or acceptance of service is sufficient proof of service and need not be verified by affidavit (r. 16.09(3)).
- Service of a document by document exchange may be proved by the date stamp on the document or a copy of it (r. 16.09(4)).
- Service of a document by email may be proved by a certificate of service of the person who served the document stating that he or she
 - served the document by emailing a copy in accordance with r. 16.09(4) and received by email an acceptance of service, with the date and time of the acceptance;
 - has sworn an affidavit of service containing the particulars set out in the certificate of service;
 - has kept the affidavit of service; and
 - will, on the request of the court or a party, produce the affidavit of service (r. 16.09(6)).

In addition to the provisions of r. 16.09, service can be proved by an endorsement of acceptance of service on a true copy of a document by the person served, noting the date on, the time when, and the capacity in which the person is served.

8. Service outside Ontario

Pursuant to r. 17.02, a party to a proceeding may be served outside Ontario, sometimes referred to as "service *ex juris*," with an originating process or notice of a reference without leave of the court where the proceeding against the party consists of a claim or claims falling within the listed categories. These include claims

- in respect of real or personal property in Ontario (r. 17.02(a));
- for foreclosure, sale, payment, possession, or redemption in respect of a mortgage, charge, or lien on real or personal property in Ontario (r. 17.02(e));
- in respect of a contract where
 - the contract was made in Ontario;
 - the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario;
 - the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract; or
 - a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside of Ontario that rendered impossible the performance of

the part of the contract that ought to have been performed in Ontario (r. 17.02(f));

- in respect of a tort committed in Ontario (r. 17.02(g));
- in respect of damage sustained in Ontario arising from a tort, breach of contract, or breach of fiduciary duty or of confidence, wherever committed (r. 17.02(h));
- against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario (r. 17.02(o));
- against a person ordinarily resident or carrying on business in Ontario (r. 17.02(p)); or
- properly the subject matter of a counterclaim, crossclaim, or third or subsequent party claim under the *Rules* (r. 17.02(q)).

Where r. 17.02 does not apply, the court can grant leave to serve an originating process or notice of a reference outside Ontario (r. 17.03(1)). A motion for leave to serve a party outside of Ontario may be made without notice to the other parties and must be supported by an affidavit or other evidence showing in which place or country the person is probably to be found and the grounds upon which the motion is made (r. 17.03(2)).

An originating process served outside Ontario without leave must disclose the facts and specifically refer to the provisions of r. 17.02 relied on in support of such service (r. 17.04(1)).

Where an order has been obtained permitting service outside Ontario pursuant to r. 17.03, a copy of the order and the evidence used to obtain it must be served as well (r. 17.04(2)).

8.1 Setting aside service outside Ontario

A party who has been served with an originating process outside of Ontario may move, before delivering a statement of defence, notice of intention to defend, or notice of appearance, for

- an order setting aside the service and any order that authorized service; or
- for an order staying the proceedings (r. 17.06(1)).

Service out of Ontario may be challenged on any of three grounds (r. 17.06(2)):

- The service is not authorized by the *Rules*;
- An order granting leave to serve outside Ontario should be set aside.
- Ontario is not a convenient forum for the hearing of the proceeding.

Although r. 17.02 provides for service of an originating process outside Ontario without leave in particular cases,

jurisprudence makes it clear that the court retains its discretion to control its own process and to set aside service outside Ontario for reasons including inconvenient forum as well as other factors considered by the courts prior to the amendment of the current rule in 1975. The making of such a motion is not in itself a submission or “attornment” to the jurisdiction of the court by the party who has been served outside Ontario (r. 17.06(4)). A party will be deemed to have submitted or “attorned” to the jurisdiction of the Ontario court, however, if it serves a statement of defence.

In bringing a motion to set aside service outside Ontario, it is open to the parties to put affidavit evidence before the court in support of their respective positions. However, because r. 17.04 requires that an originating process served outside the province without leave shall disclose the facts relied on in support of such service, it may be that it is not absolutely necessary for a party who seeks to uphold service outside of Ontario to file affidavit evidence in support of the motion.

Where the court concludes that service outside Ontario is not authorized by the *Rules* (specifically r. 17.02), the court may nevertheless make an order validating the service where it decides that the case is one in which it would have been appropriate to grant leave to serve process outside Ontario, pursuant to r. 17.06(3).

Finally, a party may move for a stay of the proceeding under s. 106 of the *Courts of Justice Act* as an alternative to moving under r. 17.06 to set aside service, and the case law indicates that the party may do so even after attorning to the jurisdiction. A commonly asserted ground on which a stay is sought is that the court of Ontario does not have jurisdiction over the defendant.

8.2 Manner of service outside Ontario

An originating process or other document to be served outside of Ontario in a jurisdiction that is not a contracting state under the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Convention)* may be served in the manner provided by the *Rules* for service in Ontario or in a manner provided by the law of the jurisdiction where service is made, provided it can reasonably be expected to come to the notice of the person to be served (r. 17.05(2)). Proof of service may be effected either in the manner prescribed by the *Rules* for proof of service in Ontario or in the manner provided by

the law of the jurisdiction where service was made (r. 17.05(4)).

However, in the case of a “contracting state” under the *Convention* (i.e., the United States and most European and British Commonwealth countries), the document must be served through the central authority in the contracting state or in a manner that is permitted by Art. 10 of the *Convention* and that would be permitted by Ontario's *Rules* if the document were being served in Ontario (r. 17.05(3)). This requires service in one of the following manners:

- through a “central authority” designated in each state in accordance with the procedures set out in the *Convention* (Art. 2);
- directly through “judicial officers, officials or other competent persons of the State of destination” (Art. 10); or
- by mail in circumstances where service by mail would be permitted by the Ontario *Rules* (Art. 10).

Note that if the contracting state objects to private service, service through the “central authority” is the only permitted form of service.

In addition to these methods of service, the *Convention* also permits service in accordance with the procedures provided for in bilateral treaties where parties are signatories to both the *Convention* and a bilateral treaty regarding the service of documents (Art. 11). In that case, provided that the manner of service would be permitted by the Ontario *Rules* if the document were being served in Ontario, the procedures in either the *Convention* or the bilateral agreement may be used (Art. 11).

The state in which the document is to be served can require that the document be translated before service (Art. 5). Proof of service may be effected in the manner provided by the *Rules* for proof of service in Ontario, in the manner provided by the law of the jurisdiction where service is made, or in accordance with the *Convention* if service is made in a contracting state (r. 17.05(4) and Forms 17A–17C).

The advice of legal counsel located in the country in which service must be effected is often required in order to ascertain the local requirements for service, translation of documents, and the like.

A copy of the *Convention* may be found on the Hague Conference on Private International Law website.

1. Overview

A pleading is a court document in an action or application that states the position and/or intention of a party to the proceeding, as well as the status of the proceeding. It could be a document that

- starts a proceeding (i.e., a statement of claim or notice of application);
- supports a step being taken by a party after the proceeding has been started but before the trial or hearing of the matter at issue (i.e., a notice of motion for an interim order or a notice of examination);
- ends a proceeding (i.e., default judgment or notice of abandonment); or
- follows the final determination of a matter (i.e., a writ of seizure and sale).

A lawyer should be very cautious about pleading fraud, misrepresentation, breach of trust, malice, or bad faith and should have clear instructions from the client to do so. These are very serious allegations and, if unproven at trial, can have serious adverse cost consequences.

2. Function of pleadings

Specifically, pleadings

- define the issue(s) between litigants with clarity and precision;
- give fair notice of the case that has to be met so that the opposing party may direct its evidence to the issues disclosed;
- define the issues for documentary discovery and examination for discovery;
- assist the court in adjudicating on the allegations made by the litigants; and
- constitute a record of the issues involved in the action that can be referred to at a later date, if necessary.

2.1 Content of pleadings — r. 25.06

2.1.1 “Material” facts

Every pleading must contain a concise statement of the material facts on which the party relies for the party’s claim or defence, but not the evidence by which those facts are to be proved (*Rules of Civil Procedure (Rules)*, r. 25.06(1)).

“Material” facts are facts that constitute, support, or are necessary to establish a cause of action. Even if a party

alleges that the act complained of was “unlawful,” “wrongful,” or “improper,” the pleading is untenable and may be struck, on motion to the court, if the pleaded material facts do not disclose a reasonable cause of action (r. 21.01(1)).

2.1.2 Clear statement

The material facts must be stated clearly and definitely in a summary way. They should not need to be inferred from vague or ambiguous expressions or from statements of circumstances consistent with different conclusions.

While one of the principal objects of r. 25.06(1) is to prevent a lengthy, wordy pleading (which may be struck out on that basis alone), a party’s case should not be stated too narrowly. If the case cannot be pleaded exactly and with precision, it is better to make allegations that are broader, rather than narrower.

2.1.3 Timing

Facts must be material at the stage of the action at which they are pleaded. A plaintiff should not anticipate possible defences, nor should a defendant plead to a cause of action not raised in the statement of claim.

2.1.4 No evidence

A pleading must not state the evidence by which facts pleaded are to be proved. Pleading a fact that is relevant only because it tends to prove a material allegation is a form of pleading evidence. The fact may be struck out if challenged.

An example of this would be pleading the fact that a party has made an admission. This fact is a form of evidence to be proved at trial, not pleaded.

Distinguishing fact from evidence can be very difficult. Note that motions brought to attack pleadings solely on the ground that the pleading pleads evidence often do not succeed.

2.1.5 Point of law

Even though the focus of most pleadings is on the factual allegations, a party may raise any point of law in a pleading (r. 25.06(2)). Conclusions of law may be pleaded only if the material facts supporting them are pleaded. This means that you cannot allege merely that a right, duty, or liability exists; the facts that create such right, duty, or liability must also be set out.

2.1.6 Form of pleading — r. 25.02

Pleadings must be divided into consecutively numbered paragraphs. Each allegation should be contained in a separate paragraph so that you avoid the situation in which a defendant, in its statement of defence, denies an entire paragraph in the statement of claim simply because the paragraph contains an allegation of one specific fact with which the defendant takes issue.

2.2 Documents or conversations — r. 25.06(7)

You do not need to set out the whole of the contents of any material document or conversation (r. 25.06(7)). You can state the effect of the document or conversation as briefly as possible. The precise words of the document or conversation need not be pleaded, unless they are material (i.e., in a defamation action).

Similarly, where notice to a person is alleged, it is sufficient to allege it as a fact, unless the form or precise term of the notice is material (r. 25.06(6)).

Note that quoting word for word from a contract or document can make an appreciable impact on the party reading the document. Where the contract is short and central to the entire case, consider attaching it as a schedule to the pleading.

2.3 Nature of act or condition of mind — r. 25.06(8)

Where fraud, misrepresentation, breach of trust, malice, or intent is alleged, the pleading must contain full particulars about the allegation(s). The allegations must be specifically and distinctly pleaded with the utmost particularity so that the party against whom the allegations are made will know the case that has to be met (r. 25.06(8)).

A party will be limited at trial to proving such allegations only if and to the extent that they are raised in the party's pleadings. An allegation of fraud should not be made for tactical purposes only, nor should it be made without a genuine factual basis which, if true, would support a finding of fraud.

On the other hand, knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.

2.4 Contract or legal relationship

Where a contract or legal relationship is alleged to exist, the facts showing the existence of the contract or legal relationship must be set out in the pleadings.

2.5 Condition precedent — r. 25.06(3)

The performance or occurrence of a condition precedent to the assertion of a claim or defence is to be implied in a party's pleading and need not be set out distinctly (r. 25.06(3)). Where the opposite party intends to contest the performance or occurrence of a condition precedent, the opposite party must specify such non-performance or non-occurrence in his or her pleading.

2.6 Res ipsa loquitur

Although some case law suggests that the rule of evidence known as *res ipsa loquitur*, "the thing speaks for itself," must be pleaded by the plaintiff, it may be sufficient for the statement of claim to contain all of the facts from which the application of the rule is alleged to arise.

If a plaintiff also pleads negligence, the plaintiff will not be ordered to provide particulars in the plaintiff's pleading where the rule applies. Note that the Supreme Court of Canada has restricted the use of *res ipsa loquitur*, finding it to be nothing more than a way to deal with circumstantial evidence. The court held that the rule should not be treated as a separate component in negligence actions.

2.7 Judicial notice

It is not necessary to plead matters of which the court will take judicial notice under the common law of evidence or the Evidence Acts, such as

- the general law;
- all public Acts of Parliament;
- the prerogatives of the Crown; and
- Royal Proclamations.

2.8 Private Acts of Parliament

A private Act of Parliament should be pleaded if relied on.

2.9 Foreign law

Judicial notice will not be taken of foreign law. It is a question of fact to be proved by evidence as with any other factual allegation. Consequently, if foreign law is to be relied on, it should be pleaded. Otherwise, it will be presumed to be the same as local law.

2.10 Inconsistent pleadings in alternative — rr. 25.06(4)–(5)

A party may make inconsistent allegations in a pleading where the pleading makes it clear that such allegations are being pleaded in the alternative. Such allegations must not be shams or wholly fictitious, nor should

different plaintiffs claim inconsistent, alternative relief (r. 25.06(4)).

A party may not raise an allegation inconsistent with its *previous* pleading in a *subsequent* pleading; rather, the previous pleading must be amended, and the inconsistent allegation pleaded in the alternative (r. 25.06(5)).

2.11 Aggravation and mitigation of damages

Matters that may not be material to the main issue but that affect the amount of damages may be pleaded. This means the statement of claim may include facts that show the nature and extent of the injury for which damages are sought to be recovered and that are intended to be proved at trial in aggravation of damages.

Similarly, a defendant must plead facts about the plaintiff's failure to mitigate damages. If the defendant fails to so plead, the defendant may not be entitled to give evidence at trial about such facts.

3. Delivery of pleadings — r. 25.04

Rule 25.04 provides for the time for delivery of pleadings. It incorporates, by reference, the time periods set out in rr. 14.08, 18.01, and 27–29.

Rule 1.03 defines the word “deliver” as meaning the service and filing (with proof of service) of a pleading. This means, for example, that where a statement of defence must be delivered within 20 days, the pleading must be both served and filed, with proof of service, within 20 days.

The court may by order extend or abridge any time prescribed by the *Rules* on such terms as are just (r. 3.02(1)). Similarly, the parties to an action may consent, in writing, to the extension or abridgement of the time for the serving, filing, or delivering of a document (r. 3.02(4)). Note also that r. 6.03(2) of the *Rules of Professional Conduct* provides that lawyers shall agree to reasonable requests concerning the waiver of procedural formalities that do not prejudice the rights of the client.

3.1 Statement of claim

Where an action has been commenced by a notice of action, a statement of claim must be filed within 30 days after the notice of action is issued. It can only be filed thereafter with the written consent of the defendant or leave of the court obtained on notice to the defendant (r. 14.03(3)).

Where an action is commenced by a notice of action, r. 14.08(2) provides that the notice of action and the

statement of claim must be *served* together within six months after the notice of action is issued (r. 14.08(2)).

Note that where the notice of action is the originating process, the statement of claim is not issued. Where an action is commenced by a statement of claim, it must be served within six months after it is issued (r. 14.08(1)).

The time limit set out for the pleadings can be extended by court order.

3.2 Statement of defence — r. 18.01

A statement of defence must be delivered within 20 days after service of the statement of claim where the defendant is served in Ontario, within 40 days where the defendant is served elsewhere in Canada or the United States of America, and within 60 days where the defendant is served anywhere else (r. 18.01).

A defendant who has been served with a statement of claim who intends to defend the action may deliver a notice of intent to defend (Form 18B) within the time prescribed for the delivery of a statement of defence (r. 18.02).

The defendant then has a further 10 days, in addition to the time prescribed by r. 18.01, within which to deliver a statement of defence. Many lawyers take advantage of the availability of such notice to have additional time within which to prepare the defence.

3.3 Reply — r. 25.04(3)

A reply (Form 25A), if any, shall be delivered within 10 days after service of the statement of defence. Where the defendant counterclaims, a reply and defence to counterclaim, if any, shall be delivered within 20 days after service of the statement of defence and counterclaim (r. 25.04(3)).

3.4 Counterclaim — R. 27

Where the counterclaim is only against the plaintiff in the main action or only against the plaintiff and another person who is already a party to the main action, a statement of defence and counterclaim (Form 27A) shall be delivered within the time prescribed for service of a statement of defence under r. 18.01 or at any time before the defendant is noted in default (r. 27.04(1)).

Where any defendant to the counterclaim is *not* already a party to the main action (i.e., a stranger who has been added to the litigation), the statement of defence and counterclaim (Form 27B) is considered to be an originating process. It must be issued before being served on all parties to the main action (rr. 27.03 and 27.04(2)).

The statement of defence and counterclaim must be served on the new defendant to the counterclaim, along

with all pleadings previously served (i.e., the statement of claim), within 30 days after it has been issued or at any time before the defendant is noted in default or subsequently with leave of the court (r. 27.04).

3.5 Crossclaims — R. 28

A statement of defence and crossclaim (Form 28A) must be delivered

- within the time prescribed for delivery of the statement of defence;
- at any time before the defendant is noted in default; or
- subsequently with leave, which the court must grant unless the plaintiff would be prejudiced thereby (r. 28.04(1)).

3.5.1 Defence to crossclaim

The defence to crossclaim (Form 28B) shall be delivered within 20 days after service of the statement of defence and crossclaim (r. 28.05(1)).

3.6 Third party claims — R. 29

A third party claim (Form 29A) must be issued

- within 10 days after the defendant delivers the statement of defence in the main action;
- at any time before the defendant is noted in default; or
- subsequently with leave, which the court shall grant unless the plaintiff would be prejudiced thereby (rr. 29.02(1) and (1.2)).

A third party claim may also be issued within 10 days after the plaintiff delivers a reply in the main action (r. 29.02(1.1)). It is to be served on the third party within 30 days after it is issued, together with all other pleadings in the action (r. 29.02(2)).

3.6.1 Third party defence

A third party defence (Form 29B) must be delivered within the time normally prescribed for delivery of a defence (r. 29.03).

3.7 Other pleadings — r. 25.01(5)

Subrule 25.01(5) provides that no pleading subsequent to a reply may be delivered without leave of the court or the consent in writing of the opposite party. Where a reply introduces new and important matters that the defendant should have the opportunity to answer, leave or consent to deliver of a rejoinder may be given. In extraordinary circumstances, leave to deliver a surrejoinder may be granted.

4. Specific pleadings

4.1 Statement of claim

A statement of claim usually is the originating process for the commencement of an action. However, an action may be commenced by issuing a notice of action where there is insufficient time to prepare a statement of claim. The notice of action must contain a short statement of the nature of the claim and a short statement of facts sufficient to enable the opposite party to identify the incident or relationship in question (rr. 14.03(1)–(2)).

The statement of claim (Form 14A) may alter or extend the claim(s) set out in the notice of action (r. 14.03(5)). It is made up of two parts: the first part contains a notice to the defendant of the nature of the proceeding and of the consequences of the defendant failing to defend the action, and the second part contains the claim itself.

4.1.1 Claim for relief

The plaintiff must set out the precise relief sought in the first paragraph of the claim. Subrule 25.06(9) provides that the nature of the relief claimed shall be specified in the claim for relief.

Where damages are claimed, the amount claimed by each claimant for each claim shall be stated. The amounts and particulars of special damages must be pleaded only to the extent that they are known at the date of pleading; however, notice of any further amounts and particulars shall be delivered after they become known and, in any event, not less than 10 days before trial.

A sentence in a statement of claim to the effect that “full particulars of the plaintiff’s special damages will be provided before trial” is unnecessary. It does nothing more than repeat the requirement of the rule.

4.1.2 Post-relief

After the claim for relief, the statement of claim should contain the following:

- definitions paragraph, table of contents, and summary of the action, if desired;
- introductory averments stating the parties, their capacity, their business, their residence, and the surrounding circumstances leading up to the dispute;
- a statement of the material facts giving rise to the cause of action;
- where the statement of claim is to be served outside Ontario without a court order, the facts and specific provisions of R. 17 relied on in support of such service;

- where the plaintiff seeks a certificate of pending litigation, a description of the land sufficient for registration (r. 42.01(2)); and
- at the conclusion of the statement of claim, the place of trial (i.e., the city or town) proposed by the plaintiff.

4.1.3 Family Law Act

Where an action is commenced under Part V of the *Family Law Act* for a claim for damages on behalf of dependants, the plaintiff need not, in its statement of claim, name and join the claim of any other person who is entitled as a dependant to maintain an action for damages in respect of the same loss.

4.1.4 Simplified procedure: statement of claim — R. 76

Where a proceeding is governed by simplified procedure under R. 76, the statement of claim or notice of action must indicate that the action is being brought under the simplified procedure.

4.2 Statement of defence

4.2.1 Deemed admissions

Under r. 25.07(2), every allegation of fact that is not denied in a party's defence shall be deemed to be admitted, unless the party pleads that it has no knowledge about the fact.

4.2.2 Damages deemed to be in issue

Since the claim for relief—paragraph 1 in every statement of claim and the equivalent paragraphs in a counterclaim or crossclaim—contains no allegations of fact that are capable of being admitted or denied, the defendant need not deny paragraph 1 of the statement of claim.

Note that r. 25.07(6) expressly states that in an action for damages, the amount of damages shall be deemed to be in issue unless specifically admitted.

4.2.3 Admissions

The defendant must admit every allegation of fact in the opposite party's pleadings that the defendant does not dispute (r. 25.07(1)). Where the defendant intends to prove a different version of facts from that pleaded by the opposite party, a general denial is not sufficient. The defendant must plead the defendant's own version of the facts in the statement of defence (r. 25.07(3)).

4.2.4 No surprises

In addition, the defendant must plead to any matter on which the defendant intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an

issue that has not been raised in the opposite party's pleading (r. 25.07(4)).

In effect, r. 25.07 requires the defendant to admit, deny, or state that the defendant has no knowledge of each allegation contained in the statement of claim.

4.2.5 Types of defence

There are four general types of defence:

- **Traverse** — This is an express contradiction or denial of an allegation of fact.
- **Confession and avoidance** — This is a plea that admits or confesses, either expressly or by necessary implication, that the allegations in the statement of claim are true but seeks to avoid the legal inference that would otherwise be drawn, or the legal conclusion or effect of such admitted facts, by stating additional facts to show that the inference, conclusion, or effect is unwarranted or to establish justification or excuse. The plea may be raised as an alternative to a traverse.
- **Objection in point of law** — A party may raise a point of law on the facts as pleaded as a convenient method of raising the issue at an early stage. The objection will ordinarily be disposed of by the judge presiding at the trial, although it may be decided on a motion under R. 21 (determination of an issue before trial).
- **Plea in abatement** — A defendant may raise issues related to the non-joinder of parties or the incapacity of the plaintiff to sue; the defendant may also plead that the action was brought prematurely or that another action about the same cause or matter is pending.

4.2.6 Simplified procedure: defendant's objection — R. 76

Where the plaintiff has opted to have the proceeding governed by simplified procedure under R. 76, even though the claim exceeds the monetary limits prescribed under it, the defendant may object to proceeding under the simplified procedure by so stating in the statement of defence.

4.2.7 Special defences

(a) Statutory defence

A court will recognize any statute that invalidates the plaintiff's claim, even where the defendant does not specifically plead such statute. A statute that bars the plaintiff's right, as well as the remedy the plaintiff seeks, need not be pleaded. However, a statute that bars only a remedy or recovery must be pleaded, since the right continues to exist and the statutory remedy, if not pleaded, may take the opposing party by surprise.

(b) Statute of Frauds and Limitations Act, 2002

Since r. 25.07(4) requires the defendant to plead any matter which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party's pleading, the *Statute of Frauds* or the *Limitations Act, 2002* should be specifically pleaded.

If not pleaded, the statute may not be relied on at trial. In making the plea, the defendant must plead the facts showing how the particular statute is applicable and the sections on which the defendant relies.

(c) Conditions precedent — r. 25.06(3)

If the defendant wishes to raise any question about the performance or occurrence of a condition precedent, the defendant must do so by a specific plea in the statement of defence. In that case, the onus is on the plaintiff to prove due performance or waiver.

A statutory notice of action that presupposes the existence of a completely constituted cause of action, independent of notice, is a kind of condition precedent within the meaning of r. 25.06(3). For example, a statute may require that a plaintiff claiming against a municipality for personal injuries alleged to have been caused by the defective condition of the sidewalks to give notice of such injuries within a certain time.

The giving of such notice is not a constituent element or ingredient of the cause of action that the plaintiff must plead. It is a condition precedent that the plaintiff need not specifically allege but that the defendant must, if the defendant intends to contest it, specifically deny.

Contrast this example with conditions precedent that must be specifically pleaded because they form an essential part of the cause of action at common law. For instance, in an action for malicious prosecution, it is necessary to plead that the proceeding complained of was terminated in favour of the plaintiff.

(d) Notice

Where notice to a person is alleged, it is sufficient to allege such notice as a fact, unless the form or a precise term of the notice is material (r. 25.06(6)). Usually, there is no obligation on the plaintiff to plead the giving of notice. If a defendant wishes to raise the issue, the defendant should specifically plead lack of notice as a defence.

(e) Illegality

Subrule 25.07(5) provides that where an agreement is alleged in a pleading, a denial of the agreement by the

opposite party shall be construed only as a denial of the making of the agreement or of the facts from which the agreement may be implied by law, and not as a denial of the legality or sufficiency in law of the agreement.

Consequently, since a defendant must warn the opposite party of any issue that may take the opposing party by surprise or that has not been raised in the opposite party's pleading, the defendant must plead facts showing illegality, either by statute or common law.

A simple plea that a contract is illegal is not a valid plea, since it is a conclusion of law. Such plea must be supported by material facts relied on as making the contract illegal. However, if illegality appears on the face of the contract, the court may take notice of the illegality even if it is not pleaded.

(f) Want of jurisdiction

In a case where the defendant may consent or acquiesce to the jurisdiction of the court, lack of jurisdiction must be pleaded if it is to be relied on.

(g) Ultra vires

A defence that an act is *ultra vires* the powers of a corporation must be pleaded.

(h) Estoppel

Estoppel is a rule of evidence whereby a party is precluded from relying on a fact whether such fact is true or not. Estoppel must be pleaded if it is to be relied on. The facts relied on as establishing estoppel must be specifically alleged.

(i) Res judicata

A judgment in an action is conclusive between the parties and their privies (those who have an interest in the action) not only on the points on which the court was actually required to pronounce judgment, but on every point that properly belonged to the subject of the litigation and that the parties, with reasonable diligence, could have brought forward at the trial.

If relied on as a defence to a subsequent action, *res judicata* (the assertion that a matter has been adjudged) or any of its alternate forms (i.e., issue estoppel or abuse of process) must be specifically pleaded.

(j) Contributory negligence

Contributory negligence must be specifically pleaded; reference should also be made to the appropriate statute relied on, usually the *Negligence Act*.

(k) Act of third party

When a defendant relies on the act of a third party, the defendant should plead it.

(l) Non est factum

A plea of *non est factum* is made where a person who has signed a specific document alleges that the person was induced to believe that the person was signing a document of an entirely different nature. This plea must be specifically pleaded.

(m) Want of authority

An agent's want (lack) of authority should be specifically pleaded.

(n) Insanity

In an action for breach of contract, a defendant who seeks to rely on insanity as a defence must plead not only that the defendant was insane at the time of the contract, but also that the plaintiff knew it.

(o) Not qualified

In an action by a professional, such as a physician or a lawyer, a defence that the professional was not a duly qualified practitioner must be specifically pleaded.

(p) Release, payment, or performance

Since r. 25.07(4) requires the defendant to plead any matter which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party's pleading, a defence of release, payment, or performance should be specifically pleaded.

(q) Accord and satisfaction

Accord and satisfaction is the purchase of a release from an obligation whether arising under a contract or tort. The issue is one of fact and must be specifically pleaded.

(r) Settled account

The defence of a settled account must be specifically pleaded.

(s) Surrender

Surrender, whether arising by deed or operation of law, must be specifically pleaded.

(t) Waiver

Waiver must be specifically pleaded, and the facts constituting a waiver must be set out.

(u) Equitable defences

The defendant must state in the statement of defence the facts relied on to support a claim of equitable relief.

(v) Purchaser for value without notice

This defence is a single plea, which must be specifically pleaded, unless it can be inferred from the facts that are alleged.

(w) Defamation and defences

Pleading in a defamation case is a minefield. Consult authoritative texts on the subject before attempting to draft either a claim or a defence in this specialized and often arcane area of the law.

A defence of justification must be pleaded, and the facts alleged to be true must be set out so that the plaintiff is not in doubt about what the defendant seeks to justify. Privilege, and the facts and circumstances to be relied on to establish it, also must be pleaded. Fair comment on the facts on which the defendant relies to establish the defence also must be set out.

Note that on December 22, 2009, the Supreme Court of Canada released its decision in *Grant v. Torstar Corp.* and in *Quan v. Cusson*. In both cases, the court recognized a new defence to the tort of defamation—that of “responsible communication on matters of public interest”—and established the required elements for successfully raising such a defence.

(x) Defences arising after action is brought

In a defence or counterclaim, a defendant may raise matters that have arisen after the commencement of the action.

4.2.8 Set-off and counterclaim**(a) Legal set-off**

Section 111 of the *Courts of Justice Act* provides for legal set-off. It is the right of the defendant when sued for payment of a debt to set off against the plaintiff's claim a debt owed by the plaintiff to the defendant, by way of defence.

Section 111 has expanded the scope of legal set-off to include the set-off of debts against each other even if the debts are of a different nature. Note that this means that earlier case law about the law of legal set-off must be read with care.

(b) Equitable set-off

Legal set-off requires that there be mutual debts or liquidated damages between the plaintiff and the defendant. If the defendant has a claim for unliquidated

damages against the plaintiff, the defendant may be entitled to set off the unliquidated claim against the plaintiff's claim by way of equitable set-off.

This may be possible where the competing claims arise out of the same transactions or relationships between the parties and it would be unfair to allow the plaintiff to succeed on its claim without allowing the set-off.

Since it is often difficult to predict accurately whether a court will allow a defendant's plea for equitable set-off, a defendant should both plead equitable set-off by way of defence to the plaintiff's claim, and counterclaim against the plaintiff for the unliquidated damages (see below).

(c) Difference from counterclaim

A set-off is a defence that operates as a bar to the whole (or a portion of) the plaintiff's claim. A counterclaim is not a defence to the plaintiff's claim; it operates as an independent action by the defendant against the plaintiff.

Note that the facts that give rise to a defence of set-off may also support a counterclaim for damages or other relief. The right to set-off is optional; while a party is never compelled to plead it, there may be certain advantages to doing so:

- Since set-off is a defence, if it is successful for the full amount of the claim, the action will be dismissed and the defendant will be entitled to the costs of the action.
- A counterclaim is a separate action, and if filed after the expiry of a relevant limitation period, it will be struck out. A defendant can set off a debt that is barred on the date the pleading is delivered, provided it was not barred on the date that the action was commenced.
- Set-off is available if the plaintiff becomes bankrupt.
- A claim of set-off when raised in a statement of defence may defeat a plaintiff's motion for summary judgment; a mere counterclaim alleging the same facts will not prevent summary judgment from being granted, although the court may order that execution on the summary judgment be stayed until after determination of the counterclaim (r. 20.08)).

(d) Contributory negligence

A defendant may plead contributory negligence in the statement of defence. There is no need to counterclaim for contributory negligence.

(e) Indemnification

The defendant may counterclaim for a declaration of indemnification. The defendant cannot issue a third party claim for indemnity against a plaintiff.

4.3 Reply and subsequent pleadings

Under rr. 25.08(1)–(3), a reply is required where the plaintiff intends to

- prove a version of the facts different from that pleaded in the statement of defence, unless it has already been pleaded in the plaintiff's claim; or
- rely on, in response to the statement of defence, any matter that might, if not specifically pleaded, take the opposite party by surprise or raise an issue that has not been raised in previous pleadings.

A reply may only be delivered in these two circumstances.

A party who does not deliver a reply shall be deemed to deny the allegations of fact made in the defence of the opposite party (r. 25.08(4)). This means that a reply that merely denies the allegations made in the statement of defence and "puts the defendant to the strict proof thereof" is both unnecessary and improper.

5. Amendment of pleadings — R. 26

Since the court should not consider issues at trial not fairly raised in the pleadings, the power of the court to allow amendments to pleadings is of great importance. Rule 26 provides that a party may amend its pleadings

- without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion, or substitution of a party to the action;
- on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent; or
- with leave of the court (r. 26.02).

5.1 Granting of amendment

Although the power of the court to allow an amendment to a pleading is discretionary, r. 26.01 provides that a motion to amend at any stage of an action shall be granted on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

An amendment will not be granted where the party seeking the amendment is acting in bad faith or is attempting to outwit the opposite party. Similarly, leave to amend will not be granted where the amendment

- causes an injustice to the other party;
- does not raise a triable issue; or
- is not properly pleaded.

Generally, since a defendant does not get a "second chance," whereas a plaintiff may bring successive actions (provided the plaintiff is not barred by a statutory limitation or a defence of *res judicata*), a defendant may

be entitled to wider scope than a plaintiff on a motion to amend a pleading.

5.2 New cause of action

An amendment generally will not be allowed to set up a new cause of action if a limitation period has expired by the time the amendment is sought. However, an amendment will be permitted if it is a mere modification or extension of a cause of action that has already been raised or if the amendment is sought to correct a clear case of misnomer.

5.3 Amendment at trial

Rule 26.06 provides that a pleading may be amended at trial on the face of the pleading without an order being taken out and without the amended pleading being served or filed.

5.4 Amendment after trial

Even after trial, an amendment may be permitted so that the pleading conforms to the case as tried, provided all of the relevant evidence has been adduced and there is no prejudice to the opposite party that could not be compensated for by costs.

Note that such an amendment should not be permitted if the action would thereby be reconstituted; but in some cases, a new trial could be ordered with an appropriate penalty and costs.

5.5 Jury trial

Where a jury assesses damages in excess of the amounts claimed in the statement of claim, the trial judge has the right to permit the statement of claim to be amended. The amendment should not be permitted if it would be unfair in the circumstances.

On a motion to make such amendment, something more should appear to justify the amendment than merely the finding of the jury. In addition, it must be shown that the defendant would not be prejudiced by the granting of the amendment.

6. Attacking pleadings

6.1 Striking out a pleading or other document — r. 25.11

Under r. 25.11, the court may, on the motion of a party to a proceeding, strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document

- may prejudice or delay the fair trial of the action;
- is scandalous, frivolous, or vexatious; or

- is an abuse of the process of the court.

6.1.1 Scandalous, frivolous, or vexatious

A scandalous matter is an indecent or offensive matter or an allegation that is made for the purpose of abusing or prejudicing the opposite party. Note that nothing that is relevant to the cause of action or defence is scandalous. This means that any irrelevant allegation may be considered “scandalous.”

Any pleading that is relevant to the cause of action should not be struck out, even if it causes delay in the trial or expense. Where there is any doubt about whether a pleading will prejudice or delay the fair trial of the action, the matter should be left to the trial judge.

A pleading is embarrassing if it raises an issue the determination of which could have no effect on the outcome of the action. A pleading may be struck out under r. 25.11 where it raises an untenable plea (i.e., a plea that clearly cannot succeed at law or that has no legal potential).

6.1.2 Timing of motion

A motion to strike out all or part of a pleading under r. 25.11 will not be entertained if the moving party has already pleaded in response to the impugned pleading, unless the moving party has done so through mistake and the matter is of great importance. This means that a defendant should carefully consider the viability of a motion to strike before serving a statement of defence.

6.1.3 Lengthy, anticipatory, or inconsistent pleading

An unduly lengthy, anticipatory, or inconsistent pleading will be struck out only if the pleading

- is obscure;
- would prejudice the other party; or
- would otherwise delay the fair trial of the action.

6.1.4 Difference from motion for amendment and deficiencies

It is important to distinguish between a motion to strike out all or a portion of a pleading or other document under r. 25.11 and a motion under R. 21 (determination of an issue before trial).

The two rules are intended to address different deficiencies. For example, a motion may be brought under R. 21 to strike out a statement of claim or to stay or dismiss an action where the moving party alleges that the entire action is fundamentally flawed; either the statement of claim discloses no reasonable cause of

action (r. 21.01(1)(b)) or the entire action is frivolous, vexatious, or an abuse of process (r. 21.01(3)(d)).

Contrast this with a motion to strike under r. 25.11, which is brought where particular portions of a pleading or other document (which, on rare occasions, may amount to the entire document) are objectionable because they fail to comply with the rules of pleading or because they contain irrelevant subject matter.

In other words, on a motion under R. 21, the moving party's position is that the fundamentally flawed action or defence may not be capable of being cured by an amendment. On a motion under r. 25.11, the moving party's complaint is directed at a mere violation of the rules of pleading that, in general, can be remedied by a partial striking out of the document or by an amendment thereto.

The more fundamental nature of an attack on a pleading under R. 21 is reflected by the fact that a R. 21 motion must be heard by a judge, whereas a r. 25.11 motion may be brought before a master.

6.2 Motion for particulars — r. 25.10

Where a party demands particulars of an allegation contained in the opposite party's pleading and the opposite party fails to supply such particulars within seven days, the court may order particulars to be delivered within a specified time (r. 25.10).

The granting of particulars is in the discretion of the court. It is to be exercised on the facts of the case, doing justice to all parties.

Particulars are to

- define the issues;
- prevent surprise;
- enable the parties to prepare for trial; and
- facilitate the hearing.

6.2.1 Written demand

Rule 25.10 now provides that a motion for particulars must be preceded by a written demand. Note that the

failure to make a demand before bringing a motion for particulars is an irregularity that does not nullify the motion; it merely deprives the moving party of costs.

6.2.2 Facts missing

Even if the moving party has knowledge of the particulars being sought, an order for particulars may still be made if a full statement of the facts has not been pleaded.

6.2.3 Material facts and particulars

A lack of particulars is not the same thing as a failure to plead material facts. Many cases have interpreted R. 25 as requiring a party to provide a certain minimum level of fact disclosure in its pleading.

6.2.4 Contrast with motion to strike

Where a party does not so disclose and, as a result, the pleading lacks the material facts necessary to support the cause of action, the pleading is defective. In this case, the proper motion is a motion to strike out the pleading for failing to plead material facts (r. 25.06(1)). No affidavit is necessary on this type of motion.

Contrast this situation with a pleading that contains all of the material facts but lacks particular pieces of information needed by the opposing party to identify the transaction properly. These missing pieces of information may be such things as dates, names of individuals, or places.

In this case, a motion for particulars is appropriate and should be supported by an affidavit attesting to the moving party's need for particulars.

6.2.5 Timing of motion

A motion for particulars is to be brought before the moving party serves its own pleading. This makes sense because the moving party requires more and specific information about the other party's pleading before the moving party can even consider what the response will be.

Disposition without trial

1. Overview

Even though you have started an action or application on behalf of your client either by issuing and serving a notice of action (followed by a statement of claim) or simply a statement of claim, or by issuing and serving a notice of application, you may end up dealing with certain matters that will end the dispute completely before a trial or hearing even takes place or that will dispose of such a significant chunk of the dispute that the trial or hearing itself will be considerably shorter and/or much less costly.

These matters include default proceedings, summary judgment, determination of an issue before trial, special case, discontinuance, withdrawal, abandonment, and dismissal of an action for delay. Note that these are all matters other than settlement that can occur at any stage of a dispute.

Each of these matters is handled by way of a motion, which usually is a subsidiary step taken within either an action or an application. Generally, motions determine an aspect of the dispute between the parties along the way to their ultimate disposition at a hearing or trial. Motions in the matters outlined above are unique—they either cut off the process completely or significantly shorten it.

2. Default proceedings — R. 19

Where the defendant in an action fails to deliver a statement of defence (or a notice of intent to defend followed by a statement of defence) within the prescribed time under R. 18 of the *Rules of Civil Procedure (Rules)*, the plaintiff may follow a two-stage process to obtain a default judgment without further notice to the defendant. The first stage is always the same; the second stage depends on the nature of the plaintiff's claim.

2.1 Noting in default — R. 19

2.1.1 Filing proof of service of claim

The first stage involves the plaintiff requiring the registrar to “note the defendant in default.” This is done by filing proof of service of the statement of claim (r. 19.01(1)). The counter clerk at the court office will enter the appropriate notation on the document that is maintained to record steps taken in the action.

Alternatively, a plaintiff may file electronically a requisition for the noting in default of a defendant in accordance with r. 19.01(1.1). When the registrar notes the defendant in default, the registrar shall send the plaintiff confirmation of the noting in default (r. 19.01(1.1)).

2.1.2 Defendant under disability

Where a defendant is under a disability, leave must be obtained on motion to a judge before the defendant may be noted in default (r. 19.01(4)).

2.1.3 Defence struck out

A defendant may also be noted in default where the statement of defence has been struck out without leave to deliver another defence or where leave to deliver another defence has been granted but the time allowed for doing so has expired. In either of these cases, the plaintiff may require the registrar to note the defendant in default on filing a copy of the order striking out the statement of defence (r. 19.01(2)).

2.1.4 Motion by co-defendant

In addition, a defendant who has delivered a statement of defence may, on notice to the plaintiff, bring a motion to require the registrar to note a co-defendant in default where the plaintiff has failed to do so (r. 19.01(3)).

2.1.5 Consequences of default

The single most important consequence of a defendant being noted in default is that such defendant is deemed to admit all allegations of fact made in the statement of claim (r. 19.02(1)(a)).

Note that the deemed admission does not apply to the plaintiff's claim for relief in paragraph 1 of the statement of claim, which is merely the plaintiff's claim for what the plaintiff considers the appropriate relief flowing from the facts alleged in the balance of the pleading.

In addition, a defendant who has been noted in default is not entitled either to deliver a defence or to take any step in the action, other than a motion to set aside the noting of default or a default judgment, except with leave of the court or the consent of the plaintiff (r. 19.02(1)(b)). Moreover, any step in the action that requires the consent of the defendant may be taken without such consent (r. 19.02(2)).

Likewise, the defendant is not entitled to notice of any further step or service of any other document in the proceeding, except where the court orders otherwise or where a party requires the personal attendance of the defendant or in certain other specified circumstances (r. 19.02(3)).

2.2 Signing default judgment — r. 19.04

2.2.1 Entitlement

Under r. 19.04(1), once the defendant has been noted in default, the second stage of the default judgment procedure depends on the nature of the plaintiff's claim. The plaintiff may require the registrar to sign a judgment against the defendant in a claim for

- a debt or liquidated demand in money, including interest, if claimed in the statement of claim (Form 19A);
- the recovery of possession of land (Form 19B);
- the recovery of possession of personal property (Form 19C); or
- the foreclosure, sale, or redemption of a mortgage (Forms 64B–64D, 64G–64K, and 64M).

The reason why the plaintiff may obtain default judgment administratively (i.e., by the mere act of the registrar signing default judgment) in any of the foregoing cases can be illustrated by example. If the plaintiff's claim is for a "debt or other liquidated demand in money" under r. 19.04(1)(a), the plaintiff will have alleged all of the facts surrounding the transaction being sued on in the statement of claim. The plaintiff also will have alleged that the defendant is indebted to the plaintiff in the amount that appears in the claim for relief in paragraph 1 of the claim.

Since the defendant who is in default is deemed to have admitted all allegations of fact, including the allegation that the defendant is indebted to the plaintiff, and the claim for relief is for payment of the very amount that the plaintiff alleges (and the defendant is deemed to have admitted) the defendant owes to the plaintiff, no judicial adjudication or evaluation of the plaintiff's allegations of fact or entitlement to the relief claimed is required.

2.2.2 Requisition for default judgment

Under r. 19.04(2), before the signing of default judgment, the plaintiff must file a requisition for default judgment with the registrar (Form 19D)

- stating that the claim comes within the class of cases for which default judgment may properly be signed;
- stating whether there has been any partial payment of the claim and, if so, the date and amount of such partial payment;

- where the plaintiff has claimed prejudgment interest in the statement of claim, setting out how the interest is calculated;
- where the plaintiff has claimed postjudgment interest in the statement of claim at a rate other than as provided in s. 129 of the *Courts of Justice Act*, setting out the rate; and
- stating whether the plaintiff wishes costs to be fixed by the registrar or assessed.

2.2.3 Costs

On signing default judgment, the registrar shall fix the costs under Tariff A and include such fixed costs in the judgment, unless the default judgment directs a reference or the plaintiff states in the requisition that the costs are to be assessed. In that case, the judgment shall include costs to be determined on the reference or on assessment (r. 19.04(6)).

2.3 Motion for default judgment — r. 19.05

2.3.1 Entitlement

Under r. 19.05(1), where a defendant has been noted in default, the second stage of the default judgment procedure requires the plaintiff to move before a judge for judgment against that defendant, rather than have the registrar sign judgment against the defendant, if the claim

- does not come within the types of claims outlined in r. 19.04(1) (as stated above);
- is a claim for which the registrar declined to sign judgment because the registrar was uncertain whether the claim came within the types of claims outlined in r. 19.04(1) or what the amount or rate that would be properly recoverable for prejudgment or postjudgment interest (r. 19.04(3)); or
- is a claim for which judgment could have been signed by the registrar but the plaintiff did not choose to proceed in this fashion.

2.3.2 Motion before a master

Note that where the registrar declines to sign default judgment for a claim referred to in r. 19.04(1), the plaintiff may make a motion to the court—which may be made to a master under r. 37.02(2) rather than a judge—for judgment (r. 19.04(3.1)).

2.3.3 Judicial adjudication required

An example of a claim that would require a motion before a judge for default judgment would involve a typical claim for general damages for tort or breach of contract.

While the defaulting defendant may be deemed to have admitted all allegations of fact made in the statement of claim, it by no means follows that the type of relief

claimed by the plaintiff (e.g., an injunction prohibiting the defendant from ever driving an automobile again or a mandatory order requiring the defendant to apologize to the plaintiff for the defendant's misdeeds) is appropriate.

Nor does it automatically follow that the amount of damages claimed is appropriate. For example, a plaintiff may seek an exorbitant figure for damages flowing from a relatively minor personal injury. In all such cases, a judge must adjudicate on the appropriateness of the relief, including the amount of damages that the plaintiff is claiming, as a result of the facts that the defendant is deemed to have admitted.

2.3.4 No notice of motion to defendant

The defendant has no right to notice of the motion for judgment or to appear on such motion because the defendant has been noted in default. The motion for judgment will proceed uncontested before the motions judge (r. 19.02(3)).

2.3.5 Affidavit evidence on motion

If the plaintiff is seeking judgment for unliquidated damages, the plaintiff's motion for judgment must be supported by evidence given by affidavit (r. 19.05(2)). Evidence by affidavit may also be required in cases where the plaintiff is seeking a discretionary remedy (i.e., a declaration or other equitable relief).

In all other cases where the plaintiff seeks to rely solely on the deemed admissions contained in the statement of claim, evidence by affidavit is not required. Note that it is rare for there to be no need to place some evidence, in addition to what is deemed to be admitted, before the judge.

2.3.6 Judgment, dismissal, or trial

On a motion for judgment, the judge may grant judgment, dismiss the action, or order that the action proceed to trial and that oral evidence be presented (r. 19.05(3)). A judge may grant judgment only if the judge is satisfied that the facts alleged in the statement of claim (and which the defaulting defendant is deemed to admit) disclose a cause of action that, in law, entitles the plaintiff to the relief claimed (r. 19.06).

Where an action proceeds to trial (and in the absence of the defendant), the plaintiff may move at trial for judgment on the statement of claim against the defendant who has been noted in default (r. 19.05(4)).

2.4 Setting aside or varying default — rr. 19.03 and 19.08

Rule 19.03 provides for the setting aside of the noting of default by the court. Where the defendant delivers a

statement of defence with the consent of the plaintiff under r. 19.02(1)(b), the noting of default is deemed to have been set aside (r. 19.03(2)).

If a defendant has been noted in default, in addition to setting aside the default, the defendant's lawyer would be well advised to see if the plaintiff has attempted execution of the judgment. If so, the defendant's lawyer will wish to bring a motion to set aside the noting in default and stay executions of any default judgments that may have taken place.

On setting aside a judgment under either r. 19.08(1) or (2), the court may also set aside the noting of default under r. 19.03 (r. 19.08(3)).

2.4.1 Motion before judge or master

Rule 19.08 provides for the setting aside or varying of a default judgment. A default judgment that is signed by the registrar or granted by the court under r. 19.04 may be set aside or varied on motion before the court (i.e., before either a judge or a master) (r. 19.08(1)).

A motion to set aside or vary a default judgment obtained under r. 19.05 (i.e., a motion for judgment on the statement of claim) or after trial must be brought before a judge (r. 19.08(2)).

2.4.2 Criteria and test

Apart from the stipulation that the setting aside or variation may be made "on such terms as are just," the *Rules* provide no criteria to be considered on a motion to set aside the noting of default or to set aside or vary a default judgment.

On a motion under either r. 19.03 or 19.08, the case law is clear that the moving party must bring its motion as soon as possible after discovering the default and must also explain the reasons for the delay giving rise to the default.

It is very important that the defendant express (if applicable) that the defendant always intended to defend the action but that due to some inadvertence (even the defendant's lawyer's inadvertence), the defence was not delivered in a timely fashion.

The case law also establishes that there is a distinction between the test applied by the court on a motion to set aside a default judgment and the test applied on a motion to set aside the noting of default.

On the latter motion, only in extreme cases must the defendant show a good defence on the merits before the noting in default will be set aside. On the former motion, a defendant must show a good defence on the merits or a "genuine issue for trial."

Where the default has arisen because the plaintiff proceeded improperly in obtaining default judgment, the defendant is entitled to have the default set aside as of right, without explaining the default or showing a good defence on the merits.

3. Summary judgment – R. 20

A party in an action may make a motion to the court for summary judgment where another party in the action can produce no or insufficient evidence to support the allegations made in its statement of claim or statement of defence (r. 20.01). The granting of summary judgment on a motion disposes, at an early stage, of claims or defences that cannot be proved, without need of a full trial with oral evidence.

3.1 Availability

3.1.1 No genuine issue for trial

Summary judgment is a drastic remedy that should be granted only in clear cases. Specifically, r. 20.04(2) provides that summary judgment shall be granted by the court if it “is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.” Where the court is so satisfied, summary judgment is a mandatory, not a discretionary, remedy.

In determining whether a genuine issue requiring a trial exists, the court shall consider the evidence submitted by the parties. Where a judge is making such a determination, the judge may weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence, unless it is in the interests of justice for such powers to be exercised only at trial (r. 20.04(2.1)). In doing so, a judge may order that oral evidence be presented by one or more parties, with or without time limits on the presentation (r. 20.04(2.2)).

3.1.2 Difference from R. 21

Rule 20 primarily is directed at whether there is a *factual* dispute between the parties and whether there is *evidence* to support a party’s claim or defence. Note that R. 21 (discussed below) is concerned with issues of law, not fact. This is why evidence is compulsory on a R. 20 motion, but is either prohibited outright or limited on a R. 21 motion. It also explains why a summary judgment motion is within the jurisdiction of a master, whereas a R. 21 motion must be heard by a judge.

Be aware that despite this difference, in *Bongiardina v. York (Regional Municipality)*, the Ontario Court of Appeal dismissed an action under R. 20 where (as per r. 21.01(1)(b)) the claimant’s pleading failed to disclose a reasonable cause of action.

This decision would seem to suggest that a claim that fails, as a matter of law, to disclose a reasonable cause of action and would therefore be subject to being struck out under R. 21 (see below) can also be considered as one in which there is no genuine issue requiring a trial under r. 20.04, leading to summary judgment against the plaintiff.

3.2 Moving party

3.2.1 Motion by plaintiff

The plaintiff is entitled to bring a motion for summary judgment for all or part of the claim made in the statement of claim after the defendant has delivered a statement of defence or has served a notice of motion (r. 20.01(1)).

The plaintiff may also move, without notice, for leave to serve a notice of motion for summary judgment along with the statement of claim. In such case, leave may be given where special urgency is shown, subject to such directions as are just.

3.2.2 Motion by defendant

The defendant may move for summary judgment, dismissing all or part of the plaintiff’s claim, after delivering a statement of defence (r. 20.01(3)).

3.3 Material on motion

3.3.1 Information and belief

A motion for summary judgment must be supported by “affidavit material or other evidence” (rr. 20.01(1) and (3)). While such an affidavit may be made on information and belief, as provided in r. 39.01(4), r. 20.02(1) provides specifically that “on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.”

3.3.2 “Other evidence”

“Other evidence” includes all forms of evidence that R. 39 makes admissible on a motion, including transcripts of cross-examination on affidavits under r. 39.02, transcripts of the examination of a witness under r. 39.03, oral evidence on a motion under r. 39.03(4), and transcripts of examinations for discovery under r. 39.04.

Note that a party may not use in evidence the party’s own examination for discovery (i.e., evidence from when that party was examined as a witness) or the examination for discovery of any person examined on behalf of, in place of, or in addition to that party, unless all other parties consent (r. 39.04(2)).

Presumably, documents produced under R. 30 (discovery) may also be used as evidence on a motion for summary judgment. Obviously, documents that are marked as exhibits on any of the foregoing types of examination may also be used as evidence on the summary judgment motion.

3.3.3 Factum — r. 20.03

Rule 20.03 requires that each party on a motion for summary judgment deliver a factum on every other party to the motion. The factum is to consist of a concise statement of the facts and law being relied on.

Note that the moving party's factum is to be served and filed with proof of service at least seven days before the hearing of the motion. The responding party's factum must be served and filed with proof of service at least four days before the hearing of the motion (r. 20.03).

3.3.4 Responding party's affidavit material

Under r. 20.02(2), in response to affidavit material or other evidence in support of a motion for summary judgment, a responding party "may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial." It is not sufficient for the responding party to say that more and better evidence will (or may) be available at trial.

3.4 Jurisdiction of master

The court may be invited to make findings of fact and to determine questions of law on a motion for summary judgment. Note that a master, who has jurisdiction generally to hear a motion for summary judgment under R. 20, may not determine any question of law under r. 20.04(4). This provision presumably also applies to a question of mixed fact and law; however, it does not prevent a master from applying existing and recognized legal principles on a motion for summary judgment.

3.5 Disposition on motion

The court may dispose of the motion as follows:

- Where the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence, the court shall grant summary judgment accordingly (r. 20.04(2)).
- Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount (r. 20.04(3)).

- Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge (r. 20.04(4)).
- Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts (r. 20.04(5)).

3.5.1 Where trial necessary

Where the court refuses to grant summary judgment, or grants it only in part, the court may still make orders to expedite the proceeding. It may specify the material facts that are not in dispute, define the issues to be tried, and order that the action proceed to trial expeditiously (r. 20.05(1)).

If the action is ordered to proceed to trial, the court may give such directions or impose such terms as are just, including making any of the orders provided for under rr. 20.05(2)(a)–(p). At the trial, any facts specified under r. 20.05(1) or (2)(a) (pursuant to an order requiring the filing, within a specified time, of a statement setting out what material facts are not in dispute) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice (r. 20.05(3)).

In deciding whether to make an order that the evidence of a witness be given in whole or in part by affidavit (r. 20.05(2)(j)), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration (r. 20.05(4)).

If an order is made requiring the parties' experts to meet on a without prejudice basis and prepare a joint statement setting out areas of agreement and disagreement and the reasons for it (r. 20.05(2)(k)), each party shall bear his or her own costs (r. 20.05(5)).

Where a party fails to comply with an order for payment into court of all or part of the claim (r. 20.05(2)(o)) or an order for security costs (r. 20.05(2)(p)), on motion by the opposite party, the court may dismiss the action, strike out the statement of defence, or make such other order as is just (r. 20.05(6)). Where on a motion under this subrule the statement of defence is struck out, the defendant shall be deemed to be noted in default. (r. 20.05(7)).

3.5.2 Stay of execution

Where summary judgment is granted and certain other issues in the action or counterclaim, crossclaim, or third party claim remain undetermined, the court may make

an order staying enforcement of the summary judgment on such terms as are just (r. 20.08).

3.5.3 Costs

The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if the party acted unreasonably by making or responding to the motion or if the party acted in bad faith for the purpose of delay (r. 20.06).

Subrule 20.06(2) permits the court to make a cost order against any party to a motion for summary judgment, including a respondent, where it appears that such party “has acted in bad faith or primarily for the purpose of delay.”

4. Determination of an issue before trial — R. 21

Rule 21 provides the procedure for determining various preliminary issues of law that dispose of all or part of the action without a trial. (Contrast this with R. 20, which deals with issues of fact.) This rule covers the determination of a question of law, the striking out of a pleading that discloses no reasonable cause of action or defence, and the staying or dismissal of an action in specified circumstances.

4.1 Determination of an issue of law — r. 21.01(1)(a)

Under r. 21.01(1)(a), a party to an action may move before a judge for the determination, before trial, of a question of law raised in a pleading. Resorting to this part of R. 21 can be particularly effective where the pleadings disclose a discrete question of law that can be clearly isolated from the contested issues of fact in the action.

Evidence is admissible on this motion only with leave or on consent. The judge may make an order or grant judgment “where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs” (r. 21.01(1)(a)).

4.2 No reasonable cause of action or defence — r. 21.01(1)(b)

The vast majority of motions under R. 21 are brought under r. 21.01(1)(b). This rule provides that any party may move before a judge to strike out a pleading on the ground that it discloses no reasonable cause of action (in the case of a statement of claim, counterclaim, crossclaim, or third party claim) or defence (in the case of a statement of defence, defence to counterclaim or crossclaim, or third party defence).

On such motion, the only issue is the sufficiency in law of the pleading attacked; the facts alleged in the impugned pleading are assumed to be true. No evidence is admissible on such motion.

4.3 Stay or dismissal — r. 21.01(3)

Under r. 21.01(3), a defendant may move before a judge to have an action stayed or dismissed on any of the following grounds, which may be proved by affidavit or other evidence:

- The court has no jurisdiction over the subject matter of the action.
- The plaintiff is without legal capacity to commence or continue the action, or the defendant does not have the legal capacity to be sued.
- Another proceeding is pending in Ontario or another jurisdiction between the same parties about the same subject matter.
- The action is frivolous or vexatious or is otherwise an abuse of the process of the court.

4.4 Promptness — r. 21.02

A motion under r. 21.01 must be made promptly. Failure to do so may be taken into account by the court in awarding costs (r. 21.02).

4.5 Factum — r. 21.03

On a motion under R. 21, each party is required to serve a factum on every other party to the motion. The factum is to consist of a concise statement of the facts and law being relied on. Note that the moving party’s factum is to be served and filed with proof of service at least seven days before the hearing of the motion. The responding party’s factum must be served and filed with proof of service at least four days before the hearing of the motion (r. 21.03).

4.6 Test

The essential test in a motion under R. 21 is “no chance of success.” In determining whether a statement of claim should be struck out under r. 21.01(1)(b) or whether an action should be stayed or dismissed under r. 21.01(3), for example, the court must be satisfied that it is plain and obvious or beyond reasonable doubt that the statement of claim discloses no reasonable cause of action.

Where the law is unclear or where there are difficult questions of fact and law involved, it is not appropriate to have such questions determined on a motion to strike out a pleading or to stay or dismiss an action.

4.7 Principles and strategies for r. 21.01(1)(b)

4.7.1 Principles

On a motion under r. 21.01(1)(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, the following principles apply:

- The facts as pleaded are taken to be true, unless they are patently absurd or incapable of proof.
- None of
 - the length and complexity of the issues;
 - the novelty of the cause of action; or
 - the potential for the defendant to present a strong defence

should prevent the plaintiff from proceeding with the plaintiff's case.

- An action will not be dismissed under R. 21 unless “the court is satisfied beyond doubt” or “it is plain and obvious” that the action cannot succeed at trial. Matters of law that have not been fully settled in the jurisprudence should not be disposed of at an interlocutory stage.

Often, statements of claim are struck out under r. 21.01(1)(b) as disclosing no reasonable cause of action where the law does not yet recognize or provide a remedy for the type of complaint raised by the plaintiff. Recall that the famous English case *Donoghue v. Stevenson*, which established the “good neighbour” principle of duty in negligence, was decided under the English equivalent of R. 21.

It is important that proposed new causes of action be adjudicated in the context of a full evidentiary record at trial, rather than being determined summarily on a preliminary motion.

4.7.2 Strategy

When examining an apparently defective pleading delivered by the party opposite, be careful to identify the precise defect and to gauge whether it is fundamental in nature (i.e., going to the heart of the action itself) or one that may be corrected through better drafting.

Consider a wrongful dismissal action where the plaintiff's lawyer has inadvertently failed to plead that the contract of employment included an implied term that the employee would be dismissed only for just cause or on reasonable notice.

On a motion under r. 21.01(1)(b) to strike out such pleading, the court may order that the statement of claim be struck out and award the moving party costs on a partial indemnity scale. However, the court will also

grant leave to the plaintiff to amend the pleading so as to include the inadvertently omitted allegation.

Nothing of any real significance will have been accomplished by bringing the motion, even though the motion may have been won. Clarification of the defective pleading could have been sought merely by an exchange of correspondence between the parties' lawyers or by asking appropriate questions on examination for discovery.

Similarly, the parties could agree that the plaintiff will move to amend the pleading on consent, either immediately or at trial, so that needless time and expense can be avoided.

Contrast this example with a situation in which the plaintiff makes a claim against an individual personally for bringing about a tort or breach of contract by a corporation of which the individual is a director and against the corporation itself as co-defendants.

If no allegation is made that the individual defendant was acting outside the scope of the individual defendant's employment or that the individual defendant committed a personal breach of duty, no separate cause of action lies against such an individual under Canadian law. In such case, the statement of claim may be struck out and the entire action dismissed under r. 21.01(1)(b) against the individual defendant.

5. Special case: action or application — R. 22

Under R. 22, the parties to either an action or an application may, on a motion, state a question of law in the form of a special case for the opinion of the court. Where the judge is satisfied that the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing, or result in substantial cost savings, the judge may hear and determine the special case (r. 22.01(2)).

A typical example of such a motion is where a provision in a standard insurance policy must be interpreted in the context of an agreed statement of facts. All of the parties want an early resolution of the matter and will co-operate with each other to bring the issue before the court.

5.1 Form and content

A special case (Form 22A) must set out

- a concise statement of the material facts as agreed on by the parties;
- refer to and include copies of all necessary documents; and
- set out the relief sought on the determination of the question of law, as agreed to by the parties.

As with motions under RR. 20 and 21, factums are required.

5.2 Court of Appeal

Where the special case raises an issue for which there are conflicting decisions of judges in Ontario and no decision of an appellate court in Ontario, a party may make a motion to a judge of the Court of Appeal for leave to have the special case determined in the first instance by that court (r. 22.03(1)).

Note that only a party to the proceeding may apply for leave to have a special case decided by the Court of Appeal. Cases decided under s. 34 of the former *Judicature Act*, which provided for a judge to refer a case before him or her to the Court of Appeal, must be read with this distinction in mind.

Appeals from a decision by the court in the first instance under R. 22 will proceed in the same manner as appeals from any judgment or order of the court.

6. Discontinuance or withdrawal of action — R. 23

A plaintiff who wants to terminate a proceeding before trial must consider the fact that the plaintiff probably will be responsible for paying the partial indemnity scale costs of the defendant.

6.1 Discontinuance by plaintiff

Under r. 23.01, a plaintiff is entitled to discontinue all or part of an action against any defendant

- as of right before the close of pleadings (as determined under r. 25.05) by serving a notice of discontinuance (Form 23A) on all parties who have been served with the statement of claim and on filing the notice with proof of service;
- after the close of pleadings, with leave of the court; or
- at any time, by filing the consent in writing of all parties.

6.1.1 Party under disability

Note that under r. 23.01(2), where a party to an action is under a disability, the action may be discontinued only with leave of a judge.

6.1.2 Effect on counterclaim, crossclaim, or third party action

Where an action is discontinued against a defendant who has counterclaimed, the defendant may proceed with the counterclaim. The defendant must deliver a notice of election to proceed with counterclaim within 30 days after discontinuance of the original action, failing which

the counterclaim shall be deemed to be discontinued without costs (r. 23.02).

Where an action is discontinued against a defendant who has crossclaimed or made a third party claim, the crossclaim or third party claim is deemed to be dismissed 30 days after the discontinuance, unless the court orders otherwise during that period. Where an action against a defendant *against whom a crossclaim has been made* is discontinued, the crossclaim is likewise deemed to be dismissed (r. 23.03).

Note that discontinuance by the plaintiff of all or part of its claim is not a defence to a subsequent action, unless the order giving leave to discontinue or a consent filed by the parties provides otherwise (r. 23.04(1)).

6.1.3 Costs of discontinuance

Where all or any part of an action is discontinued, any party to the action may make a motion concerning the costs of the action within 30 days after the action is discontinued. Where a crossclaim or third party claim is deemed dismissed, any party to the crossclaim or third party claim may make a motion concerning costs of the crossclaim or third party claim within 30 days after the deemed dismissal (r. 23.05).

6.2 Withdrawal by defendant

Under r. 23.06, a defendant may withdraw all or part of its statement of defence at any time by delivering to all parties a notice of withdrawal of defence (Form 23C). However, where the defendant has crossclaimed or made a third party claim, leave to withdraw must be obtained from the court.

6.2.1 Deemed default

Where a defendant withdraws the entire statement of defence, the defendant is deemed to be noted in default (r. 23.06(2)).

6.2.2 Withdrawal of admission

Where the defendant seeks to withdraw an admission in a statement of defence, r. 51.05 requires consent from the opposite party or leave of the court to do so.

7. Abandonment of application — R. 38

Under r. 38.08, an applicant may abandon (*not* “discontinue”) an application by delivering a notice of abandonment. Note that the *Rules* do not set out a particular form for this notice.

7.1 Party under disability

Where a party to an application is under a disability, abandonment requires leave of a judge (r. 38.08(4)).

7.2 Deemed abandonment

An applicant who fails to appear at the hearing of the application shall be deemed to have abandoned the application unless the court orders otherwise (r. 38.08(2)).

7.3 Respondent entitled to costs

Where an application is abandoned or deemed to have been abandoned, a respondent on whom notice of the application was served is entitled to the costs of the application unless the court orders otherwise (r. 38.08(3)).

8. Dismissal of action for delay – R. 24

8.1 Availability of dismissal

Under r. 24.01, a defendant who is not in default under the *Rules* or under any order of the court may move to have an action dismissed for delay where the plaintiff has failed to

- serve the statement of claim on all the defendants within the prescribed time;
- have any defendant who has failed to deliver a statement of defence noted in default, within 30 days after the default;
- set the action down for trial within six months after the close of pleadings;
- deliver a notice of readiness for pre-trial conference under r. 76.09(1) (if applicable); or
- move for leave to restore to a trial list an action that has been struck off the trial list, within 30 days after the action was struck off.

8.2 Plaintiff under disability

Where the plaintiff is under a disability, r. 24.02 prescribes the persons on whom notice of a motion to have an action dismissed for delay shall be served. Rule 24.02.1 requires a defendant who is successful on such a motion to serve a copy of the order dismissing the action on every defendant to the action who has crossclaimed against him or her.

8.3 Effect on counterclaim, crossclaim, or third party or subsequent action

As with discontinuance under R. 23, a defendant against whom an action has been dismissed for delay may proceed with its counterclaim. The defendant must deliver a notice of election to proceed with counterclaim (Form 23B) within 30 days, failing which the counterclaim shall be deemed to be discontinued without costs (r. 24.03).

Any crossclaim or third party claim commenced by a defendant in respect of whom an action has been

dismissed for delay is deemed to have been dismissed unless the court orders otherwise (r. 24.04(1)). Where an action against a defendant against whom a crossclaim has been made has been dismissed for delay, the crossclaim shall be deemed to be dismissed 30 days after a copy of the order dismissing the action is served on the crossclaiming defendant under r. 24.02.1, unless the court orders otherwise during the 30-day period (r. 24.04(1.1)).

Note that a dismissal (deemed or otherwise) of an action for delay under this rule is not a defence to a subsequent action unless the order dismissing the action provides otherwise (rr. 24.04(2) and 24.05(1)).

8.4 Costs of deemed dismissal

Under r. 24.05.1, if an action is dismissed for delay, any party to the action may make a motion respecting costs of the action within 30 days after the dismissal. Likewise, if a crossclaim or third party claim is deemed to be dismissed, any party to the crossclaim or third party claim may, within 30 days after the deemed dismissal, make a motion respecting the costs of the crossclaim or third party claim.

8.5 Test

The court has discretion to dismiss an action for delay under R. 24. There are two main principles that guide the court in exercising its discretion. In resisting the motion to dismiss for delay, the plaintiff (respondent to the motion) must provide a reasonable excuse for not having complied with the *Rules*. To succeed on the motion, the defendant (moving party) should be able to demonstrate that it has been prejudiced by the plaintiff's delay.

8.6 Material on motion

A defendant's motion to dismiss for delay should be supported by affidavit material alleging the facts that bring the motion within r. 24.01, along with any evidence of prejudice occasioned by the delay.

Likewise, a plaintiff responding to a motion to dismiss for delay should deliver affidavit material explaining the delay, if possible, and responding to the defendant's allegation of prejudice.

8.7 Dismissal by registrar

Note that r. 48.14 also provides for dismissal for delay by the registrar where an action has not been placed on a trial list or terminated within two years after the first defence is filed or where an action that has been placed on a trial list and was subsequently struck off is not restored to a trial list within 180 days after being struck off.

9. Abandonment of action — R. 48.15

Rule 48.15 provides for dismissal of an action as abandoned by the registrar if the following conditions are satisfied:

- More than 180 days have passed since the date the originating process was issued.
- No statement of defence, notice of intent to defend, or notice of motion in response to an action, other than a motion challenging the court's jurisdiction, has been filed.
- The action has not been disposed of by final order or judgment.
- The action has not been set down for trial.
- The registrar has given 45 days' notice in Form 48E that the action will be dismissed as abandoned.

Subsidiary claims – counterclaims, crossclaims, and third party claims

1. Overview

After determining that your client is required to proceed by way of action, rather than by application, you issue and then serve either a notice of action (followed by a statement of claim) or simply a statement of claim on behalf of your client.

The defendant(s) in the action may defend the action and

- assert a counterclaim against the plaintiff(s) or against the plaintiff(s) and another person not yet a party to the litigation;
- assert a crossclaim against any co-defendant(s); or
- issue a third party claim against a person not yet a party to the litigation.

2. Counterclaim – r. 27.01(1)–(2)

A defendant who has a claim either

- against the plaintiff; or
- jointly against the plaintiff and another person

may assert such claim by way of counterclaim, along with a defence to the main action. The right may be any right or claim; it need not arise from the same facts, occurrences, or transactions involved in the main action (*Rules of Civil Procedure (Rules)*, r. 27.01).

2.1 Joining a party

The claiming defendant may join, as a defendant to the counterclaim, any other person—including a stranger to the litigation—who is a necessary or proper party to the claim, including a co-defendant in the main action (r. 27.01(2)).

2.1.1 Co-counterclaimant

In a novel interpretation of the *Rules* and the *Courts of Justice Act*, the Ontario Court (General Division) (now the Superior Court of Justice) permitted a counterclaim to be brought in the name of both the defendant in the main action and a related company as co-counterclaimant. In effect, the court allowed a stranger to the litigation to be added as plaintiff by counterclaim.

2.2 Separate trials – r. 27.08

A counterclaim shall be tried at the trial of the main action, unless the court orders otherwise (r. 27.08(1)). Where a counterclaim may unduly complicate or delay the trial of the main action or cause undue prejudice to a

party, the court may order separate trials of the main claim and counterclaim or order that the counterclaim proceed as a separate action (r. 27.08(2)).

2.3 Dismissal – r. 52.01(2)(b)

If a defendant fails to attend at trial, the trial judge may allow the plaintiff to prove the plaintiff's claim and dismiss any counterclaim.

2.4 Discontinuance or dismissal of action

Where an action is discontinued or dismissed against a defendant who has counterclaimed, the defendant may proceed with the counterclaim (rr. 23.02 and 24.03).

2.5 Pleadings

2.5.1 Service – rr. 27.02 and 27.04

A counterclaim is included in the same document as the statement of defence. The title of the pleading is “statement of defence and counterclaim” (r. 27.02).

Where the counterclaim is only against the plaintiff in the main action or against the plaintiff and another person who is already a party to the main action, a statement of defence and counterclaim (Form 27A) must be served within the time prescribed for service of a statement of defence under r. 18.01 or at any time before the defendant is noted in default (r. 27.04(1)).

Where any defendant to the counterclaim is not already a party to the main action (i.e., a stranger who has been added to the litigation), the statement of defence and counterclaim (Form 27B) is considered to be an originating process; it must be issued before being served on all parties to the main action (rr. 27.03 and 27.04(2)).

The statement of defence and counterclaim must be served on the new defendant to the counterclaim, along with all pleadings previously served (i.e., the statement of claim) within 30 days after it has been issued or at any time before the defendant is noted in default or subsequently with leave of the court (r. 27.04).

2.5.2 Response – r. 27.05

A defendant to the counterclaim who is already a party to the main action (i.e., the plaintiff or any co-defendant) shall deliver its responding pleading, a “defence to counterclaim,” within 20 days after service of the statement of defence and counterclaim (r. 27.05(1)).

If the plaintiff delivers a reply in the main action, the plaintiff's defence to counterclaim shall be included in the same document as the reply. This pleading is a "reply and defence to counterclaim" (r. 27.05(2)).

A defendant to a counterclaim who is not already a party to the main action (i.e., a stranger who has been added to the litigation) shall deliver its defence to counterclaim within 20 days after service of the statement of defence and counterclaim if the defendant is resident in Ontario (r. 27.05(3)). If the defendant is resident elsewhere in Canada or the United States of America, the timeline is 40 days. If the defendant lives outside North America, the timeline is 60 days. These time limits mirror those found in R. 18 for main actions.

2.5.3 Further response — r. 27.06

If the counterclaiming defendant wishes to do so (and if r. 25.08(3) so permits), the counterclaiming defendant may deliver a "reply to defence to counterclaim" within 10 days after being served a defence to counterclaim (r. 27.06).

2.5.4 Amendment — r. 27.07

A defendant may amend a defence that already has been served to add a counterclaim only against the plaintiff or someone who is already a party to the main action in accordance with rr. 26.02–26.03, and 26.05 (r. 27.07(1)).

Where the defendant wants to amend a defence that has already been served to add a counterclaim against a party who is not already a party to the main action, the defendant may, with leave of the court, have the registrar issue an amended statement of defence and counterclaim (r. 27.07(2)).

2.6 Stay of main action, stay of execution, and set-off

Where a defendant does not dispute the plaintiff's claim in the main action but does assert a counterclaim, the court may stay the main action or grant judgment, with or without a stay of execution, until the counterclaim is disposed of (r. 27.09(1)). A similar result may occur where the plaintiff does not dispute the defendant's claim in the counterclaim (r. 27.09(2)).

In the event that both the plaintiff in the main action and the counterclaiming defendant are successful, either in whole or in part, the court may, in a proper case, grant judgment for the balance (the difference between the amounts claimed by the parties) in favour of the party claiming the larger amount and dismiss the claim for the smaller amount. This is known as a "set-off" of mutual debts (r. 27.09(3)).

3. Crossclaim

A crossclaim is not commenced by the issuance of an originating process; it is commenced by the delivery of the pleading containing the crossclaim and need not be issued. A crossclaim is an exception to the general rule that all proceedings must be commenced by the issuing of an originating process, since it is a claim by a defendant against an *existing* defendant(s) in the same action, be it the main action, a counterclaim, a third party claim, etc. (A defendant may never crossclaim a plaintiff in the same action.)

Where, for instance, two defendants in the main action issue separate third party claims against different third parties, the third parties in the two separate third party claims are not co-defendants in the same action—the two defendants in the main action are.

This means that the third parties may not crossclaim against each other. If they wish to make claims against each other, they must do so by fourth party claim under R. 29.

3.1 Availability — r. 28.01

Rule 28.01 governs a crossclaim and provides as follows:

- 28.01—(1)** A defendant may crossclaim against a co-defendant who,
- (a) is or may be liable to the defendant for all or part of the plaintiff's claim;
 - (b) is or may be liable to the defendant for an independent claim for damages or other relief arising out of,
 - (i) a transaction or occurrence or series of transactions or occurrences involved in the main action, or
 - (ii) a related transaction or occurrence or series of transactions or occurrences; or
 - (c) should be bound by the determination of an issue arising between the plaintiff and the defendant.

A crossclaim under r. 28.01(1)(a) allows the defendant, in effect, to say to a co-defendant, "I am taking the position in the main action that I am not liable to the plaintiff; but, if I am found to be liable, then you should pay as well as or instead of me."

3.2 Difference from counterclaim

A crossclaim under r. 28.01(1)(b) is an independent claim for damages or other relief that arises out of the same transaction or occurrence as the main action. Note that unlike a counterclaiming defendant, a crossclaiming defendant may not, in effect, graft onto the main action a crossclaim against a co-defendant that has nothing factually to do with the main action.

3.3 Discontinuance or dismissal of action

Where an action is discontinued or dismissed against a defendant who has crossclaimed, the crossclaim is deemed to be dismissed, with costs, 30 days after the discontinuance of the action, unless the court orders otherwise during that period.

3.4 Pleadings

3.4.1 Service – rr. 28.02 and 28.04(1)–(2)

A crossclaim (Form 28A) shall be included in the same pleading as the statement of defence. The pleading is called a “statement of defence and crossclaim” (r. 28.02). It may be delivered, as a matter of right, within the time prescribed by the *Rules* for delivery of the statement of defence in the main action.

Alternatively, a crossclaim may be delivered any time before the defendant is noted in default. Thereafter, it may be delivered only with leave of the court, which the court shall grant unless to do so would prejudice the plaintiff (r. 28.04(1)).

Since a crossclaim is not an originating process, it need not be served personally on a defendant against whom the crossclaim is being made, unless that defendant has failed to deliver a notice of intent to defend or a statement of defence in the main action. In that case, the defendant shall be served personally or by an alternative to personal service permitted by the *Rules* (r. 28.04(2)).

3.4.2 Response – rr. 28.05 and 28.06

A defence to crossclaim (Form 28B) shall be delivered within 20 days after service of the statement of defence and crossclaim (r. 28.05). The defendant by crossclaim may defend both the crossclaim and the plaintiff’s claim in the main action. In that case, the defendant by crossclaim may raise any defence open to the defendant in the main action (r. 28.06(1)).

If the defendant by crossclaim does defend the plaintiff’s claim in the main action, the defendant has the same rights and obligations in the action—including those for discovery, trial, and appeal—as a defendant in the main action (r. 28.06(3)(a)).

3.4.3 Consequences regardless of defence – rr. 28.06(3)(b) and (5)

Even if the defendant by crossclaim does not defend the plaintiff’s claim in the main action, the defendant by crossclaim is still bound by any order or determination made in the main action between the plaintiff and the crossclaiming defendant.

3.4.4 Defence not required – r. 28.05(2)

Where the crossclaim only contains a claim for contribution or indemnity under the *Negligence Act* and the defendant by crossclaim has already delivered a defence in the main action setting forth all facts on which the defendant by crossclaim intends to rely in defence of both the main action and the crossclaim, the defendant by crossclaim does not need to deliver a defence to crossclaim (r. 28.05(2)).

3.5 The Negligence Act – r. 28.01(2)

Subrule 28.01(2) provides that a defendant who claims contribution from a co-defendant under the *Negligence Act* must do so by way of crossclaim. The reason for this can best be explained by the following example:

Suppose that two individuals, engaged in a fight, negligently injured an innocent bystander, who suffered both physical damage and loss of income. Suppose further that the bystander sued both fighters, and the court determined that Defendant A was 40 percent responsible for the plaintiff’s injuries, while Defendant B was 60 percent responsible.

The plaintiff ultimately received one single judgment providing that, “The defendants shall pay to the plaintiff the sum of \$30,000 [plus interest and costs].” Because both defendants have been adjudged to have caused or contributed in some way (and to some extent) to the plaintiff’s injuries, under the Canadian regime of tort liability, both defendants are jointly and severally (i.e., individually and together) liable for the full amount of the \$30,000 judgment (plus interest and costs).

This means that the plaintiff may then choose to recover the full amount of the judgment from either of the two defendants or to recover a portion of the full amount from one defendant and the balance from the other. The finding of a 40/60 split in responsibility as between the two defendants is irrelevant to the plaintiff’s right of recovery of the full amount against either defendant.

If the plaintiff chooses to recover the full amount from Defendant A, the result is grossly unfair to Defendant A. Defendants A and B were each found liable to the plaintiff, but Defendant A will have paid the full amount of the judgment.

A plaintiff may be forced to seek recovery against one of two joint defendants in a situation where one defendant has insurance and the other does not.

Section 1 of the *Negligence Act* provides that joint tortfeasors (like Defendants A and B) may recover from each other in proportion to their respective degrees of fault. This means that Defendant A, having paid the full \$30,000 (plus interest and costs), may recover 60

percent of that amount from Defendant B, who was found 60 percent responsible for the plaintiff's injuries.

Defendant A's recovery is possible only if Defendant A formally claims contribution against defendant B under the *Negligence Act* by way of crossclaim, rather than as a separate action.

Thus, co-defendants crossclaim against each other in a plaintiff's negligence action so that the court has jurisdiction to grant judgment entitling them to contribution from each other in accordance with their respective degrees of responsibility.

4. Third (and subsequent) party claims

A third party claim is an originating process and must therefore be issued, as with a statement of claim. Unlike a crossclaim, which is a claim by a defendant against another existing defendant (i.e., a person who is also a party to the action), a third party claim is a claim by a defendant against a stranger to the litigation—someone who is not already a party to the main action.

4.1 Availability — r. 29.01

Rule 29.01 governs a third party claim and provides as follows:

29.01— A defendant may commence a third party claim against any person who is not a party to the action and who,

- (a) is or may be liable to the defendant for all or part of the plaintiff's claim;
- (b) is or may be liable to the defendant for an independent claim for damages or other relief arising out of,
 - (i) a transaction or occurrence or series of transactions or occurrences involved in the main action, or
 - (ii) a related transaction or occurrence or series of transactions or occurrences; or
- (c) should be bound by the determination of an issue arising between the plaintiff and the defendant.

4.2 Comparison with crossclaim

As with a crossclaim, a third party claim under r. 29.01(a) allows the defendant, in effect, to say to the defendant by third party, "I am taking the position in the main action that I am not liable to the plaintiff; but if I am found to be liable, then you should pay as well as or instead of me."

Likewise, a third party claim under r. 29.01(b), as in a crossclaim, is an independent claim for damages or other relief that arises out of the same transaction or occurrence as the main action.

For example, a defendant in an action arising out of a multi-vehicle collision will issue a third party claim

seeking damages against another person for injuries sustained in the collision. The defendant (who is the "plaintiff by third party claim") could end up recovering damages against that third party, even if the plaintiff is unsuccessful in recovering damages against the defendant in the main action.

4.3 Discontinuance or dismissal of action

Where an action is discontinued or dismissed against a defendant who has made a third party claim, the third party claim is deemed to be dismissed with costs 30 days after the discontinuance, unless the court orders otherwise during that period.

If a third party action is brought by a defendant, the plaintiff in the main action should take notice and consider whether the proposed third party should be added as a party defendant because if the main action is dismissed outright as against the defendant, then the third party action will be dismissed (unless the court orders otherwise), and the plaintiff could be "out of court."

4.4 Objectives of third party claim

The objectives of a third party claim are as follows:

- to avoid a multiplicity of actions, since the procedure provides a substitute for another action and disposes of all issues arising out of a transaction or occurrence or series of transactions or occurrences as between the plaintiff and the defendant and between the defendant and a third party;
- to avoid the possibility that there might otherwise be contradictory or inconsistent findings in two different actions on the same facts;
- to allow the third party to defend the plaintiff's claim against the defendant;
- to save costs;
- to enable the defendant to have the issue against the third party decided as soon as possible so that the plaintiff cannot enforce a judgment against the defendant before the third party issue is determined;
- to enable the defendant to assert an independent claim for damages or other relief which arises out of or is related to the subject of the plaintiff's action; and
- to ensure that a third party is bound by the determination of an issue arising between the plaintiff and the defendant.

4.5 Pleadings

4.5.1 Issuance

A third party claim (Form 29A) may be issued as a matter of right within 10 days after the defendant delivers a

statement of defence in the main action or at any time before the defendant is noted in default. Alternatively, it may be issued within 10 days after the plaintiff delivers a reply to the defendant's statement of defence.

4.5.2 Time extension

Thereafter, a third party claim may be issued with the plaintiff's consent or with leave, which the court shall grant unless to do so would prejudice the plaintiff (r. 29.02(1.2)). This provision recognizes that the time limit for issuing a third party claim should not act as a limitation period in favour of a third party.

Often, the defendant is unable to identify a potential third party and prepare a third party claim within the 10-day period. Any limitation defence should be pleaded by the third party as a defence to the third party claim. It should not influence the outcome of a motion to extend time for asserting the third party claim. Note that such motion may be made without notice to the third party.

4.5.3 Service – rr. 29.02 and 17.02(q)

A third party claim shall be served on the third party, together with all the pleadings previously delivered in the main action or in any counterclaim, crossclaim, or third or subsequent party claim in the main action, within 30 days after the third party claim is issued.

The third party claim shall also be served on every other party to the main action within the time for service on the third party (rr. 29.02(2) – (3)).

A third party claim may be issued and served outside Ontario, without a court order, where such claim is properly the subject matter of a third party claim under the *Rules* (r. 17.02(q)).

4.5.4 Court file number

Third and subsequent party claims have the same court file number as the main action, followed by a suffix letter. The letter "A" is usually added to denote the first third party claim that is issued. If another defendant issues its own third party claim, the suffix "B" is added; if one of the third parties issues a fourth party claim, the suffix "C" is added, and so on.

These letters distinguish each separate third or subsequent party claim both from the main action and from each other. Note that no letter suffix is added to a counterclaim or crossclaim. The court file number for these subsidiary claims is the same as in the main action.

4.6 Third party defence – r. 29.03

A third party may defend against a third party claim by delivering a third party defence (Form 29B) within 20 days after service of the third party claim where the third party is served in Ontario, within 40 days where the third

party is served elsewhere in Canada or in the United States of America, or within 60 days where the third party is served elsewhere (r. 29.03).

4.6.1 Consequences of defence – r. 29.06

A third party who has delivered a third party defence shall be served with all subsequent documents in the main action. Judgment in the main action, on consent or after noting the defendant in default, may only be obtained on notice to the third party.

In addition, where the defendant making a third party claim is also a plaintiff by crossclaim, the co-defendant who is a defendant by crossclaim and the third party have the same rights to discovery from each other as if they were parties to the same action (r. 29.06).

4.7 Third party defence of main action – r. 29.05(1)

A third party may also deliver a statement of defence in the main action, raising any defence that would be open to the defendant (r. 29.05(1)). Since the *Rules* do not specify a name for this pleading, it should be called something that distinguishes it from the defendant's statement of defence in the main action. For example, it could be called the, "statement of defence of the third party in the main action."

The right to defend the main action also applies to subsequent parties (fourth party, fifth party, etc.). Each third and subsequent party may defend not only the claim by which it was brought into the litigation, but also every other action that preceded it.

This means, for example, that a fourth party is entitled to deliver a "fourth party defence," a "third party defence of the fourth party," and a "statement of defence of the fourth party in the main action" (rr. 29.05 and 29.12).

For example, if a plaintiff sues a manufacturer in a product liability case, the manufacturer will claim over against a third party who provided a contractual indemnity to the manufacturer for such claims. The fact that the defendant manufacturer may not assert any legitimate defences to the plaintiff's claim because it has the right to be indemnified by the third party is unfair to the third party.

If the defences available to the defendant had been properly asserted, the plaintiff's action might have been dismissed entirely, thereby relieving the third (and, potentially, any subsequent) party of liability. This is why third and subsequent parties are entitled to defend the main action and all actions "above" them in the chain, as though they were parties to such prior actions.

4.7.1 Defences raised

The third party may have certain defences, contractual or otherwise, arising solely out of its relationship with the defendant. These defences, which will be asserted in the third party defence, have no place in the third party's statement of defence of the third party in the main action. These defences have nothing to do with the plaintiff's relationship with and alleged cause of action against the defendant. Thus, in defending the main action, the third party may raise only those defences that are open to the defendant.

4.7.2 Independent claim

In a third party claim that arises out of an independent claim for damages (as in the multi-vehicle collision discussed above), it usually will be inappropriate for the third party to defend the main action. This is because the third party will have no interest in the outcome of the main action.

4.7.3 Consequences of defending main action — r. 29.05(2)

A third party who delivers a statement of defence of the third party in the main action has the same rights and obligations in the main action as a defendant in the main action, including those for discovery, trial, and appeal (r. 29.05(2)).

4.7.4 Consequences regardless of defence — rr. 29.05(2)(b) and (5)

Regardless of whether the third party delivers a statement of defence of the third party in the main action, the third party is bound by any order or determination made in the main action between the plaintiff and the defendant who made the third party claim (rr. 29.05(2)(b) and (5)).

4.8 Reply — rr. 29.04 and 29.05(4)

A reply to third party defence (Form 29C) shall be delivered by the defendant within 10 days after service of the third party defence (r. 29.04).

The plaintiff's reply to the statement of defence of the third party in the main action must be delivered within 10 days after service of that statement of defence (r. 29.05(4)).

4.9 Counterclaim by third party — rr. 27.01(2) and 27.10

Under r. 27.10, a third party may counterclaim against the defendant who made it a third party, as well as (but not solely against) the plaintiff in the main action (rr. 27.01(2) and 27.10).

Similarly, where a defendant in an action counterclaims against the plaintiff, the plaintiff (defendant by counterclaim) may serve a third party claim on a person from whom the plaintiff claims relief for the counterclaim.

4.10 Trial of third party claim — r. 29.08

The third party claim is to be placed on the trial list immediately after the main action and shall be tried at or immediately following the main action, unless the court otherwise orders.

4.11 Prejudice or delay — r. 29.09

Rule 29.09 provides that a plaintiff is not to be prejudiced or unnecessarily delayed by reason of any third party claim. On motion by the plaintiff, the court may make such order or impose such terms, including an order that the third party claim proceed as a separate action, as are necessary to prevent prejudice or delay, provided the order or terms do not cause injustice to the defendant or the third party.

4.12 Statutory third party under the Negligence Act

Recall that r. 28.01(2) provides that a defendant who claims contribution from a co-defendant under the *Negligence Act* shall do so by way of crossclaim. Section 5 of the *Negligence Act* provides that a person who is not already a party to an action (and who, therefore, cannot be made a defendant by crossclaim) may be added as a party defendant or a third party.

Several Ontario cases have held that a plaintiff should not be compelled to have as a defendant someone the plaintiff does not wish to sue or against whom the plaintiff makes no claim. Consequently, an order will not be made adding a person as a party (or defendant) against the strenuous objections of the plaintiff.

In such cases, a defendant seeking contribution under the *Negligence Act* from a person who is not already a party to the main action should commence a third party claim against that person.

4.13 Simplified procedure — R. 76

Where the trial of an action is governed by simplified procedure under R. 76 (i.e., the claim is for \$100,000 or less) and a defendant makes a counterclaim, crossclaim, or third (or subsequent) party claim, the general rule is that the main action, together with the subsidiary claim(s), will continue under the simplified procedure.

1. Overview

In most cases, a motion is a “proceeding within a proceeding.” It usually is a subsidiary step taken within either an action or an application to determine various issues that may arise between the parties. Note that the parties may resolve procedural issues by agreement and thereby avoid a motion altogether.

A motion is commenced by a notice of motion (*Rules of Civil Procedure (Rules)*, Form 37A). Depending on the type of order being sought, the motion may be heard by a judge or a master.

A person who makes a motion is called the “moving party”; a person against whom a motion is made is called the “responding party” (r. 1.03).

Some motions may end the dispute between the parties completely before a trial or hearing even takes place, or they may dispose of such a significant chunk of the dispute that the trial or hearing itself will be considerably shorter and/or much less costly.

Caution should be exercised with motions since adverse consequences should be considered. Rule 4 of the Law Society of Upper Canada’s *Rules of Professional Conduct* sets out a lawyer’s obligations with respect to the administration of justice. This rule deals with the lawyer’s obligation not to abuse the court process with unnecessary motions. The cost consequences of a motion should be considered because if there is an adverse costs award on a motion (with costs payable forthwith), the lawyer may have to go to the client to ask for payment of the costs award. This is a significant factor in handling motions.

2. Procedure on a motion — R. 37

The procedure on a motion is governed by R. 37, although some motions have their own procedure that supplements R. 37.

2.1 Case management and motions — R. 77

Rule 77 establishes a case management system that applies to most actions and applications commenced in the City of Ottawa, the City of Toronto and the County of Essex.

Rule 77 also governs the conduct of motions in actions and applications subject to case management.

2.2 Practice directions for motions

In certain regions, practice directions governing the filing requirements and the conduct of motions are in effect. These practice directions are published in the *Ontario Reports* and must be consulted before bringing a motion. They also appear in the commercially available consolidated and annotated versions of the *Rules*.

2.3 Local practice

Local practice concerning particular aspects of motions, such as the booking of appointments, the filing of material, etc., can vary from centre to centre. Be sure to verify such matters with the local registrar. For example, many jurisdictions have rules for motions that are expected to take more than 60 minutes (they may be assigned a special list). Also, some jurisdictions will have rules requiring that the court be advised prior to the motion’s day if the motion is in fact proceeding in order to save the motions court judge from unnecessarily reading volumes of motion records.

2.4 Timing of a motion

Motions are often referred to as being “interlocutory,” meaning “within the litigation.” While this is generally true, a motion can sometimes be brought before commencement of a proceeding. Under r. 48.04(1), any party who has set an action down for trial and any party who has consented to the action being placed on a trial list shall not initiate or continue any motion or form of discovery without leave of the court. If such a motion is to be brought after an action has been set down, the moving party must first seek and obtain leave before addressing the substantive motion.

Note, however, that r. 48.04(2) provides that r. 48.04(1) does not relieve a party from complying with a number of obligations under various rules listed therein. For example, r. 48.04(1) does not relieve a party from complying with undertakings given on examination for discovery. Subrule 48.04(3) provides that a party does not require leave of the court to bring a motion to compel compliance with any obligation imposed by a rule listed in r. 48.04(2)(b).

2.4.1 Motion before proceeding commenced

Rule 37.17 provides that in an urgent case (such as where an order for an interlocutory injunction is sought under

R. 40), a motion may be brought before the commencement of a proceeding on the moving party's undertaking to commence the proceeding forthwith.

There are even some motions that must be brought before a proceeding is commenced. An example is a motion for leave to commence a derivative action under Ontario's *Business Corporations Act*.

2.4.2 Motion post-judgment

Some motions are properly brought after final judgment has been pronounced after trial. Examples of such motions include those that may be available to enforce or assist in enforcing judgments under R. 60 (enforcement of orders).

2.5 Notice of motion

A motion is made by way of a notice of motion (Form 37A). The notice must state

- the precise relief sought;
- the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and
- the documentary evidence to be used at the hearing of the motion (r. 37.06).

The "documentary evidence" portion of the notice refers to the four types of evidence provided for under R. 39.

2.6 Service and filing of notice of motion

2.6.1 Person or party to be served

The notice of motion must be served on any person or party who will be affected by the order sought, except where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, or where the delay required to effect service might entail serious consequences (rr. 37.07(1)–(3)).

In the latter case, the court may make an interim order without notice. That kind of order used to be referred to as an "*ex parte*" order. Where an order is made without notice, the order, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion, must be served on any person or party affected thereby, unless the court orders otherwise (r. 37.07(4)).

2.6.2 Consequences where no notice

Where it appears to the court that the notice of motion should have been served on a person who was not served, the court may

- dismiss the motion completely or dismiss it only against the person who was not served;

- adjourn the motion and direct that the notice of motion be served on the person who was not served; or
- direct that any order made on the motion be served on the person who was not served (r. 37.07(5)).

2.6.3 Motion without notice

Despite the breadth of r. 37.07, many motions do not require notice. For example, by accepted practice no notice is required for motions to extend the time to issue a third party claim or to add a party to a proceeding. This is because the moving party would be entitled to commence an entirely new proceeding against the proposed new party without leave or a court order. The rights of the proposed new party would not be any more affected by the order to extend the time to issue a third party claim or to add a party to the proceeding than they would be by the moving party simply commencing a separate action.

Under r. 39.01(6), without-notice motions must have full and fair disclosure of all material facts.

2.6.4 When service to be effected

The notice of motion is to be served at least seven days before the date on which the motion is to be heard. It is also to be filed with proof of service at least seven days before the hearing date (rr. 37.07(6) and 37.08(1)).

Note that in counting days, you must exclude the day on which the first event happens, but include the day on which the second event happens (r. 3.01(1)(a)). This means that if a motion is to be heard on Friday, the notice of motion must be served and filed at the latest on Wednesday of the week before.

2.6.5 Where service not required

Where service is not required, the notice of motion shall be filed at or before the hearing in the court office where the motion is to be heard (r. 37.08(2)).

2.6.6 Extension or abridgment of time for service

The court may, by order, extend or abridge any time prescribed by the *Rules* on such terms as are just (r. 3.02(1)).

2.7 Place of hearing on a motion — r. 37.03

All motions, with or without notice, must be brought and heard in the county in which the proceeding was commenced or to which it has been transferred under r. 13.1.02, unless the court orders otherwise (r. 37.03(1)).

2.8 Jurisdiction of judge and master — r. 37.02

A judge has jurisdiction to hear any motion in a proceeding (r. 37.02(1)). Under r. 37.02(2), a master has jurisdiction to hear any motion in a proceeding and has all the jurisdiction of a judge in respect of a motion, except a motion

- where the power to grant the relief sought is conferred expressly on a judge by a statute or rule;
- to set aside, vary, or amend an order of a judge;
- to abridge or extend a time prescribed by an order that a master could not have made;
- for judgment on consent in favour of or against a party under disability;
- relating to the liberty of the subject;
- under s. 4 or 5 of the *Judicial Review Procedure Act*; or
- in an appeal.

2.8.1 Interlocutory injunction

A motion for an interlocutory injunction under s. 101 of the *Courts of Justice Act (CJA)* and R. 40 is an example of a motion that can only be heard by a judge. This type of motion may be made without notice. If the injunction is granted in such a case, it may not be for a period exceeding 10 days, unless the time period has been extended under the *Rules* (r. 40.02).

On the hearing of a motion for an interlocutory injunction, the moving party must abide by any order as to damages that the court may make if, ultimately, it appears that the granting of the order has caused damage to the responding party for which the moving party should compensate (r. 40.03).

2.8.2 Complicated proceeding(s)

Where a proceeding involves complicated issues or where there are two or more proceedings that involve similar issues, all motions in the proceeding(s) may be directed to be heard by a particular judge. Parties and/or their lawyers may make a written request to the regional senior judge in their respective judicial region(s) to have a judge appointed. Rule 37.03 (place of hearing of motion) does not apply to such motions (r. 37.15). Note that a judge who hears a motion pursuant to a direction under r. 37.15(1) shall not preside at the trial of the action or the hearing of the application except with the written consent of all of the parties (r. 37.15(2)).

2.9 To whom a motion is to be made — r. 37.04

A motion in a proceeding is to be made to the court if it is within a master's jurisdiction; otherwise, it must be made

to a judge. Note that in the first paragraph of a notice of motion, the moving party must state the forum to which (or the judicial official to whom) the motion will be made.

The word "court" is defined as including a master having jurisdiction to hear motions under R. 37 (r. 1.03). This means that if a proceeding is in the Superior Court of Justice and the operative rule provides that a motion may be made to the "court," the motion should be heard by a master in those regions in which masters are located—namely, Toronto, Ottawa, and Windsor.

2.10 Confirmation of motion — r. 37.10.1

Rule 37.10.1 provides that a party who is making a motion on notice to another party must

- confer (or attempt to confer) with the other party;
- not later than 2 p.m. three days before the hearing date, provide the registrar a confirmation of motion (Form 37B) by fax or email or by leaving the confirmation at the court office; and
- send a copy of the confirmation to the other party by fax or email.

The motion will not be heard if the confirmation is not provided, except by order of the court (r. 37.10.1(2)). Note that the moving party must ensure that the confirmation is kept up to date (r. 37.10.1(3)).

2.11 Attendance and manner of hearing

Subsection 135(1) of the *CJA* establishes that all court hearings shall be open to the public. This provision is subject to s. 135(2) of the *CJA* and the rules of court.

Subsection 135(2) provides that the court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public. In such a case, the presiding judge or officer shall endorse leave for a hearing in the absence of the public on the notice of motion (r. 37.11(2)).

A motion may be heard in the absence of the public where any of the following conditions apply:

- The motion is to be heard and determined without oral argument.
- Because of urgency, it is impracticable to hear the motion in public.
- The motion is made during a pre-trial conference.
- The motion is before a single judge of an appellate court.
- The motion is to be heard by telephone conference.

2.12 Motion heard in writing

Where a motion is on consent, unopposed, or made without notice under r. 37.07(2), the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise (r. 37.12.1(1)).

If the motion is on consent, the consent and a draft order shall be filed with the notice of motion. If the motion is unopposed, a notice from the responding party stating that the party does not oppose the motion and a draft order shall be filed with the notice of motion.

Where the motion is opposed but the issues of fact and law involved are not complex, the moving party may propose, in the notice of motion that the motion be heard in writing without the attendance of the parties.

In this case, the motion must be brought on at least 14 days' notice. In addition to filing a motion record, the moving party also must serve and file with the court a draft order and a factum setting out the moving party's argument (r. 37.12.1(4)).

2.12.1 Response

Subrule 37.12.1(5) provides that within 10 days of service of the moving party's material on a motion to be heard in writing, the responding party must serve and file with the court

- a consent to the motion;
- a notice that the responding party does not oppose the motion;
- a motion record, a notice that the responding party agrees to have the motion heard and determined in writing, and a factum setting out the responding party's argument; or
- a notice that the responding party intends to make oral argument, along with any material on which the responding party intends to rely.

Where the responding party delivers a notice that it intends to make oral argument, the moving party may either attend at the hearing and make oral argument, or not attend and simply rely on its motion record and factum (r. 37.12.1(6)).

3. Material on a motion

3.1 Motion record — r. 37.10

Where a motion is made on notice, the moving party is required to serve a motion record on every other party to the motion and to file it with proof of service at least seven days before the hearing (r. 37.10(1)).

The motion record must contain, in consecutively numbered pages,

- a table of contents;
- a copy of the notice of motion;
- a copy of all affidavits and other material served by any party (moving and/or responding parties) for use on the motion;
- a list of all relevant transcripts of evidence in chronological order (but not necessarily the transcripts themselves); and
- a copy of any other material in the court file required for the hearing of the motion.

3.2 Pleadings

The pleadings in an action, having been filed with the court, form part of the court file. Copies of the pleadings may be included in the motion record as "other material" under r. 37.10(2)(e) without needing to be proved or otherwise validated or identified.

Where it is necessary to place before the court the pleadings in another action (i.e., in a motion to consolidate two actions or in a motion to stay one action on the ground that there is another action pending in the same or another jurisdiction in respect of the same subject matter), those pleadings must be proved by one of four methods as identified in R. 39.

In motions court, the complete court file is usually not brought to the motions court, and the motions court judge usually only has the material pertaining to the motion. If the lawyer wishes to have the entire court file, special arrangements should be made. This may depend on the local jurisdiction where the motion is being heard.

3.3 Responding party's motion record

If the responding party thinks that the motion record is incomplete, the responding party may serve a responding party's motion record containing any other material to be used at the hearing of the motion that is not included in the moving party's motion record.

The responding party's motion record must be served on every other party and filed with proof of service at least four days before the hearing (r. 37.10(3)).

3.4 Material filed as part of record

A notice of motion, along with any other material served by a party for use on a motion, may be filed with proof of service as part of the party's motion record; it need not be filed separately (r. 37.10(4)).

3.5 Transcript of evidence

If a party intends to refer to a transcript of evidence at the hearing of the motion, a copy of the transcript must be filed (rr. 37.10(5) and 34.18).

3.6 Factums

A party to a motion may serve on every other party a factum consisting of a concise argument stating the facts and law to be relied on by the party (r. 37.10(6)).

The moving party's factum, if any, must be served and filed with proof of service at least seven days before the hearing. The responding party's factum, if any, must be served and filed with proof of service at least four days before the hearing (rr. 37.10(7)–(8) and 40.04).

Factums are mandatory on some motions, such as a motion for summary judgment (R. 20), for determination on a point of law (R. 21), for an interlocutory injunction (R. 40), or to discharge a certificate of pending litigation (R. 42).

Even where a factum is unnecessary, many lawyers consider it to be a practical necessity to file one. An optional factum provides the lawyer with an excellent opportunity to concisely set out the position of the party that the lawyer represents to the motions court judge. Judges and masters expect a factum even on simple motions—it may be the only material that a judge or master will read before the motion is heard.

3.7 Refusals and undertakings chart

On a motion to compel answers or to satisfy undertakings given on an examination or cross-examination, the moving party must serve on every other party to the motion a refusals and undertakings chart (Form 37C). The chart must be filed with proof of service in the court office where the motion is to be heard at least three days before the hearing.

The chart must set out the issue that is the subject of the refusal or undertaking and its connection to the pleadings or affidavit, the question number and reference to the page of the transcript where the question appears, and the exact words of the question.

The responding party must serve on every other party to the motion a completed copy of the chart that shows the answers provided or the basis for the refusal to answer the question or satisfy the undertaking. The copy of the chart must be filed, with proof of service, in the court office where the motion is to be heard at least two days before the hearing.

3.8 Motion checklist

The following is a checklist of necessary steps that must be taken by the moving party when bringing a motion:

- (1) Identify the rule or statutory provision under which the motion will be brought.
- (2) Determine whether the motion will be before a judge or master.
- (3) Book an appointment for the hearing of the motion (where the practice directions require you to do so).
- (4) Draft, serve, and file the notice of motion at least seven days before the date of the motion.
- (5) Serve and file the motion record at least seven days before the date of the motion.
- (6) If applicable, file transcripts of evidence.
- (7) Serve a factum, if desired or required, at least seven days before the date of the motion and file it at least seven days before the date of the motion.
- (8) Confer with the other party.
- (9) Not later than 2 p.m. three days before the hearing date, provide the registrar a confirmation of motion (Form 37B) and send a copy of the confirmation to the responding party.

4. Evidence on a motion — R. 39

All of the evidence to be used by a party on a motion is to be listed (or a copy thereof provided) in the motion record, in accordance with r. 37.10(2). (Recall that there may be both a moving party's motion record and a responding party's motion record.)

Under R. 39, evidence on a motion may be by

- affidavit;
- transcript of cross-examination on an affidavit;
- transcript of examination of a witness; and
- transcript of examination for discovery.

Note that pleadings are not evidence and should not be referred to as such in the last paragraph of a notice of motion (which paragraph states the documentary evidence to be used at the hearing of the motion).

4.1 Evidence by affidavit — rr. 39.01 and 4.06

An affidavit is a sworn, written statement containing the evidence of a witness (referred to as the “deponent” or the “affiant”). The form, format, and content of an affidavit are prescribed by r. 4.06 and Form 4D.

Hearsay is often included in affidavits, and it is permissible. Commonly, lawyers' affidavits are submitted on motions. It is very important to state the source of the information to the court (e.g., I have been advised by my client that ...). This allows the court to evaluate the

evidence submitted before it. Great caution should be used with regard to letters exchanged between the lawyers that may have been “without prejudice.” These documents might be privileged, and the court may criticize use of “without prejudice” letters.

If a lawyer submits a lawyer’s affidavit, that same lawyer cannot argue the motion under the Law Society’s *Rules of Professional Conduct*.

4.1.1 Corporation

Where a corporation is a party to a proceeding, any affidavit required may be made by an officer, director, or employee of the corporation having knowledge of the facts required to be deposed. The affidavit must state that the officer, director, or employee has such knowledge (r. 4.06(5)).

4.1.2 Partnership

In any proceeding to which a partnership is a party, an affidavit may be made by a member or employee of the partnership (r. 4.06(6)).

4.1.3 Exhibit to an affidavit — r. 4.06(3)

Documents may be marked as exhibits to affidavits and physically annexed to the affidavit, or merely produced and identified by the deponent without being physically annexed (r. 4.06(3)).

If reliance is to be placed on the document’s contents, confirmation of or belief in the truth of the contents must be stated in the affidavit. Similarly, the allegations contained in a pleading cannot be relied on as fact by a party in support of a motion without an affidavit deposing to the truth of such allegations.

If the affidavit states that a particular document is attached or annexed, it is important to make sure that it actually is attached by way of a paperclip or a staple.

4.1.4 Service of affidavit

Where a motion is made on notice, affidavits in support of the motion are to be served with the notice of motion and filed with proof of service at least seven days before the hearing. Likewise, any affidavits to be used in opposition to the motion must be served and filed with proof of service at least four days before the hearing (rr. 39.01(2)–(3)).

4.1.5 Cross-examination on affidavit — r. 39.02

Where a party has served every affidavit on which the party intends to rely on a motion and has completed all examinations of witnesses (including deponents of affidavits) under r. 39.03, the party may then cross-

examine the deponent of any affidavit served by a party who is adverse in interest on the motion (r. 39.02(1)).

(a) Simplified procedure — R. 76

Note that such cross-examination is not permitted in an action under the simplified procedure.

(b) Delivery of affidavit after cross-examination

A party who has cross-examined on an affidavit delivered by an adverse party cannot subsequently deliver an affidavit for use at the hearing or conduct an examination of a witness under r. 39.03 without leave or consent.

The court shall grant such leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under r. 39.03 (r. 39.02(2)).

(c) Reasonable diligence

The court may refuse an adjournment of a motion for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence (r. 39.02(3)).

(d) Transcript of cross-examination

On a motion (other than a motion for summary judgment or contempt), a party who cross-examines on an affidavit must, where that party orders a transcript of the examination, purchase and serve a copy of the transcript on every adverse party to the motion free of charge (r. 39.02(4)(a)).

(e) Liability for costs

The cross-examining party is liable for the partial indemnity costs of every adverse party on the motion in respect of the cross-examination, regardless of the outcome, unless the court orders otherwise (r. 39.02(4)(b)).

(f) Scope of cross-examination

As at trial, the scope of cross-examination on an affidavit is extremely wide. It is not confined to the subject matter of, or the evidence put forward in, the affidavit itself. The deponent may be cross-examined on all matters relevant to the issues on the motion, provided the questioning is fair, in good faith, and relevant to the issues on the motion or the credibility of the witness.

(g) Deponent’s duty to be informed

The deponent of an affidavit sworn on information and belief must, when cross-examined, inform himself or

herself about matters not within the deponent's knowledge that are relevant to the issues on the motion.

(h) Re-examination

A person cross-examined on an affidavit may be re-examined by the person's own lawyer. The re-examination must take place immediately after the cross-examination and may not take the form of a cross-examination (rr. 34.11(2)–(3)).

(i) Notice of examination — rr. 34.04–34.06

Where the person to be cross-examined is a party to the proceeding, a notice of examination (Form 34A) must be served on the party's lawyer of record. Where the party is acting in person, the party must be served with the notice personally or by an alternative to personal service (r. 34.04(1)).

Where the person to be cross-examined is not a party to the proceeding, a notice of examination must be served on the lawyer for the party who filed the affidavit. Where the party who filed the affidavit acts in person, the notice must be served personally on the person to be cross-examined and not by an alternative to personal service (r. 34.04(3)).

Where the person to be examined resides in Ontario, the notice shall be served on at least two days notice, unless the court orders otherwise. Such notice must be given to every party to the proceeding other than the examining party (r. 34.05). The person to be examined and all other parties may consent to a notice period that is less than the minimum period prescribed or to dispensing with notice (r. 34.06).

Where the person to be examined resides outside Ontario, the court may make an order about where the cross-examination is to take place, the notice period, attendance money, and other matters respecting the cross-examination, in the same manner as such order may be made for examination for discovery (r. 34.07(1)).

(j) Adjournment for directions

As with any examination, where the right to examine is being abused, a cross-examination under R. 34 may be adjourned—by the examining party or the person being examined—to make a motion for either directions about the continuation of the cross-examination or an order terminating the cross-examination or limiting its scope.

The cross-examination also may be adjourned where any of the following conditions apply:

- The cross-examination is being conducted in bad faith or in an unreasonable manner.

- The answers to the questions being asked are evasive, unresponsive, or unduly lengthy.
- There has been neglect or improper refusal to produce relevant documentation.

On such motion, the court may order the person whose conduct has been improper to pay personally and forthwith the costs of the motion, any costs thrown away, and the costs of any continuation of the cross-examination. The court may make such other order as is just (r. 34.14). Where a person does not comply with such order, a judge may make a contempt order against the person.

(k) Failure or refusal

Under r. 34.15, where a person fails to attend at the time and place fixed or agreed to for a cross-examination, refuses to take the oath or make affirmation, or refuses to answer any proper questions or to produce documents or things required to be produced, the court may

- where an objection to a question is held to be improper, order the person examined to re-attend at that person's own expense and answer the question and any proper questions arising from the answer;
- where the person being examined is a party, dismiss the party's proceeding or strike out the party's defence;
- strike out all or part of the affidavit of the deponent; and
- make such other order as is just.

Where a person does not comply with such order, a judge may make a contempt order against the person (r. 34.15(2)).

4.2 Examination of a witness — r. 39.03

4.2.1 Before the hearing

A person may be examined as a witness before the hearing of a pending motion so that a transcript of evidence is available for use at the hearing (r. 39.03).

This right extends to opposite parties, who may be summoned and examined. This means that there is no civil equivalent of the criminal "privilege against self-incrimination." An opposite party may be cross-examined by the examining party and any other party and then re-examined by the examining party on matters raised by the other parties. The re-examination may also take the form of cross-examination (rr. 39.03(1)–(2)).

(a) Reasonable diligence

The court may refuse an adjournment of a motion for an examination where the party seeking the adjournment has failed to act with reasonable diligence (r. 39.03(3)).

(b) Summons to witness

Where the person to be examined is not a party but does reside in Ontario, the person's attendance may be secured by serving him or her with a summons to witness (examination out of court) (Form 34B) personally, and not by an alternative to personal service, together with attendance money calculated in accordance with Tariff A (rr. 34.04(4)–(5)). Where the person to be examined resides outside Ontario, a motion must be made in accordance with r. 34.07.

(c) Simplified procedure — R. 76

Note that an examination of a witness under r. 39.03 is not permitted in an action under the simplified procedure.

4.2.2 At the hearing

A person may be examined at the hearing of a motion in the same manner as at a trial, with leave of the presiding judge or officer. The attendance of such person may be compelled in the same manner as provided in R. 53 for a witness at trial (rr. 39.03(4)–(5)).

Note that leave to examine a witness orally at the hearing is rarely sought or granted. An exception is the cross-examination of a witness on a motion for a labour injunction. In this case, a responding party may require such cross-examination to take place at the hearing of the motion (*CJA*, s. 102(4)).

4.3 Examination for discovery transcript — r. 39.04

On the hearing of a motion, an examination for discovery transcript may be used in evidence. In such case, r. 31.11 (use of examination for discovery at trial) applies, with necessary modifications (r. 39.04).

Note that the moving party is entitled to use as evidence only the examination for discovery of an adverse party; the moving party may not use in evidence the moving party's own examination for discovery (i.e., evidence from when the moving party was examined as a witness) except in specified circumstances and with leave of the judge or officer hearing the motion (rr. 31.11(6)–(7)).

5. Prohibited motion

Any party may make a motion to a judge or master for an order prohibiting another party from making further motions in a proceeding without leave. The judge or master may so order where the judge or master is satisfied that the other party is trying to delay or add costs to the proceeding or otherwise abuse the process of the court through a multiplicity of frivolous or vexatious motions (r. 37.16).

6. Abandoned motion

A party who makes a motion may abandon it by delivering a notice of abandonment (r. 37.09(1)). The party will be deemed to have abandoned the motion if the party has served but not filed a notice of motion or does not appear at the hearing (r. 37.09(2)).

Where a motion is abandoned or is deemed to be abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise (r. 37.09(3)).

7. Disposition of a motion

On the hearing of a motion, the relief sought may be granted, or the motion may be dismissed or adjourned in whole or in part, with or without terms (r. 37.13(1)).

Where a motion is brought within an action, the court may order that the action be placed on a list of cases requiring a speedy trial forthwith or within a specified time (r. 37.13(1)(a)).

Where a motion is brought within an application, the court may order that the application be heard at such time and place as may be just (r. 37.13(1)(b)).

A judge hearing a motion may order that the motion be converted into a motion for judgment in a proper case (r. 37.13(2)(a)).

Alternatively, the judge may order the trial of an issue—except on motions under RR. 74 and 75 (estate matters)—with such directions as are just and adjourn the motion to be disposed of by the trial judge. In such case, rr. 38.10(2)–(3) apply with necessary modifications (rr. 37.13(2)–(4)).

8. Costs of a motion

Section 131 of the *CJA* provides that the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court; the court may determine by whom and to what extent the costs shall be paid. The parties to a motion should always seek a determination of costs on the motion at the hearing of the motion.

8.1 Costs tied to success

Generally, the successful party on a motion can expect a costs order to be made in the successful party's favour. Note that the provisions of R. 49 (offer to settle) that impact costs in a proceeding also apply to motions, with necessary modifications (r. 49.02(2)).

8.2 Costs fixed

On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the

court shall fix the costs of the motion and order them to be paid within 30 days (r. 57.03(1)(a)).

8.3 Costs to be assessed

In an exceptional case, the court may refer the costs of the motion for assessment under R. 58 and order costs to be paid within 30 days after assessment (r. 57.03(1)(b)).

8.4 Failure to pay costs as ordered

Where a party fails to pay the costs of a motion as ordered, the court may dismiss or stay the party's proceeding, strike out the party's defence, or make such other order as is just (r. 57.03(2)).

8.5 No costs on motion without notice

On a motion made without notice, there shall be no costs awarded to any party, unless the court orders otherwise (r. 57.03(3)).

8.6 Cost awards

Traditionally, the awards of costs on a motion are as follows:

- **“Costs in the cause”** — This entitles the party who eventually is awarded the costs of the proceeding as a whole to receive the costs of the motion. If, for example, a plaintiff is awarded damages at the trial of the action, but for some reason (such as improper conduct) is denied the costs of the action, the plaintiff will not receive the plaintiff's costs of a motion in which costs were awarded “in the cause.”
- **“Costs to a specified party in the cause”** (e.g., “costs to the plaintiff in the cause” or “costs to the third party in the cause”) — This entitles the named party to receive the costs of the motion if that party succeeds in securing costs in the proceeding.
- **“Costs to a party in any event of the cause”** (e.g., “costs to the plaintiff in any event of the cause”) — This entitles the named party to receive the costs of the motion no matter what order (if any) is made as to costs of the proceeding and no matter what the outcome of the proceeding as a whole may be.
- **“Costs to a specified party fixed in the amount of \$X”** (e.g., “costs to the plaintiff fixed in the amount of \$1,500”) — This entitles the named party to receive costs of the motion fixed at the amount indicated no matter what order (if any) is made as to costs of the proceeding and no matter what the outcome of the proceeding as a whole may be. This manner of awarding costs has become the most favoured method of dealing with costs by judges and masters, especially given the provisions in r. 57.03 (above).
- **“Costs payable forthwith after assessment thereof”** — This entitles the party to immediate

assessment and payment of the costs after the motion, notwithstanding that the proceeding (or any other aspect of it) has not yet been determined.

- **“Costs reserved to the trial judge”** — This reserves the disposition of costs of the motion to the trial judge. Note that if the trial judge does not specifically dispose of the costs of the motion, no party will be entitled to receive the costs of the motion. The parties should ask the trial judge to hear argument on and to make a costs order with respect to the motion on which this order was made.
- **“No costs”** — This constitutes an adjudication on the issue of costs and should be included in the formal order that results from the motion. It means that no costs of the motion are to be paid by or to any party.
- **“Costs payable forthwith”** — Costs are payable immediately if the term “forthwith” is used; if not, the costs are paid when the action is concluded.

8.7 Costs scale

Unless the order provides to the contrary, the costs of a motion are assessed on a “partial indemnity” (formerly “party and party”) scale or basis in accordance with Part I of Tariff A. An assessment officer cannot allow items not falling within the Tariff.

Costs that are ordered to be assessed on a “substantial indemnity” (formerly “solicitor and client”) scale or basis are assessed in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A.

9. Setting aside, varying, or amending an order

A person affected by an order may make a motion to set aside or vary that order if any of the following apply:

- The order was obtained on a motion without notice.
- The person failed to appear on the motion through accident, mistake, or insufficient notice.
- The person is affected by an order of a registrar.

9.1 Notice of motion and hearing date

A notice of motion to set aside or vary an order must be served forthwith after the order comes to the attention of the person affected by it and must name the first available hearing date that is at least three days after service of the notice of motion (r. 37.14(1)).

9.2 To whom the motion must be made — rr. 37.14(3)–(6)

If such motion concerns an order made by a registrar, the motion may be made to a judge or master, at a place in accordance with r. 37.03 (place of hearing of motion) (r. 37.14(3)).

If such motion concerns an order of a judge, it may be made to the judge who made the order, at any place, or to any other judge, at a place determined in accordance with r. 37.03 (r. 37.14(4)).

Similarly, if such motion concerns an order of a master, it may be made to the master who made the order, at any place, or to any other master or to a judge, at a place determined in accordance with r. 37.03 (r. 37.14(5)).

If such motion concerns an order of a judge or panel of the Court of Appeal or Divisional Court, it may be made

- where the order was made by a judge, to the judge who made it or to any other judge of the court; or

- where the order was made by a panel of the court, to the panel that made it or to any other panel of the court (r. 37.14(6)).

9.3 Disposition of motion

On such motion, the court may set aside or vary the order on such terms as are just (r. 37.14(2)).

It is improper for the deponent of an affidavit to be the lawyer arguing the motion. The reason for this is that it is embarrassing for the court (the motions court judge) to question the affidavit if the deponent is before the court. These obligations are set out under r. 4.02 of the Law Society's *Rules of Professional Conduct*.

1. Introduction and purposes

Discovery in Ontario actions (there is no discovery in applications) is a two-part process, beginning with documentary discovery under the *Rules of Civil Procedure (Rules)* (R. 30) and then oral discovery (R. 31). The inspection of property rights in R. 32, the medical examinations of parties in R. 33, and examination for discovery by written questions in R. 35 are also part of the discovery process.

The subject of privilege frequently arises in both contexts and thus also arises several times in this chapter. The purposes of discovery are to

- enable the examining party to know the case it has to meet;
- procure admissions to enable one to dispense with formal proof;
- procure admissions that may hurt an opponent's case;
- facilitate settlement, pre-trial procedure, and trials;
- eliminate or narrow issues; and
- avoid surprise at trial.

1.1 The lawyer's duty respecting discovery

The *Rules of Professional Conduct* impose specific obligations on lawyers respecting discovery, as follows:

4.01—(4) Where the rules of a tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate

- (a) shall explain to his or her client:
 - (i) the necessity of making full disclosure of all documents relating to any matter in issue, and
 - (ii) the duty to answer to the best of his or her knowledge, information, and belief, any proper question relating to any issue in the action or made discoverable by the rules of court or the rules of the tribunal,
- (b) shall assist the client in fulfilling his or her obligations to make full disclosure, and
- (c) shall not make frivolous requests for the production of documents or make frivolous demands for information at the examination for discovery.

Privacy legislation and principles can also impact the nature and scope of permitted investigation and preparation for discovery. Many statutes and regulations that preserve confidentiality expressly exempt legal

proceedings. So, for instance, the *Personal Information Protection and Electronic Documents Act (PIPEDA)* permits disclosure of personal information in certain circumstances to a lawyer or pursuant to a summons without the consent of the individual (s. 7(3)). Similarly, under s. 64(2) of the *Freedom of Information and Protection of Privacy Act*, a court can order production of a document that would otherwise be protected under the statute.

Other statutes, such as the *Regulated Health Professions Act, 1991* prohibit the admission of documents from a proceeding under the *Act* in a subsequent legal action (s. 36(3)). The heightened awareness of confidentiality and personal privacy means that the lawyer must exercise great care in gathering documents or conducting investigation for the purpose of discovery preparation to ensure that the privacy rights of the parties and others are respected. Where information is gathered from a source where collection is regulated by a specific statute, the provisions of the statute and case law must be reviewed to ensure that there is no inadvertent breach of the statute while assiduously marshalling evidence for discovery and trial.

2. Discovery plan

A party who intends to obtain evidence under RR. 30 (documents), 31 (oral discovery), 32 (inspection of property), 33 (medical examination), or 35 (discovery by written questions) must obtain the agreement of all other parties to a written discovery plan (r. 29.1.03(1)). Where the parties do not agree on a discovery plan or fail to update it, a court on any subsequent motion may refuse to grant the relief requested or deny costs (r. 29.1.05). As well, the court may impose a discovery plan where a party is not prepared to voluntarily agree to a plan.

The plan must be agreed to before the earlier of

- (1) 60 days after the pleadings are closed or such longer period as they agree upon; and
- (2) attempting to obtain the evidence (r. 29.1.03(2)).

Where circumstances change, the plan must be updated (r. 29.1.04).

The plan must include

- the intended scope of documentary discovery, taking into account relevance, costs, and the importance and complexity of the issues in the action;

- the timing for service of each party's affidavit of documents;
- information concerning the timing, costs, and manner of the production of the documents by the parties and others;
- the names of persons to be examined and information concerning the timing and length of examinations; and
- any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action (r. 29.1.03(3)).

In preparing the plan, the parties shall consult and have regard to “The Sedona Canada Principles Addressing Electronic Discovery” available from The Sedona Conference (r. 29.1.03(4)). These 12 principles encourage counsel to meet, cooperate, and agree on a plan at an early stage for preserving and exchanging electronic information in a cost-effective manner proportionate to the proceeding. They provide for judicial assistance and sanctions where the parties do not cooperate or where a party would be materially prejudiced by the failure of another party to preserve and produce these records. While the general rule is that the producing party is expected to bear the expense of production, the parties may agree to or the court may order another cost arrangement in appropriate circumstances.

There is no prescribed form, and it may be as simple as a letter exchanged between counsel for the parties.

3. Proportionality in discovery

In addition to the general proportionality provision in r. 1.04(1.1), there is a specific directive regarding proportionality in the discovery process. Subrule 29.2.03(1) requires the court to consider the following factors when determining whether a party or person has to answer a question or produce a document:

- The time required to answer the question or produce the document would be unreasonable.
- The expense would be unjustified.
- It would cause undue prejudice to the person or party.
- It would unduly interfere with the orderly progress of the action.
- The information is readily available to the requesting party from another source.

In addition to these factors, where the request is for the production of documents, the court is to consider whether making the order would result in an excessive volume of documents to be produced (r. 29.2.03(2)).

4. Discovery of documents — R. 30

4.1 Overview

Rule 30 imposes two separate but related disclosure obligations on all parties to an action. First, a party is required to *disclose* the existence of all documents that are relevant to any matter in issue in the action. Second, the party is required to *produce*, for inspection by all adverse parties, all such documents that are relevant to any matter in issue in the action for which the party does not claim privilege. Privilege (in respect of documents) can be considered as the right to withhold from adverse parties the production and inspection of documents that are relevant to any matter in issue in the action. The distinction between disclosure and production of documents is important to keep in mind as different obligations and entitlements apply to each.

The disclosure obligation is discharged by the swearing and serving of an affidavit of documents (r. 30.03). The obligation itself is described in r. 30.02(1) as follows:

30.02—(1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.

The production obligation is described in r. 30.02(2) as follows:

30.02—(2) Every document relevant to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document.

In addition to the general obligation to disclose and produce documents that are relevant to any matter in issue in the action, a party must disclose and, if requested, produce any insurance policy under which an insurer may be liable to satisfy all or a part of a judgment in the action. No information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action (r. 30.02(3)). The purpose of the rule is to address the practical reality that prior to trial, it is useful for the parties to know what amount of money is available for settlement or judgment, even if that is not relevant evidence for purposes of the trial itself.

The court may also order a party to disclose all relevant documents in the possession, control, or power of the party's subsidiary or affiliated corporation, or of a corporation controlled directly or indirectly by the party, and to produce for inspection all such documents that are not privileged (r. 30.02(4)). This rule applies notwithstanding the fact that the subsidiary or affiliate is not a party to the action.

4.2 Definitions: “documents” and “power”

The R. 30 discovery obligation is broad, partly because of the broad definition of the term “document.” A document is defined in r. 30.01(1)(a) as including “a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account and data and information in electronic form.” The last category means that electronic information stored on a computer disk is a document, as is the hard copy printout from that stored information. Both must be disclosed and (if they are not privileged) produced. Email communications qualify as documents.

The word “power” is defined as well, because the documents that must be disclosed and produced include documents that are or were in a party’s “possession, control or power.” Clause 30.01(1)(b) provides that a document shall be deemed to be “in a party’s power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled.” Many documents may be in a party’s possession, control, or power, even if the party does not personally know of their existence. For example, if an investigator employed by the lawyer has produced witness statements and other documents and has provided copies to the lawyer, the client may not know specifically of their existence. Nonetheless, the documents are constructively in the possession of the party, because they are held by both the investigator and the lawyer, who are agents of the party. The discovery obligation extends to all such documents, which must therefore be included in the affidavit of documents.

Great caution should be taken if one represents a large corporation (especially one with a foreign headquarters) to make sure that all documents that could be relevant have been identified.

In a document that is relevant and producible, there may be portions that contain privileged information or confidential information that is not relevant to the issues in the litigation. In such a case, although it is not specifically provided for by the *Rules*, the courts have recognized and allowed a practice that has developed of redacting or blacking out the privileged or irrelevant portions to make them unreadable. Electronic documents can be edited and marked to show that text has been removed. Some software programs have built-in tools for document redaction, but it is also common to simply strike through the text to be shielded from disclosure with a black marker. This process requires some care, as the text is often recognizable after being blacked out with a marker and many word processing programs save the deleted text as part of the document’s version history. Where the opposite party has concerns about the

redacted content of the document or the producing party’s basis for such redaction, the court may order a party to produce the document (r. 30.04(5)). It is not sufficient that the redacted portions are merely irrelevant; there must be some confidential, private, or proprietary aspect to the information that needs to be shielded from disclosure. The court can examine the document to assess any claim for privilege (r. 30.04(6)). Where no basis exists for the redaction, the court will order the party to produce unredacted copies.

4.3 Affidavit of documents

All parties to an action must serve on every other party an affidavit of documents disclosing to the full extent of the party’s knowledge, information, and belief regarding all documents relevant to any matter in issue in the action that are or have been in the party’s possession, control, or power (r. 30.03(1) and Forms 30A and 30B).

The party’s lawyer must certify on the affidavit that he or she has explained to the deponent

- the necessity of making full disclosure of all documents relevant to any matter in issue in the action; and
- what kinds of documents are likely to be relevant to the allegations made in the pleadings (r. 30.03(4)).

This certificate is required on all affidavits of documents where a party is represented by a lawyer. By signing the certificate, the lawyer is not, however, confirming the accuracy or completeness of the affidavit of documents; only the party can truly know whether all relevant documents have been disclosed.

Although the affidavit of documents must be served on all parties to the action, it is not filed in court unless it is relevant to an issue on a pending motion or at trial (r. 30.03(5)).

4.4 The form and contents of the affidavit

4.4.1 Forms 30A and 30B

There are two kinds of affidavits of documents: Form 30A for individuals, and Form 30B for corporations and partnerships. In both cases, the affidavit must list and describe, in separate schedules A, B, and C, all documents relevant to any matter in issue in the action

- that are in the party’s possession, control, or power and that the party does not object to producing (Schedule A);
- that are or were in the party’s possession, control, or power for which the party claims privilege and the grounds for the claim (Schedule B); and
- that were formerly in the party’s possession, control, or power but are no longer in the party’s

possession, control, or power, together with a statement of when and how the party lost possession or control of or power over them and their present location (Schedule C) (r. 30.03(2)).

The affidavit must also contain a statement that the party has never had in his or her possession, control, or power any document relevant to any matter in issue in the action other than those listed in the affidavit (r. 30.03(3)).

A party who has no documents to produce must still swear an affidavit of documents, even if it says only that he or she has no relevant documents.

In simplified procedure cases, the affidavit of documents also contains a Schedule D, which lists the name and addresses of persons who might reasonably be expected to have knowledge of transaction or occurrences in issue.

4.4.2 Schedule B – claims of privilege

A party who objects to the production of any document must state the ground upon which he or she objects to production; however, the existence of the document must still be disclosed. Concerning privileged documents, both r. 30.03(2) and the prescribed forms are very clear that all such documents must be listed and described. Nonetheless, the careless and sometimes deliberate practice has grown among some lawyers of employing standard or “boilerplate” language in Schedule B to the affidavit of documents, often in terms such as the following:

All documents passing between lawyer and client or prepared in contemplation of litigation.

Such standard form language is grossly non-compliant with the *Rules* and should neither be used by the drafter of an affidavit of documents nor accepted by its recipient. Particularly for litigation-privileged documents, the case law is clear that each document must be separately listed, stating the date and nature of the document (i.e., whether it is a letter, an expert’s report, an investigator’s report, a witness statement, a memorandum of the interview with a witness, a photograph, etc.); the function, role, and status of the receiver and sender of each document in question; and their relationship to the party to the action. Sufficient particulars must be given to enable a court to make a *prima facie* decision as to whether the claim for privilege has been established from what appears on the face of the affidavit. The rule does not require that the affidavit give particulars that would destroy the benefit of any privilege that might properly attach to the documents. So, for example, a party need not disclose the name of the expert where Schedule B refers to an expert report for which litigation privilege is claimed.

The situation is somewhat different for documents that are claimed to be lawyer-client privileged. The date of such documents is irrelevant to the propriety of the claim for privilege because, unlike litigation privilege, lawyer-client privilege does not arise only upon the reasonable contemplation of litigation. As a result, a blanket description is probably quite sufficient, such as “all communications passing between the defendant and its lawyers” or, somewhat more completely, “all confidential communications passing between the defendant, or an expert retained on behalf of the defendant, and the defendant’s lawyers, where the communications were made in the course of the obtaining or providing of legal advice and the lawyers were acting in a professional capacity as lawyers.”

4.5 Inspection of documents

Rule 30.04 contains the requirement that a party produce the original documents listed in its affidavit of documents, Schedule A, for inspection by the other parties to the litigation. A party on whom a request to inspect (Form 30C) has been served must contact the party making the request within five days of being served (r. 30.04(3)). The documents listed in a party’s affidavit of documents and produced for inspection are referred to as that party’s “productions.”

Subrule 30.04(4) provides that all documents listed in a party’s affidavit of documents that are not privileged and all documents previously produced for inspection by the party shall, without notice, summons, or order, be taken to and produced at the examination for discovery of the party or the person on behalf of or in place of or in addition to the party and at the trial of the action, unless the parties agree otherwise. There is no need for demands or notices to produce these documents for inspection on an examination for discovery or at trial.

A party must also produce on request (Form 30C) any document referred to in any original process, pleading, or affidavit served by that party (r. 30.04(2)). Case law confirms that this is the case regardless of any claim for privilege.

Pursuant to r. 30.04(7), a party inspecting a document is entitled to obtain a copy at his or her own expense.

The disclosure or production of a document for inspection is not to be taken as an admission of its relevance or admissibility (r. 30.05). The document still must be proved and comply with rules of evidence before it will be admissible as evidence at trial.

4.6 Documents or errors subsequently discovered — continuing discovery

The *Rules* recognize that an affidavit of documents may be sworn at a very early stage of the litigation. Almost invariably, a party acquires additional documents after the affidavit has been sworn or discovers that it had overlooked relevant documents and inadvertently failed to list them in the affidavit. If such documents were in the possession of the party at the time of swearing of the affidavit of documents, they should have been disclosed.

Rule 30.07 imposes a duty on a party that has already served its affidavit of documents to make continuing disclosure of documents that subsequently come into its possession or control and to correct any inaccuracies in the affidavit of documents. Such a party must serve forthwith a supplementary affidavit specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents.

However, this obligation of continuing documentary discovery with respect to after-acquired documents applies only to documents that are not privileged, as the wording of r. 30.07(a) makes clear. If after swearing its affidavit of documents, a party comes into possession of or control over privileged documents, such as further lawyer-client communications, expert reports, or witness statements, there is no obligation to serve a supplementary affidavit of documents. This must be carefully distinguished from the situation under r. 30.07(b), which applies when a party discovers that the original affidavit of documents was inaccurate or incomplete when it was sworn. In that case, the party must swear a supplementary affidavit of documents, disclosing all additional documents, whether privileged or not, that should have been disclosed in the original affidavit. In the supplementary affidavit, the party may claim privilege for those documents that qualify, with all of the details that would have been disclosed if those documents had been included in the original Schedule B.

The *Rules* provide serious sanctions for the failure to disclose or produce a relevant document. Subrule 30.08(1) provides that where a party fails to disclose or produce a document for inspection in compliance with the *Rules* or a court order,

- if the document is favourable to the party's case, the party may not use the document at the trial, except with leave of the trial judge (but see r. 53.08.); or
- if the document is not favourable to the party's case, the court may make such order as is just.

Subrule 30.08(2) provides additional sanctions where a party fails to serve an affidavit or to produce a document. The court may

- revoke or suspend the party's right to initiate or continue an examination for discovery;
- dismiss the action or strike out the statement of defence; or
- make such other order as is just.

4.7 Privileged document not to be used without leave

If a party has opted not to produce a privileged document, it would be unfair to others to let that party use that document at trial. Rule 30.09 seeks to find a fair compromise. If the party abandons the claim for privilege by giving notice in writing and providing a copy of the document or producing it for inspection at least 90 days before the commencement of trial, the party may use the document at the trial. If those terms are not met, the document may only be used to impeach the testimony of a witness or with leave of the trial judge. Rule 53.08 requires that leave be granted on such terms as are just and with an adjournment if necessary, unless to do so would cause irreparable prejudice to the opposite party.

It is important to appreciate the effect of this rule and the exception to it. Suppose that a defendant claims litigation privilege for surveillance photographs of a plaintiff in a personal injury action, does not produce them for inspection, and does not abandon the claim for privilege. The photos seem to show the plaintiff engaging in physical activities that are inconsistent with the injuries for which the plaintiff is seeking damages from the defendant. At trial, the plaintiff gives evidence-in-chief consistent with the plaintiff's claim for severe injuries. In cross-examination, defendant's counsel produces the photos, and the plaintiff agrees that they show the plaintiff engaged in strenuous physical activity. This use of the photos is permitted by the exception in r. 30.09, inasmuch as it constitutes impeaching of the testimony of a witness. However, the cross-examiner would not be permitted to have the photos marked as exhibits in the trial, because the prohibition in r. 30.09 prevents the documents from being used as real evidence themselves.

The distinction between these two uses may seem subtle, but it can be important. Suppose that, instead of admitting under cross-examination that the photos showed the plaintiff engaged in strenuous physical activity, the plaintiff denies being the person shown in the photographs. Regardless of whether the trial judge believes the plaintiff, the defendant would probably not be permitted to call other evidence to prove the identity of the person shown in the photos, because this would constitute an attempt to prove the photos themselves and have them used as substantive evidence in the case, contrary to r. 30.09.

In determining whether to claim and maintain privilege for a document, therefore, counsel must carefully consider whether there is a possibility that he or she may wish to use the document as substantive evidence later at trial. If there is such a possibility, one must be cautious about maintaining the claim for privilege. This concern applies almost exclusively to documents for which litigation privilege (as opposed to other privileges) applies, because generally it is only litigation privileged documents that could possibly be relevant and admissible as evidence at trial. Even if litigation-privilege is claimed for a document, the opposite party is entitled to obtain disclosure of all of the important contents of the document on examination for discovery under R. 31 in any event (see the discussion below). As a result, there may be little advantage in claiming and maintaining litigation privilege for documents.

In regard to surveillance, there may be two purposes: (1) impeachment of testimony; and (2) proof that the plaintiff actually does not have a physical injury. These differences can be very subtle. It is highly recommended that counsel obtain instructions with regard to use of surveillance evidence in case a trial judge refuses to authorize such use.

4.8 Production from non-parties

There are times when relevant documents are in the possession of non-parties. Rule 30.10 allows a party to move for production of a document in such cases, provided that in order for production to be ordered, the document must be relevant to a material issue in the action and the court must be satisfied that it would be unfair to require the moving party to proceed to trial without having discovery of the document.

Courts are reluctant to order discovery from non-parties and will generally do so only if reasonable efforts to obtain the documents in issue from the parties to the action have failed.

Rule 30.10 is often used to obtain police records in civil lawsuits where freedom of information laws prevent police forces from disclosing certain records.

Under s. 64 of the *Freedom of Information and Protection of Privacy Act*, the courts can make any such order irrespective of the freedom of information laws.

4.9 Privilege

Understanding the different kinds of privilege is essential to meaningfully understanding the rules of discovery. There are two general types of privilege that may be claimed: a class privilege and a case-by-case privilege. The general categories of class privilege are

- lawyer and client communications;
- litigation privilege; and
- settlement communication privilege.

A claim of privilege giving rise to the right not to produce a document or a portion of a document is an exception to the general rule of complete disclosure of all documents and information that are relevant to the issues in a legal proceeding. The onus of establishing that a particular document is subject to privilege rests with the party resisting production and claiming privilege.

4.9.1 Lawyer-client privilege

This is the best known and most assiduously protected of all privileges, sometimes also called “legal advice privilege.” Communications that are intended to be confidential, passing between a lawyer and the lawyer’s client or prospective client for the purpose of giving or receiving legal advice, whether oral or in writing, are privileged. The privilege belongs to the client, not the lawyer. The effect of the privilege is generally that neither the client nor the lawyer, without the client’s consent, can be compelled to disclose either the fact or the content of the communication.

If, however, a lawyer is consulted or employed for purposes other than giving legal advice, any communications that are not for the purpose of giving legal advice are not privileged. The privilege does not extend to matters that the lawyer learns by other means than a confidential communication from a client.

Communications with a lawyer who was the lawyer not for the party, but rather for his or her insurer, are privileged on the ground that the insured person is entitled to assume that his or her communications with the insurer’s lawyer, who had delivered a statement of defence on his or her behalf, would be accorded the same treatment as communications to the client’s personal lawyer.

Of critical importance is the fact that where a client voluntarily testifies as a witness to a confidential communication between the client and his or her lawyer, the client thereby waives the privileged character of such communication, and both the client and the lawyer may be fully examined in relation thereto.

Privilege extends to communications between a wrongdoer and his or her lawyer with respect to prior wrongdoings when such communications pertain to the best defence available to the wrongdoer or to the best terms of making redress. This is not the case with regard to future wrongdoings. There can be no privilege protecting communications between a client and his or

her lawyer who are acting in concert to perpetrate or facilitate a crime or a fraud.

Any communication that would have been privileged if made by the client to the lawyer is privileged if made by the client to an agent of the lawyer, since the assistance of such agents is indispensable to the lawyer's work. This would include communications made to a student-at-law who is acting as the lawyer's agent in that matter or to an assistant employed by the lawyer.

Great care must be taken that such communications do not take place in the presence of other persons whose attendance during the discussion may cause a loss of privilege. Consideration must also be given to the place where such confidential discussions occur. In discussing confidential matters with clients in locations outside the lawyer's office where privacy cannot be assured, the privilege may be lost when other parties, opposing counsel, or strangers overhear the confidential communications.

The issue may be more complicated if the lawyer is permanently in the employ of the client, such as "in-house counsel." If the communication to such a lawyer would otherwise have been privileged (that is, if the communication was made in confidence for the purpose of obtaining professional advice), the fact that the lawyer is so employed should not destroy the privilege. The result may be different, however, if the lawyer is also an officer of the company in circumstances where it would be difficult to say whether the communication was made to the lawyer in the capacity of lawyer or in the capacity of officer.

4.9.2 Litigation privilege – documents prepared in contemplation of litigation

The purpose of litigation privilege is to create what the courts have called a "zone of privacy" in pending litigation so as to ensure the efficacy of the adversarial process. It arises and operates even in the absence of a lawyer-client relationship and applies to all litigants, whether or not represented.

Litigation privilege attaches to documents that are created for the dominant purpose of prosecuting or defending reasonably contemplated litigation, and it protects such documents from compulsory production for inspection to other parties in litigation. Although many descriptions of litigation privilege also apply the privilege to communications, and not merely to documents, most of the discussion both among academic writers and in the jurisprudence focuses on the latter. The test to determine whether a document is entitled to litigation privilege is two-fold. First, a party must

determine when a document was created. If the document was created before litigation was reasonably contemplated, then it is not privileged. There must be a definite prospect of litigation, the mere fact that a claim is made or contemplated is not sufficient. Second, if the document was created after litigation was reasonably contemplated, it is necessary to assess whether the particular document was produced for the "dominant purpose" of submission to a legal advisor for use in the litigation.

There was conflicting case law in Ontario as to whether to be privileged, a document must be prepared for the "dominant" purpose or for the "substantial" purpose of use in litigation. This was finally resolved by the Supreme Court of Canada in its 2006 decision in *Blank v. Canada (Minister of Justice)*, which chose the dominant purpose test.

The court further clarified that, unlike lawyer-client privilege, litigation privilege is neither absolute in scope nor permanent in duration. Once the litigation to which the privilege applies has ended, the privilege itself comes to an end.

4.9.3 Negotiations for settlement and communications without prejudice

Confidential communications with an adverse party for the purpose of settlement negotiations regarding the matters in dispute are privileged. This type of communication is commonly known as a "without prejudice" communication or "settlement privilege." The underlying rationale is the public interest in ensuring that parties may communicate freely with each other, commenting on the strengths and weaknesses of their cases and making concessions and admissions, without the risk that such statements may be used against them if the negotiations fail and the dispute proceeds to adjudication in court. Whether communications can properly be characterized as without prejudice is a question of fact in each case.

Typically, such communications when made in writing are indicated by the term "without prejudice." While the marking of a letter "without prejudice" is considered to be evidence of the intention of the writer to maintain confidentiality for the communication, it does not conclusively determine the issue of privilege so as to exclude it from being tendered in evidence.

Generally, such a communication will be excluded only if the author of the document is in dispute or negotiation with another and is offering terms of settlement or compromise. Conversely, a letter need not be stated to be written "without prejudice" to be so. If it is meant to be a genuine offer of settlement and where negotiations for

settlement are in progress, the conversations and correspondence are deemed to be without prejudice.

Where a letter has been written without prejudice, the whole of the subsequent correspondence dealing with the same subject matter is protected, provided that the privilege has not been waived or destroyed and the parties were throughout making a *bona fide* attempt to settle the dispute. Privilege covers all subsequent correspondence of both sides, even if they are not expressed to be without prejudice, unless there is a clear break in the chain of correspondence to show that the ensuing letters are open.

In the following circumstances, communications made without prejudice may lose their privilege and be admissible in evidence:

- Correspondence that was initiated without prejudice results in the settlement of a dispute, and the settlement is challenged.
- Correspondence is not written in a genuine attempt at settlement but is, in reality, only a repudiation of the claim.
- Correspondence, by its nature, might prejudice the person to whom it was sent, e.g., if it contains notice of an act of bankruptcy.
- It disproves delay or proves waiver of election.
- A letter's main purpose was to threaten or malign the recipient.
- A plaintiff claims reformation of a contract.

5. Examination for discovery

5.1 Introduction

Examination for discovery is the compulsory pre-trial disclosure by a party to an action, under oath, of all of the party's knowledge, information, and belief as to all of the facts and evidence that are relevant to the issues in the action. In the United States, the process is called "depositions"; in England, "interrogatories."

Every civil litigator repeatedly faces the task of explaining this unfamiliar process to clients who have not previously been involved in litigation. An explanation to someone unfamiliar with the process might be as follows:

- In a lawsuit, every party may require the opposite party to submit to questioning about the facts in issue in the lawsuit, under oath, before the trial takes place. The major purpose of examination for discovery is to allow each party to discover or to learn all of the opposite party's information concerning the lawsuit, including
 - the party's recollection and information of all relevant events;
 - the names of potential witnesses; and

- the party's position on the legal and other issues in the lawsuit.

- This process allows each party to prepare better for trial and gives the parties as much information as possible so they can better assess the likely outcome of the trial. Such an assessment often leads to a settlement of the dispute before trial.
- This questioning takes place not in court or before a judge, but in the private business office of an appointed official known as an "official examiner." If the parties agree, the examination can be held in a lawyer's office or anywhere else that may be convenient.
- At the examination, the persons who are present are
 - the party being examined or questioned;
 - his or her lawyer;
 - the lawyers for any of the other parties to the lawsuit;
 - the parties themselves (if they wish); and
 - a court reporter.

These individuals sit at a meeting table, with the lawyer for the examining party across from the witness being examined.

- The examining lawyer is entitled to ask the party being examined any questions about the facts and circumstances involved in the lawsuit, and the party is required to answer all relevant questions. The questions may typically concern
 - the witness's background, education, and employment;
 - the witness's personal involvement in the events involved in the lawsuit;
 - various relevant documents that the parties have located and disclosed to each other; and
 - any information concerning the issues in the lawsuit, whether or not hearsay, that the witness has learned from anyone else.

The questioning also extends to the examined party's position on various issues in the lawsuit, the findings of any expert witnesses that the party has retained, and (in the case of a defendant) whether the party has any insurance policy that may be available to pay the amount of any judgment that the plaintiff may be awarded at trial.

- The questions and answers are recorded by the court reporter, and a *verbatim* written transcript is produced, which can be used by the opposite party at trial.
- When questioned, a witness is required to answer truthfully and fully, even if the answers are harmful to the witness's case. If the witness does not personally know the answer to a question but with reasonable effort can obtain the information from others or from documents that are available, the witness is required to undertake to obtain the

information after the examination has been concluded and to provide it to the questioning party through the witness's own lawyer.

- During the examination, the witness may not confer privately with his or her lawyer to discuss the questions asked and the answers that should be given. Nor may the lawyer answer any questions for the witness, except with the clear consent of the examining party. The role of the lawyer for the witness is limited to ensuring that the questioning is fair and proper. The witness's lawyer may intervene to object to improper questions. If only proper questions are asked throughout the examination, counsel for the witness may say little or nothing during the entire process.

There is a general limit of seven hours for the discovery of all parties in a case under the ordinary procedure, except with the consent of the parties or leave of the court (r. 31.05.1(1)).

In considering whether to grant leave, the court is to consider

- the amount of money in issue;
- the complexity of the facts or law in issue;
- the amount of time that ought reasonably to be required in the action for oral examinations;
- the financial position of each party;
- the conduct of any party, including a party's unresponsiveness in prior examinations, such as a failure to answer questions on grounds other than privilege or the questions being obviously irrelevant, failure to provide complete answers, or providing answers that were evasive, irrelevant, unresponsive, or unduly lengthy;
- a party's denial or refusal to admit something that should have been admitted; and
- any other reason that should be considered in the interest of justice (r. 31.05.1(2)).

In a simplified procedure case, the limit is two hours (r. 76.04(2)). There is no specific power in the court to increase the time, although counsel may agree to do so informally.

5.2 Cases in which examination for discovery is available

Subrule 31.03(1) provides that examination for discovery is available in any "action." Discovery is therefore not available in applications, although much the same purpose can be achieved in an application by cross-examination of a party on its affidavit under r. 39.02 or examination of a party as a witness on a pending application under r. 39.03. Further, where the presiding judge on the hearing of an application orders that the whole application or any issue be treated as an action and

proceed to trial, rights of discovery may then arise (r. 38.10).

5.3 Who may examine and be examined — r. 31.03

5.3.1 Parties "adverse in interest"

A party to an action, whether plaintiff or defendant, may examine any party adverse in interest (r. 31.03); accordingly, the right of discovery is not limited to the plaintiff examining the defendant and *vice versa*. "Adversity of interest," which must be disclosed in or apparent from the pleadings, means opposing pecuniary interest or any other substantial interest in the subject matter of the litigation.

If co-defendants crossclaim against each other, they are adverse in interest and may examine each other. If co-defendants have not actually crossclaimed against each other, they may still be adverse if one has pleaded facts in its statement of defence that are inconsistent with and are contrary to the position of the other co-defendant. Thus a defendant claiming contribution or indemnity from a co-defendant is a party adverse in interest to that co-defendant, and a defendant whose interest is identical with or similar to that of the plaintiff on an issue is a party adverse in interest to a co-defendant who is contesting the plaintiff's claim on that issue.

A plaintiff may, after noting a defendant in default, proceed to discovery against a defaulting defendant for the purpose of furthering the prosecution of the action (r. 31.04(2)(b)). The defaulting defendant may also be examined by a co-defendant who is defending the action, because a defendant who does not file a defence is deemed to have admitted the allegations of the plaintiff and is accordingly adverse in interest to the other defendants. A defendant who has filed no defence has no corresponding right to examine the plaintiff.

A third or subsequent party who defends the main action is subject to being examined for discovery by the plaintiff (r. 29.05(2)(a)). A third party added under to s. 258(14) of the *Insurance Act* may be examined for discovery pursuant to s. 258(15) of that *Act*.

5.3.2 Nominal parties, assignees, or trustees in bankruptcy

The *Rules* provide for expanded discovery in cases where the action is brought by or against an assignee, a trustee-in-bankruptcy, or a nominal party. Where an action is brought by or against an assignee, the assignor may be examined in addition to the assignee (r. 31.03(6)). Where an action is brought by or against a trustee-in-bankruptcy, the bankrupt may be examined in addition to the trustee (r. 31.03(7)). Where an action is brought or

defended for the immediate benefit of a person who is not a party, the person may be examined in addition to the party bringing or defending the action (r. 31.03(8)).

In order to obtain the right to examination of a person where it is alleged that the action is being brought or defended on his or her behalf by a nominal party, it must be shown that the party in whose name the action is brought or defended is not the real litigant, the person whose examination is sought is the real litigant, and the action is being prosecuted or defended for the person's benefit (r. 31.03(8)).

5.3.3 Corporations

A corporation is examined by questioning an officer, director, or employee of the corporation. Subject to any agreement in the discovery plan, the examining party has the right to choose the person whom he or she wishes to examine. So long as the examining party selects a person who is reasonably acquainted with the facts, this choice will not be set aside. The corporation may, however, seek an order for the substitution of another witness associated with the corporation if the person first selected by the examining party is not responsible or does not have knowledge of the matters in issue (r. 31.03(2)(a)). Another officer, director, or employee may also be substituted if the one first selected has an interest adverse to the corporation that he or she has been chosen to represent. Statements of the person examined on behalf of a corporation bind the corporation in the sense that they are admissible at trial against the corporation even if they are hearsay.

Counsel about to examine a corporation for discovery must decide whether he or she cares which specific individual is produced for discovery by the corporation. If it is important to the examining lawyer to question a particular person, then the lawyer should be careful to name the individual specifically in the discovery plan (e.g., "A.B., Director of Quality Control of the Defendant").

5.3.4 Partners and sole proprietors

Where an action is by or against a partnership or a sole proprietorship using the firm name, each person who was or is alleged to have been a partner or the sole proprietor, as the case may be, at a material time, may be examined on behalf of the partnership or sole proprietorship.

The name(s) of the representative(s) to be examined on behalf of the partnership or sole proprietorship will be included in the discovery plan, if they can be agreed upon.

5.3.5 Corporations, partnerships, and sole proprietorships — examining a second officer, director, or employee

When it comes to corporations (r. 31.03(2)(b)), partnerships, or sole proprietorships (r. 31.03(3)(b)), more than one officer, director, or employee may be examined, either with consent of the parties or leave of the court.

Leave to examine a second officer, director, or employee will likely not be given unless the first examination has failed to give to the party seeking it the information to which he or she is entitled. A second examination will not be granted if the information desired could have been obtained from the first officer, director, or employee, and the second examination should be confined to points on which the previous examination was unsatisfactory. A second examination can be ordered only after the completion of the first examination. If a party selects an officer, director, or employee of a corporation and the party is told that he or she is making a mistake and that he or she can get fuller information from another officer but the party persists in this choice and on the examination finds that he or she has made a mistake, the party will have difficulty in obtaining leave to examine a second person.

If more than one examination on behalf of a corporation, partnership, or sole proprietor is sought, the court must satisfy itself that

- satisfactory answers cannot be obtained from only one person without undue expense or delay; and
- examination of more than one person would likely expedite the conduct of the action (r. 31.03(4)).

5.3.6 Persons under disability

Where a party to an action is a person under disability, the party may be examined for discovery under r. 31.03(5) by any party adverse in interest if the party under disability is competent to give evidence.

Where the party under a disability is not competent or the examining party chooses, the litigation guardian may be examined in place of the person under disability. However, where the litigation guardian is the Children's Lawyer or the Public Guardian and Trustee, the litigation guardian may only be examined with leave of the court (r. 31.03(5)).

The evidence given on the examination for discovery of a party under disability may be read into or used in evidence at the trial only with leave of the trial judge (r. 31.11(5)).

5.3.7 The Crown

In Ontario, examinations for discovery of the Crown are addressed in s. 8 of the *Proceedings Against the Crown Act*. No separate treatment is given to discovery rights against the Crown under the *Rules*.

5.3.8 Examination of non-parties with leave — r. 31.10

Subrule 31.10(1) provides that the court may grant leave to examine for discovery any person who there is a reason to believe has information relevant to a “material issue” in the action, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation. The test that must be satisfied prior to the court making an order is set out as follows:

31.10—(2) An order under subrule (1) shall not be made unless the court is satisfied that,

- (a) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the party seeks to examine;
- (b) it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and
- (c) the examination will not,
 - (i) unduly delay the commencement of the trial of the action,
 - (ii) entail unreasonable expense for other parties, or
 - (iii) result in unfairness to the person the moving party seeks to examine.

The requirements of r. 31.10 have been held to be cumulative; all of them must be satisfied before an order for non-party discovery will be made.

A party who examines a person orally under r. 31.10(1) must serve every party who attended or was represented on the examination with the transcript free of charge unless the court orders otherwise (r. 31.10(3)). The examining party is not entitled to recover the cost of the examination from another party unless the court orders otherwise (r. 31.10(4)). This examination may not be read into evidence at the trial (r. 31.10(5)).

5.4 The scope of the examination — r. 31.06

5.4.1 The basic obligation

The scope of the examination for discovery is set out in r. 31.06, which is one of the most important rules for counsel to know and understand fully. Subrule 31.06(1) provides that a person must answer any proper question to the best of his or her knowledge, information, or belief relevant to any matter in issue or made discoverable by

rr. 31.06(2)–(4), and no question on an examination for discovery may be objected to on the ground that

- the information sought is evidence;
- the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or
- the question constitutes cross-examination on the affidavit of documents of the party being examined.

5.4.2 The breadth of examination

The examination must be relevant “to any matter in issue” in the action as raised in the pleadings and particulars. Where a party makes alternative claims or raises alternative defences, all of the parties are bound to answer questions about all of the alternative allegations.

In the last two decades, the tendency has been to broaden discovery, and the court will not conduct a minute examination as to the relevance of questions, but this may change with the proportionality considerations of r. 29.2.03. A party has a right to obtain from its opponent discovery of anything that can fairly be said to be material to enable that party to maintain its own case or to hurt the case set up against it.

There is nothing objectionable in the practice of asking a witness on examination for discovery to give answers in a narrative form. Even after a defendant has been noted in default or admitted liability, it may be necessary for a plaintiff suing for damages to inquire into the facts of the accident and the circumstances surrounding it, on the ground that an assessment can only properly be made when those facts and the circumstances are before the court. Questions are permissible as to matters that are relevant only to aggravation or mitigation of damages or other relief. For the purpose of testing the relevance of a question to a particular issue, the case of the party seeking discovery is assumed to be true.

The breadth of examinations for discovery is far wider than trial court admissibility for evidence. For example, bald hearsay may be the subject of discovery testimony but not admissible at trial.

5.4.3 “Knowledge, information and belief”

As the introductory words to r. 31.06 provide, a party is required to answer all proper questions “to the best of his or her knowledge, information and belief”. *Knowledge* is obtained from the witness’s own personal observation or participation. *Information* is acquired when a witness has not observed or participated in an event or occurrence personally but has been informed of it by someone else. *Belief* arises when the witness infers a fact from either personal knowledge or information from others. The breadth of this obligation means that a

witness may not object to answering questions on the ground that the answer would be hearsay.

The obligation to provide all information that the party has acquired arises from the fact that in Ontario, as a general rule, one is entitled to examine for discovery only parties to the lawsuit and only one designated representative of a party that is a corporation. The obligation leads to certain consequences:

- A party is required, without being asked to do so, to make positive efforts to inform himself or herself, from all those persons to whom he or she may reasonably have access, as to the facts and circumstances in issue in the action. If, for example, a witness is the designated representative of a corporation, such person is required to speak to all others in the employ of the corporation who may have relevant information, so as to be able to provide full and complete discovery to the opposite party.
- If the party has obtained information from other persons who may qualify as potential witnesses at trial, the party is required to disclose all such information, whether helpful or harmful, if asked on discovery.
- If a party is unable to answer questions on examination for discovery, he or she is required to undertake to make reasonable efforts to obtain the information required to answer the question from others and then to provide the information to the examining party.

Thus, in Ontario, the objective of achieving complete pre-trial discovery is achieved by imposing on the one person who is examined on behalf of a party the obligation to obtain and disclose relevant information from others.

Counsel appearing with a witness under oral examination for discovery must make it clear as to whether testimony is “actual knowledge” of the witness or rather information or belief obtained from other sources. The lawyer must ensure that the witness’s discovery testimony is as accurate as possible.

The objective of complete pre-trial discovery is achieved in a much different way in other jurisdictions such as Nova Scotia and the United States. In those jurisdictions, examinations or depositions may be held not only of the parties, but also of multiple representatives of corporate parties, witnesses who are not parties, and (in some jurisdictions) even expert witnesses.

5.4.4 The three improper r. 31.06 objections

Subrule 31.06(1) provides:

31.06—(1) ... no question may be objected to on the ground that,

- (a) the information sought is evidence;
- (b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or
- (c) the question constitutes cross-examination on the affidavit of documents of the party being examined.

5.4.5 Privilege

In general, the same rules with respect to privilege apply to examinations for discovery and discovery of documents as at trial. This is subject to one qualification of enormous importance relating to the litigation privilege that may attach to documents (see below). In addition, there are two other privileges that are relevant to examinations for discovery.

(a) Communications between spouses during marriage

Communications between spouses are privileged, but the privilege does not extend to common-law spouses (Ontario’s *Evidence Act*, s. 11).

The privilege applies only to the contents of the communications, however, and does not protect from compulsory disclosure the information that may have been communicated. As a result, a person examined for discovery must answer questions calling for the disclosure of facts even though the information confirming such facts came from his or her spouse. Further, a spouse may not object to answering questions as to his or her own observations made respecting the spouse. Also, a third person overhearing a conversation between spouses may testify to it.

(b) Adultery

The privilege now conferred by s. 10 of the *Evidence Act* originates from the principle of law that a witness cannot be compelled to answer a question that might subject him to any penalty or ecclesiastical censure.

Because the enactment is a protective one, it must be scrupulously observed. The intent of the section is to limit the privilege only to those proceedings instituted in consequence of adultery. The mere fact that adultery may be alleged in an action does not make the action one instituted in consequence of adultery.

(c) Communications between doctor and patient

Generally, while doctor-patient communications are confidential in nature, no privilege attaches to doctor-patient communications, and all relevant medical information must be disclosed in legal proceeding.

(d) Litigation privilege and the scope of examination for discovery under r. 31.06

The litigation privilege protects certain documents from compulsory production for inspection to other parties in litigation. That is, a party cannot be forced to show a litigation-privileged document to another party or to provide that party with a copy of the document. That protection from physical production, however, does not insulate from disclosure of any relevant information that may be contained in the document. As a result, on examination for discovery, a party may be asked about and may be required to disclose all facts and information that are relevant to the matters in issue in the action, even if

- such facts and information happen to have been recorded in a document, the physical production of which is protected by litigation privilege; and
- the party learned of those facts and obtained that information only through the litigation-privileged document.

A party cannot protect from disclosure under R. 31 relevant information by simply recording it in a litigation-privileged document.

5.4.6 Disclosure of potential witnesses — r. 31.06(2)

A party usually has information about persons who may have relevant information and who could therefore be called as witnesses at trial by one party or another. A party may be required to disclose the names and addresses of all such persons under r. 31.06(2). This obligation, when combined with the requirement to disclose all of the party's information concerning relevant subject matter, means that a party must disclose not only the names and addresses of potential witnesses, but also details of the evidence such witnesses could present, whether favourable or unfavourable to the party's case.

While this rule is sometimes referred to as the "witness" rule, counsel must be very careful when formulating a question that is designed to elicit this information. The rule may seem to be worded awkwardly, but it is important to follow its language as closely as possible in order (i) not to formulate an objectionable question, and (ii) to exploit fully one's discovery rights. For example, sometimes counsel asks "Would you advise me of all witnesses you will be calling at trial?" This question is improper because it asks the party to disclose its trial strategy and therefore goes beyond the requirement of the rule. At the same time, such a question asks for less than the rule permits because it will not lead to disclosure of potential witnesses who may assist the examining party's case rather than the examined party's

case. It is therefore best to formulate the question in words approximating the following:

Will you please advise me of the names and addresses of all persons, other than those whose names have been mentioned thus far during the examination, who may reasonably be expected to have knowledge of any of the transactions or occurrences in issue in this action?

5.4.7 Expert opinions — r. 31.06(3)

Under the common-law rules of evidence, witnesses are permitted to testify only as to their personal observations and, with few exceptions, are not permitted to give evidence as to their opinions on relevant matters. One of the exceptions is the witness who, by reason of special education, training, or experience, has developed an expertise that takes him or her out of the realm of lay persons and makes his or her opinion more credible and trustworthy. Such persons are permitted to give opinion evidence in court, and we refer to them as "expert witnesses."

The *Rules* have two important provisions dealing with expert witnesses. The first has to do with the pre-trial discovery of expert evidence under R. 31. The second is the compulsory pre-trial service on all other parties of a written report by a proposed expert witness at trial, setting out, among other matters, the substance of his or her proposed testimony (r. 53.03).

Subrule 31.06(3) governs discovery of expert opinions in the following terms:

31.06—(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that are relevant to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,

- (a) the findings, opinions and conclusions of the expert relevant to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and
- (b) the party being examined undertakes not to call the expert as a witness at the trial.

The disclosure obligation is very wide, extending to each of "findings, opinions and conclusions" (collectively, "opinions"). The jurisprudence has established that the obligation applies to opinions whether they have been communicated by the expert to the party (or its lawyer) orally or in writing and whether they are preliminary or final. Further, a party must disclose the factual information and documents used by the expert in arriving at the opinions, as well as calculations and raw

test data, although not the expert's drafts, notes, correspondence, or memoranda, which remain privileged.

There remains a "zone of privacy" with respect to expert opinions that turn out to be unfavourable to a party. A party cannot be forced to turn over to the other side unfavourable expert evidence if the criteria appearing in clauses (a) and (b) of r. 31.06(3), set out above, are met. The test for non-disclosure is conjunctive, and the first part of the test also has two parts, both of which must be satisfied. That is, it must first be the case that the expert opinion was made or formed in preparation for contemplated or existing litigation and for no other purpose: clause (a). This language is similar to the definition of litigation privilege for documents, except that the dominant purpose test that applies to litigation privilege is replaced here by the exclusive purpose test. Second, the party must undertake not to call the expert as a witness at the trial: clause (b). If both parts of the test are met, a party may properly decline to disclose the expert's opinions, as well as the expert's name and address, when asked questions as to expert opinions on examination for discovery.

The disclosure obligation relating to expert opinions is often misunderstood. Sometimes one cannot escape the conclusion that this misunderstanding is deliberate on the part of some lawyers. Here are two examples:

- (1) Some lawyers confuse expert "reports" with expert "opinions." This is to confuse documentary discovery under R. 30 with informational discovery under R. 31. Sometimes a lawyer will pose a question on examination for discovery, apparently under the impression that he or she is asking for expert opinions as provided for by r. 31.06(3): "Would you produce any expert reports that you have obtained?"

The problems with this question are these: first, r. 31.06(3) entitles a party to disclosure of findings, opinions, and conclusions and not merely to disclosure of a written report into which such findings, opinions, and conclusions may have been incorporated; second, any written report that an expert has produced is probably litigation privileged, and the opposite party is not entitled to its production if privilege has properly been claimed.

As with questions under r. 31.06(2), the best way to ask about expert opinions is to follow the words of the rule as exactly as possible: "Has any expert been retained by you or on your behalf relating to any issues in this action?" and "Would you disclose the findings, opinions, and conclusions of such expert, as well as their name(s) and address(es)?"

- (2) When a proper question is asked seeking expert findings, opinions, and conclusions, some counsel

reply, "We will provide you with an expert report prior to trial, under r. 53.03," or "We will advise you of any opinions on which we will be relying at trial," or even "We will comply with our obligations under the *Rules*."

That constitutes a complete failure to address the request under r. 31.06(3). The rule is clear that an examining party is entitled to obtain the expert's findings, opinions, and conclusions at the time of the examination for discovery and not merely at some future time that suits the convenience and the strategy of the lawyer for the examined party. The only exception is if the requirements of clauses (a) and (b) of the rule are fulfilled. As a result, in order to avoid the obligation to disclose expert opinions then and there, a party must undertake at the time the questions are asked, and not at some unspecified time in the future, not to call the expert as a witness at trial.

When such an improper answer is given to a legitimate question, examining counsel should not just accept it and move on, but should insist on either (i) being furnished with the information then and there, or (ii) the examined party undertaking at that very moment not to call the expert. A persistent refusal to comply with the requirements of the rule is an affront to the litigation process and may properly lead to a motion to compel compliance.

5.4.8 Insurance policies — r. 31.06(4)

This is the single instance in which a party is required to give discovery of information that has nothing whatever to do with the issues as pleaded in the action. Rather, it is directed almost exclusively to settlement of the lawsuit.

The r. 31.06(4) obligation to disclose insurance information is as follows:

31.06—(4) A party may on an examination for discovery obtain disclosure of

- (a) the existence and contents of any insurance policy under which an insurer may be liable to satisfy all or part of a judgment in the action or to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment; and
- (b) the amount of money available under the policy, and any conditions affecting its availability.

This mirrors the right, under r. 30.02(3), to obtain disclosure and inspection of such an insurance policy.

Although this rule does not say so explicitly, it is only a defendant's insurance policy that will satisfy these criteria; thus, a plaintiff cannot properly be asked whether he or she has insurance under which he or she can claim payment. In any event, of course, if a plaintiff's insurer makes voluntary payment to the plaintiff under the terms of the policy, the insurer may maintain a subrogated action against the defendant in the name of

the plaintiff, seeking to recover a judgment and payment so as to reimburse itself.

Sometimes an insurer will take either of the following positions:

- The policy, when interpreted properly, does not cover the claim made by the plaintiff.
- The defendant has been guilty of a breach of the policy so that the insurer has a “policy defence” and is not liable either to indemnify the defendant or to satisfy the plaintiff’s judgment.

Any such position taken by the defendant’s insurer is clearly of vital interest to the plaintiff. It is for that reason that clause (b) requires disclosure of any conditions affecting the insurance policy’s availability. This includes any agreement or understanding between the insurer and insured, as well as any notice or position taken, whether oral or written, that may affect the availability of insurance proceeds.

5.4.9 Questions regarding pleadings

Questions are permissible to determine whether particular statements of fact made in the pleadings are true, but questions will not be allowed as to whether the pleadings of the party interrogated are true generally. As well, it is quite proper to ask the party to disclose all of the facts and evidence on which the party relies in making certain allegations in its pleading, on a paragraph-by-paragraph basis.

5.4.10 “Fishing”

If questions are asked solely in order to enable the party to see if he or she can find a case, either of complaint or defence, of which he or she knows nothing and which will be quite a different case from the case pleaded, the principle against “fishing” applies, and the questions need not be answered. This is simply an application of the principle that questioning on examination, while given broad latitude, must be relevant to the case as pleaded.

5.4.11 Oppressive questions

Questions will not be allowed if they are oppressive or put an undue burden on the party being questioned; questions that are unreasonable, vexatious, prolix, unnecessary, or scandalous need not be answered. Oppressiveness depends not so much on the question itself but on the nature of the action. Questions that are unobjectionable in form may in the circumstances of a particular case be vexatious, and each case must be judged on its own circumstances. Questions will not be allowed if they exceed the legitimate requirements of the particular action. The proportionality requirements of R. 29.2 will assist counsel in resisting such tactics.

Inconvenience is not enough to forestall discoveries, but questions may be disallowed if they put a burden on the opposite party out of all proportion to the benefit to be gained by the party examining. Thus, questions may be unreasonable because to answer them involves searching through books extending over many years or if they cause a trade secret to be divulged unless, of course, the trade secret is an issue in the action. A scandalous question is an insulting or degrading question that is impertinent or irrelevant to the matter in issue in the action, but nothing can be scandalous that is relevant.

5.4.12 Questions put for ulterior motives

No question need be answered which is not *bona fide* for the purpose of the present action but asked with a view to future or other litigation.

5.4.13 Divided discovery — r. 31.06(6)

As a general rule, all relevant issues may be canvassed in an examination for discovery. In certain cases, however, the court may grant an order for divided discovery, under r. 31.06(6):

31.06—(6) Where information may become relevant only after the determination of an issue in the action and the disclosure of the information before the issue is determined would seriously prejudice a party, the court on the party’s motion may grant leave to withhold the information until after the issue has been determined.

An order granting divided discovery deprives the litigants of their ordinary procedural rights, so the Court of Appeal has held that discovery should be divided only in the clearest cases. Further, such an order is appropriate only where the threshold issue to be determined is clearly severable from the consequential issue. The best illustration of the application of this rule is an action for an accounting, in which (if serious prejudice can be shown) the party seeking an accounting may not be allowed to examine the books of the defendant or to ask questions concerning the state of the accounts until the party’s right to an accounting had been established by judgment.

5.4.14 The examination is limited to the asking of questions

The party being examined must be asked questions; the party cannot, for example, be asked to perform tests or give samples of handwriting. But a defendant who denies having written a material document may be asked whether other documents are in his or her handwriting, though these documents have nothing to do with the action and will only be used for the comparison of handwriting. The examinee cannot be required to draw even a rough diagram.

5.4.15 Questions as to law

Questions are not proper if they are in effect questions of law, although a person is entitled to examine with regard to facts supporting a conclusion of law pleaded by the opposite party. Further, if the party's understanding of the law at a material time is relevant, the party may be asked to disclose that understanding.

5.5 Practice in relation to examination for discovery

An examination for discovery may take the form of either an oral examination or an examination by written questions and answers, but not both except with leave of the court (r. 31.02(1)). Examinations by written questions and answers are not permitted in cases under the simplified procedure (r. 76.04(1)).

The procedure on oral examinations is set out in R. 34, and the procedure on examinations by written questions and answers is set out in R. 35. Rule 34 addresses not only oral examination for discovery but also the taking of evidence before trial, cross-examination on an affidavit, an examination out of court of a witness before the hearing of a pending motion or application, and an examination in aid of execution.

Where more than one party is entitled to examine a person (i.e., a plaintiff may be examined by each of two co-defendants and by a third party who defends the main action), the examination must be by way of oral examination unless the parties agree otherwise, and it can be initiated by any party adverse to the party to be examined (r. 31.05). In practice, one party will conduct the lead or main examination for discovery, and the other parties will examine only with respect to those matters that have not been covered either fully or at all by the first examiner. Where the parties cannot agree who will conduct the main examination, the rule is that the order of examining is the order in which the parties appear in the title of proceeding.

Where a party is entitled to examine for discovery more than one person under r. 31.03 or multiple parties who are in the same interest and the court is satisfied that multiple examinations would be oppressive, vexatious, or unnecessary, the court may impose just limits on the right of discovery (r. 31.03(9)).

An examination for discovery is initiated by serving a notice of examination (Form 34A) under r. 34.04 or written questions under r. 35.01. A party who seeks to examine a plaintiff may serve the notice only after delivering a statement of defence and, unless the parties agree otherwise, serving an affidavit of documents (r. 31.04(1)). The examination of the defendant may

commence only after the defendant has delivered a statement of defence or been noted in default and, unless the parties agree otherwise, the examining party has served an affidavit of documents. The party who first serves on another party a notice of examination or written questions is entitled to commence and complete the examination before being examined by another party, unless the court orders otherwise (r. 31.04(3)). These rules can be and often are altered by the parties, so long as everyone consents, but it is important to be aware of the particular details of these rules and the strategic options they provide.

5.5.1 Persons entitled to be present at the examination

The office of the official examiner is not a public court. The official examiner is in charge of the examination and has the discretionary right to exclude persons from it, although parties have the right to be present at any examination for discovery or other step or proceeding in the lawsuit and cannot be excluded except for good reason. The exercise of discretion is subject to review, although it will not be lightly interfered with and then only if it was not exercised judicially. The discretion should be exercised based on whether the examination would be prejudiced by the person whose presence is being considered.

5.5.2 Production of documents on the examination

A person to be examined orally for discovery must bring to the examination and produce for inspection all documents in his or her possession, control, or power that are not privileged and are listed in the party's affidavit of documents, all documents previously produced for inspection unless the parties agree otherwise (r. 30.04(4)(a)), and all documents or things listed in the notice of examination (r. 34.10(2)).

5.5.3 Methods of compelling attendance

The acceptable method of compelling someone's attendance at an examination for discovery depends on various circumstances, including whether the person is a party, has a lawyer, resides in Ontario, is being examined in place of a party, or other factors set out in R. 34. In most cases, a notice of examination (Form 34A) must be served. Serving a notice of examination (Form 34A) compels the attendance of a party who resides in Ontario. If a person has a lawyer, it is sufficient to serve the notice on the lawyer, but if the person is self-represented, the notice must be served personally or by an alternative to personal service (r. 34.04(1)). Where a person is to be examined on behalf of or in place of a party, attendance is compelled by serving the notice on the party's lawyer of

record or by personal service on the person to be examined (r. 34.04(2)). Where the person to be examined for discovery resides in Ontario but is neither a party nor a person to be examined on behalf of or in place of a party, a summons to witness (Form 34B) is necessary; it must be served personally, not by an alternative to personal service (r. 34.04(4)).

5.5.4 Time and place of the examination of a resident of Ontario

Where the person to be orally examined resides in Ontario, not less than two days' notice of the time and place of the examination must be given to the party or person to be examined and to all other parties (r. 34.05).

An oral examination of a person resident in Ontario must take place in the county in which the person resides, unless the court orders or the person to be examined and all the parties agree otherwise (r. 34.03).

5.5.5 Where person to be examined resides outside Ontario

Foreign plaintiffs have no automatic right to be examined at their place of residence. The place and manner of the examination for discovery of any party outside Ontario is a matter to be determined by the court having regard to what is just and convenient—not only for one party but for all of them. This will depend on the circumstances adduced in evidence. The convenience of the lawyers for the parties is not a material consideration.

Where the person to be examined for discovery resides in Canada but outside Ontario an interprovincial summons is used (Form 53C). The provisions of the *Interprovincial Summonses Act* and r. 53.05 are applicable.

Rule 34.07 sets out various terms where the person to be examined resides outside Ontario, and r. 34.07(1) gives the court authority to determine various procedural details of the examination by ordering

- whether the examination is to take place in or outside Ontario;
- the time and place of the examination;
- the minimum notice period;
- the person before whom the examination is to be conducted;
- the amount of attendance money to be paid; and
- any other matter respecting the holding of the examination.

Where the person is to be examined outside of Ontario, the court order will contain, if requested, a commission and letters of request, in accordance with the requirements of r. 34.07(2).

Subrule 34.07(4) provides that where the person to be examined is not a party or person being examined on behalf of a party, attendance money should be paid by the examining party. Attendance money is defined in Tariff A, Part II, Item 21. Parties themselves are not paid attendance money.

5.5.6 Counsel answering questions

Questions in an oral examination for discovery must be answered by the person being examined, but where there is no objection, the question may be answered by counsel. In such cases, the answer is deemed to be the answer of the person being examined unless that person before the conclusion of the examination repudiates, contradicts, or qualifies the answer (r. 31.08).

Rule 31.08 does not confer a right on counsel for the witness to answer questions asked on examination for discovery. Sometimes counsel who should and do know better attempt to bully more junior lawyers into accepting their improper attempts to coach the witness by “offering” helpful answers. This is completely improper. Counsel for a witness at an examination is never permitted to answer a question on behalf of a witness unless the examining lawyer consents. If a lawyer for a witness begins to do so without consent, the examining lawyer is perfectly entitled to interrupt and insist that the lawyer stop.

That said, it is often helpful for a lawyer to answer certain questions on consent, that is, questions as to

- a party's legal position on relevant issues;
- “potential witnesses” under r. 31.06(2);
- expert opinions under r. 31.06(3);
- insurance policies under r. 31.06(4); and
- any other matter where the lawyer may be expected to have better information than the actual witness.

In such cases, it may be more efficient for the lawyer to answer the questions directly rather than to have the witness undertake to obtain answers and then fulfill the undertaking after the examination has been concluded by obtaining the requested information from the lawyer anyway.

5.5.7 Objections to questions

Where a question is objected to, the objector must state briefly the reason for the objection, and the question and the brief statement must be recorded (r. 34.12(1)). In the interest of efficiency, if the objector consents, a question that is objected to may be answered at the examination and then a ruling as to the question's propriety can be obtained from the court later, before the evidence is used at a hearing (r. 34.12(2)). The court can also make a

determination on a motion about questions that are objected to and not answered (r. 34.12(3)).

Counsel who wish to object to a question should behave ethically so as not to violate the rule that prohibits counsel from either answering a question on behalf of or coaching the witness. If a proper explanation of the objection requires a recitation of other evidence or a discussion that might be considered as improper coaching of the witness, then the proper practice is to require that the witness leave the examining room while the objection is discussed. Counsel should not use the device of an “objection” to attempt to coach or lead a client improperly.

5.5.8 Communications with witnesses giving evidence

The *Rules of Professional Conduct* address the subject of communications between counsel and a witness during the witness’s testimony. Rule 4.04 sets out detailed requirements respecting such communications before any tribunal, including the regular courts. The commentary provides that the rule “applies with necessary modifications to examinations out of court.” Those rules of professional conduct are the following:

- During examination-in-chief, the examining lawyer may discuss with the witness any matter that has not been covered in the examination up to that point.
- During examination-in-chief by another lawyer of a witness who is unsympathetic to the lawyer’s cause, the lawyer not conducting the examination-in-chief may discuss the evidence with the witness.
- Between completion of examination-in-chief and commencement of cross-examination of the lawyer’s own witness, the lawyer ought not to discuss the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief.
- During cross-examination by an opposing lawyer, the witness’s own lawyer ought not to have any conversation with the witness about the witness’s evidence or any issue in the proceeding.
- Between completion of cross-examination and commencement of re-examination, the lawyer who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination.
- During cross-examination by the lawyer of a witness unsympathetic to the cross-examiner’s cause, the lawyer may discuss the witness’s evidence with the witness.
- During cross-examination by the lawyer of a witness who is sympathetic to that lawyer’s cause, any conversations ought to be restricted in the same way

as communications during examination-in-chief of one’s own witness.

- During re-examination of a witness called by an opposing lawyer, if the witness is sympathetic to the lawyer’s cause, the lawyer ought not to discuss the evidence to be given by that witness during re-examination. The lawyer may properly discuss the evidence with a witness who is adverse in interest.

Examinations for discovery are covered by these rules. A lawyer for the person being examined ought not to have any conversation with that person about his or her evidence or any issue in the action. It is improper, for example, for counsel at a lunch break to say to the witness, “I sure was surprised by the answer that you gave when you were asked X. Didn’t you really mean Y?” The witness may ask counsel at a break “How am I doing?” Counsel may properly remind the witness of general advice such as “speak slowly,” “take your time,” “make sure that you understand the question before answering,” and so on. Beyond that, counsel should be very careful not to violate the rules set out above, either directly or indirectly. So important is this rule that many counsel for witnesses being examined for discovery will not even have lunch with the witnesses during the examinations so as to eliminate any possible suspicion that improper discussions are taking place.

5.5.9 Effect of refusal to answer a proper question

Rule 31.07 deals with the situation where a party has refused to answer a proper question or to answer a question on the ground of privilege, has indicated that a question will be considered, or has undertaken to answer a question and has not done so within 60 days. Apart from any other sanction, a party may not at trial introduce the information except with leave of the trial judge (r. 31.07(2)). This sanction is in addition to those provided by r. 34.15 (r. 31.07(3)), but is subject to the overriding provision in r. 53.08.

5.5.10 Improper conduct of examination

If the person being examined or the examining party is acting improperly, the examination may be adjourned by any party present or represented in order to bring a motion to seek directions from the court with respect to the continuation of the examination (r. 34.14(1)). The rule sets out the types of conduct that may result in an adjournment.

In order to prevent abuse of this rule, r. 34.14(2) provides that the person who either caused the adjournment by improper conduct or adjourned the examination improperly may be ordered to pay personally and forthwith not only the costs of the motion but also any costs thrown away and the costs of the continuation of

the examinations, and the court may fix the costs and make such other order as is just.

5.5.11 Sanctions for default or misconduct by person to be examined — r. 34.15

In addition to the sanctions noted above for failure to answer a proper question or abandon a claim for privilege, r. 34.15 provides that where a person fails to attend at the time and place fixed for an examination or refuses to take an oath or make an affirmation, to answer any proper question, to produce a document or thing, or to comply with an order under r. 34.14, the court may

- where an objection to a question is held to be improper, order or permit the person being examined to reattend at his or her own expense and answer the question, in which case the person shall also answer any proper questions arising from the answer;
- where the person is a party or, on an examination for discovery, a person examined on behalf or in place of a party, dismiss the party's proceeding or strike out the party's defence;
- strike out all or part of the person's evidence, including any affidavit made by the person; and
- make such other order as is just.

Where a person does not comply with an order under r. 34.14 or r. 34.15(1), a judge may also make a contempt order against the person in default (r. 34.15(2)).

5.5.12 Videotaping or other recording of examination

Rule 34.19 provides that an examination may be videotaped either on consent or by court order. A transcript must still be prepared in all such cases. Videotaped examinations for discovery are still uncommon in Ontario.

5.5.13 Second oral examination

A party may generally only be examined once; a second oral examination can be held only with leave of the court (r. 31.03(1)). Leave to conduct a second oral examination should be granted only in special circumstances where the interests of justice require it, but not in circumstances where on the first examination, examining counsel refrains from examining or prematurely terminates the examination. In such cases, the party examined will not likely be ordered to reattend, and counsel will have lost an important opportunity.

5.5.14 Examination by written questions and answers — R. 35

An alternative to oral examination for discovery is examination by written questions and answers under R. 35. This type of examination, which is not common, is

sometimes chosen by counsel in cases involving mainly legal issues, where it is not considered necessary or advantageous to examine the opposite party orally so as to be able to make an assessment of the party's credibility and demeanour in giving evidence.

A written examination is commenced by serving a list of questions to be answered (Form 35A) on the person to be examined and every other party (r. 35.01). The questions must be answered by service on the examining party of the affidavit of the person being examined within 15 days after service of the questions (r. 35.02(1) and Form 35B).

An objection to a question may be made in the affidavit together with a brief statement as to the reason for objecting (r. 35.03).

Where the examining party is not satisfied with an answer or where the answer suggests a new line of questioning, the examining party may, within 10 days after receipt of the answers, serve a further list of questions which must be answered within 15 days (r. 35.04(1)).

In some cases, the court may order an oral examination; i.e., where the answers are evasive, unresponsive, or otherwise unsatisfactory (r. 35.04(3)), or a party fails to answer a proper question, or the answer to the question is insufficient, the court may order the question to be answered by affidavit or by oral examination (r. 35.04(2)).

5.5.15 Continuing discovery — r. 31.09

As with documentary discovery under R. 30, the *Rules* recognize that an examination for discovery takes place at a certain point in time. Often a party acquires further relevant information after completion of the examination that, if it had been known at the time of the examination, would have been required to be disclosed. If the *Rules* were to permit a party to withhold such after-acquired information, there would be a powerful incentive for a party to delay its investigation of the facts of a case so that when it was examined for discovery, it would have little information to disclose. To avoid this result and in furtherance of the philosophy of full disclosure, the *Rules* impose an obligation on a party who has been examined for discovery to provide what is commonly referred to as "continuing discovery." This obligation applies both to information that is acquired for the first time after completion of the examination for discovery and information disclosed on examination for discovery that later turns out to be incorrect.

Where a party subsequently discovers that an answer to a question given on examination for discovery was incorrect or incomplete or is no longer correct and

complete, the party must provide the correct or complete information in writing to every other party forthwith (r. 31.09(1)). That writing may be treated at a hearing as if it formed a part of the original discovery. Any adverse party may require that the information be verified by affidavit or be the subject of further examination for discovery (r. 31.09(2)). Where a party fails to comply with these provisions and the information subsequently obtained is

- favourable to his or her case, the party may not introduce the information at the trial except with leave of the trial judge; or
- not favourable to his or her case, the court may make such order as is just (r. 31.09(3)).

Where evidence is admissible only with the leave of the trial judge, leave will be granted on terms that are just and with an adjournment, if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial (r. 53.08(1)).

5.6 The uses of an examination for discovery

5.6.1 To read the examination into the trial record as evidence

A party may read into evidence, as part of his or her own case against an adverse party, any part of the evidence given on the examination for discovery of the adverse party or a person examined on behalf of or in place of or in addition to that party if the evidence is otherwise admissible, whether or not the party or person has already given evidence (r. 31.11(1)). The use of the examination for discovery is not limited to “opposite” parties (i.e., plaintiff and defendant) but extends to any “adverse party” (i.e., two defendants who have crossclaimed against each other).

The way in which this rule is used at trial is as follows. In trial preparation, a party will review the transcript of the examination for discovery of the adverse party carefully and will select those portions that contain admissions and other information that is helpful to its case. At trial, the party’s counsel will advise the court that he or she proposes to read into the trial record from that examination for discovery transcript. For the assistance of the court, counsel provides a copy of the transcript to the judge, proceeds to indicate the page and question number where counsel will begin, and then reads out loud and *verbatim* the desired passages. The court reporter will record the evidence just as the oral evidence of any witness is recorded. Often counsel will provide a schedule of the portions to be read in for the assistance of the court, other counsel, and the reporter.

Several points should be noted:

- The transcript of the examination for discovery does not itself become an exhibit at trial. It is the orally read evidence that becomes the trial evidence.
- Counsel has control as to when during the trial to read in, from the discovery, transcript passages from the adverse party. It must be done during the part of the trial in which that party is putting in its evidence, but other than that general requirement, the transcript evidence can be read in at several different times, interspersed by witnesses giving oral evidence.
- The evidence given by an adverse party may be read into the trial record only as against that adverse party.

There are some cases where the evidence of one party may be admissible against another; e.g., admissions made by a partner on examination for discovery in an action against the partnership are admissible against the partners, even if the witness had ceased to be a partner when the admissions were made.

Where evidence is read into the trial record, it may be used against the party as well as in its favour; but it should be noted that a party putting in discovery evidence is not necessarily bound by those answers. The party is at liberty to contradict that which is unfavourable by other evidence, and the weight to be given to that evidence depends upon the circumstances of each case (r. 31.11(4)).

Where only part of the evidence given on an examination for discovery is read into or used in evidence, at the request of an adverse party and in order to ensure evidence is considered in context, the trial judge may direct the introduction of any other part of the evidence that explains the part first introduced (r. 31.11(3)). It is improper for the trial judge to read the transcript of the examination for discovery of one of the parties before any part of it has been introduced in evidence (r. 34.18(4)), nor can the trial judge rely on any part of the transcript that has not been made part of the record by a party. Merely because a question is asked and answered on an examination for discovery does not mean that the question and answer are automatically admissible at trial, and a trial judge has the power to exclude inadmissible or irrelevant discovery evidence even though no objection was taken to it on the examination.

An interesting and important aspect of R. 31 is the interplay between

- the obligation of a party to provide full and complete answers to questions asked on discovery to the best of his or her knowledge, information, and belief; and
- the right of a party to read such evidence into the trial record against the party giving the evidence.

The problem that arises for the party being examined is that it may be required to disclose, at the examination for discovery, relevant information of which the party has been made aware (for example, statements made by other persons), but

- the information may be unfavourable to the examined party's case; and
- the examined party may actually disagree with the information that he or she is nonetheless obliged to disclose.

It is of the utmost importance that counsel for a party being examined for discovery be alert to the possibility that the client may be required to disclose unfavourable hearsay information. Counsel should ensure that the party makes clear that it expressly disagrees with the evidence. This can be done by an alert and well-prepared witness at the time of disclosure of the evidence or by counsel for the witness on re-examination at the conclusion of the examination for discovery or in a later letter from counsel.

Subrule 31.11(6) deals with the situation where a person who has been examined for discovery is later unavailable by such reasons as death, illness, unavailability, or a refusal to be sworn to answer questions. The trial judge may grant leave to read into evidence all or part of the examination, to the extent admissible if the person were testifying in court. Subrule 31.11(7) sets out the considerations that must be looked at by the trial judge in determining whether to grant leave:

- the extent to which the person was cross-examined on the examination for discovery;
- the importance of the evidence;
- the general principle that evidence should be presented orally in court; and
- any other relevant factor.

5.6.2 To contradict the party on cross-examination

When a person gives evidence at trial in contradiction to the evidence the person previously gave on discovery, the examination can be used by any person adverse in interest to impeach that person's credibility (r. 31.11(2)). This can be done only in compliance with ss. 20–21 of the *Evidence Act*. These sections require that "any prior inconsistent statement" in writing or reduced to writing be shown to that witness if it is intended to contradict the witness by the writing, and the witness must be given an opportunity to respond thereto.

For example, at trial, the plaintiff gives evidence on examination-in-chief on a material point that contradicts and is more favourable to his case than the evidence that

he gave on examination for discovery. Counsel for the defendant might wish to

- cross-examine the plaintiff using the prior inconsistent evidence given on examination for discovery; or
- refrain from cross-examining on that point, instead await the defendant's own case, and then simply read into the record the contradictory evidence from the plaintiff's examination for discovery, under r. 31.11.

The above-noted provisions of the *Evidence Act* do not permit counsel to adopt the latter strategy. In order to contradict a witness using a prior inconsistent statement, such as evidence given on examination for discovery, counsel must put the statement directly to the witness in cross-examination and allow the witness an opportunity to explain the apparent contradiction. It is important to appreciate that this rule does not prevent a party from reading into the trial record evidence given by a party on discovery that is unfavourable to that party, as this is one of the purposes of examining for discovery in the first place; the *Evidence Act* provisions deal exclusively with evidence that is contradictory to evidence already given by the same person at trial.

5.6.3 As evidence against the party in another suit

Where an action has been discontinued or dismissed and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, the evidence given on an examination for discovery taken in the former action may be read into or used in evidence at the trial of the subsequent action, as if it had been taken in the subsequent action (r. 31.11(8)).

5.6.4 On a motion

A party is allowed to use evidence obtained on the adverse party's examination for discovery or any person examined in the place of or in addition to the adverse party on a motion (r. 39.04(1)). A party cannot use its own examination for discovery on the hearing of a motion, unless the other parties consent (r. 39.04(2)).

6. Inspection of property — R. 32

The court may make an order for the inspection of real or personal property where it appears to be necessary for the proper determination of an issue in a proceeding (r. 32.01). The right conferred is intended to give the opposite party an opportunity to satisfy himself or herself, apart from testimony given on oral examination. Since the right of inspection is part of discovery (although it is available in applications as well as

actions), it should be granted unless it can be shown that it will not assist the court in determining the issues; there ought to be at least a probability that the inspection will establish the position of one of the parties regarding a material fact. It has been held that R. 32 should be construed liberally to permit inspection. Rule 32 also provides that the court is to specify the time, place, and manner of inspection and may impose other terms it deems just, including the payment of compensation. Experiments can be ordered as ancillary to inspection if they are necessary for the proper determination of the questions in issue.

7. Physical or mental examination of parties

Subsection 105(2) of the *Courts of Justice Act (CJA)* provides that where the physical or mental condition of a party is in question in a proceeding, the court may make an order that the party undergo a physical or mental examination by one or more health practitioners. These examinations are available in applications as well as actions. The definition of “health practitioner” in s. 105(1) includes medical doctors, dentists, and psychologists.

Subsection 105(3) recognizes that the physical or mental condition of a party may be put in issue by another party. If this occurs, the court should not make an order directing physical or mental examination unless

- the allegation is relevant to a material issue in the proceeding; and
- there is good reason to believe that there is substance to the allegation.

Rule 33 sets out the procedure to be followed in connection with medical examinations. It addresses the question of notice, the contents of the order, disputes as to the scope of the examination, what information must be provided by the party being examined, who may attend at the examination, and the preparation of a report. Subrule 33.06(1) requires the health practitioner to prepare a report, and r. 33.06(2) requires that the party obtaining the order must serve the report on all other parties forthwith. A party who fails to comply with s. 105 or r. 33.04 is liable, if a plaintiff or applicant, to have the proceeding dismissed or, if a defendant or respondent, to have the statement of defence or affidavit in response to the application struck out (r. 33.07).

In first party motor vehicle accident benefits cases under the statutory accident benefits of the *Insurance Act*, a defendant insurer may have separate rights for medical evaluations of a plaintiff. One right may be contained under s. 105 of the *CJA*, and a second right may exist under s. 44 of the *Statutory Accident Benefits Schedule*,

O. Reg. 34/10, made under the *Insurance Act*. Counsel should be clear as to which legal rights are being exercised.

A court may order a second or further examination in certain circumstances (r. 33.02; *CJA*, s. 105(4)). This usually arises if an injured plaintiff has various injuries requiring evaluations from professionals in different medical specialties (e.g., psychiatric issues and orthopaedic issues).

8. Deemed undertaking of confidentiality with respect to discovery evidence

Rule 30.1 imposes a deemed undertaking not to use information or documents obtained through the discovery process for any collateral purpose. It applies to any evidence obtained through documentary discovery, examinations for discovery, inspections of property, medical examinations, and examinations by written questions (r. 30.1.01(1)). All parties and their counsel are deemed to have undertaken not to use the evidence or any information to which the rule applies for any purpose other than the proceeding in which the evidence was obtained (r. 30.1.01(3)). There is an exception in the event the party who disclosed the information consents to its use (r. 30.1.01(4)). The rule does not prohibit the use of any information that is filed with the court as evidence or that is given in evidence at a hearing (r. 30.1.01(5)).

If a party wishes to use information obtained through the discovery process and is unable to obtain the consent of the party providing the information, that party may move before the court, and if the party satisfies the court that the interests of justice outweigh any prejudice that would result, the court may order that the “deemed undertaking” does not apply. In making its order the court may impose any terms or conditions that the court deems just (r. 30.1.01(8)).

A party that uses discovery information contrary to the deemed undertaking is guilty of contempt of court and is exposed to various sanctions. The prohibition means that neither counsel nor client may

- pass on or disclose such information to any person, including another existing or potential litigant who may be looking for information to assist in prosecuting its own case against the same party; or
- use such information to found a new action against the same party.

This becomes very important where there is more than one lawsuit commenced arising out of the same transactions or events. For example, in a motor vehicle accident context, a bodily injured plaintiff may issue a tort lawsuit against the at-fault driver and a second

lawsuit against his or her own insurer under statutory accident benefits.

Disclosure of evidence from one action to the other is not permissible unless it is done on either consent or court order (which is often granted).

9. Simplified procedure for actions under \$100,000 – Rule 76

In actions for amounts less than \$100,000, which are governed by the simplified procedure under R. 76, a party proceeding under the simplified procedure is

entitled to a total of two hours of examination for discovery, regardless of the number of parties in the litigation. Under r. 76.03(2), a party is required to add a Schedule D to its affidavit of documents, which includes the names and addresses of persons who might reasonably be expected to have knowledge of the matters at issue in the action. In the event that a party has not listed a potential witness in the affidavit of documents, it may not call that witness at the trial without leave of the trial judge (r. 76.03(3)).

Offers to settle and pre-trial procedures

1. Introduction

This chapter covers pre-trial procedures and offers to settle. Rule 49 of the *Rules of Civil Procedure (Rules)* dealing with offers to settle is intended to encourage and facilitate settlements through imposing cost consequences for failure to accept a realistic offer. This objective is apparent elsewhere in the *Rules*, in particular in r. 1.04(1), which provides that the *Rules* as a whole are to be “liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.”

Lawyers should be aware that a number of the rules referenced below were amended as of January 1, 2010. For instance, RR. 48 (listing for trial) and 50 (pre-trial conference) were substantially revised. Court decisions interpreting the text of the rules as they existed prior to January 1, 2010, should be read with caution.

2. Place of trial

Trial preparation begins at a very early stage of any proceeding. Before the originating process can be issued, the lawyer must decide where to start the proceeding. The place of commencement and hearing of a trial is now governed by rr. 46.01 and 13.1.01 which came into force on July 1, 2004. The originating process must be issued by the court in which the proceeding is to be commenced, brought, tried, or heard, and the place shall be named in the originating process.

By virtue of r. 13.1.01, a proceeding may be commenced in any place in Ontario named in the originating process, unless a statute or rule requires it to be commenced in a particular county.

That right is subject to an order being made by the court pursuant to r. 13.1.02(2), which empowers the court on a motion by any party to order that the trial be held at a place other than that named in the proceeding. The court will change the designated place for trial only where

- a statute or rule requires the proceeding be heard in a particular place (r. 13.1.02(1));
- a fair hearing cannot be held in the place where the proceeding was commenced (r. 13.1.02(2)(a));
- a transfer is desirable in the interests of justice with regard to the factors set out in r. 13.1.02(2)(b); or
- the regional senior judge initiates a transfer (r. 13.1.02(4)–(7)).

A motion to transfer to another county under r. 13.1.02(1), (2), or (3) may be brought and heard in the county to which the transfer of proceeding is sought, despite rr. 37.03(1) and 76.05(2) (place of hearing motions) (r. 13.01.02(3.1)).

Pursuant to s. 114 of the *Courts of Justice Act (CJA)*, where a party moves to change the place of hearing in a proceeding, an agreement as to the place of hearing is not binding but may be taken into account by the court.

The “interests of justice” test, introduced by r. 13.1.02(2), requires consideration of many of the same factors that were considered under the former “balance of convenience” test of the old r. 46.03. In both cases, relevant factors include the location of witnesses, the delay or expedition of the trial, the relative cost, whether the case has a connection with the place proposed, and the judicial caseload in the place proposed. It has been held that litigation that directly affects a community should be heard in the court that serves the community. Since the rule and the “interests of justice” test took effect in July 2004, cases decided before the introduction of R. 13.1 should be read with care.

The concept of a “fair trial” has been interpreted broadly and is not limited to circumstances of adverse publicity that might prejudice a jury.

3. Jury notice

Section 108 of the *CJA* regulates the availability of a jury trial. Subsection 108(1) provides any party to an action in the Superior Court of Justice that is not in the Small Claims Court with the right to have the issues of fact tried or the damages assessed or both by a jury. A jury trial is not an option, however, in all cases. Subsection 108(2) lists types of claims with respect to which a jury trial is not available. Those include actions seeking an injunction or mandatory order, partition or sale of real property, foreclosure or redemption of a mortgage, specific performance of a contract, declaratory relief, other equitable relief, and relief against a municipality. Furthermore, according to s. 26 of the *Crown Liability and Proceedings Act*, a proceeding against the federal Crown shall be without a jury.

Where a party wishes to have the issues of fact tried or the damages assessed or both by a jury, the party shall deliver a jury notice (Form 47A) at any time before the close of pleadings (r. 47.01).

Once a jury notice has been served, if the opposing party takes the position that a statute requires a trial without a jury or that the jury notice was not delivered in accordance with r. 47.01, that party may move before a master or a judge of the Superior Court of Justice for an order striking out the jury notice (r. 47.02(1)). A motion to strike out a jury notice on the ground that the action ought to be tried without a jury shall be made to a judge (r. 47.02(2)). Where an order striking out a jury notice is refused, the refusal does not affect the discretion of the trial judge to try the action without a jury (r. 47.02(3)).

Rule 47 therefore specifically contemplates cases in which a trial with a jury is not prohibited but is inappropriate. Factors a judge may consider when ruling on a motion to strike a jury notice on this basis include the following:

- Where there will be complex issues of law, few issues of fact, and a large number of documents introduced into evidence, a jury notice may be struck out.
- A motion to strike a jury notice on the grounds of complexity may be dismissed as premature where examinations for discovery have not been held.
- Where a judge concludes that issues such as causation will arise that involve difficult and complex questions and there is doubt whether the jury would be able to retain an understanding of the evidence through a lengthy trial, a jury notice will be struck out.
- While there is no longer a practice requiring that a jury be struck out in medical malpractice cases, where the facts, law, or both are such that a jury cannot reasonably be expected to follow the evidence properly or apply the judge's charge properly, the jury notice should be struck.

A jury shall be composed of six persons selected in accordance with the *Juries Act* (*CJA*, s. 108(4)). All six jurors do not have to agree on the verdict or answer to a question. It is sufficient if five of the jurors agree, and where more than one question is submitted, it is not necessary that the same five jurors agree to every answer (s. 108(6)). Where a juror dies or is discharged, the judge may direct that the trial proceed with five jurors, but in that case, the verdict or answers to questions must be unanimous (s. 108(8)).

Motions to strike juries can also be made during a trial (usually due to complexity). Judges often wait to hear some evidence before determining whether the matter is becoming too complex for a jury. The lawyer should be aware that motions to strike a jury are often brought for strategic reasons by counsel who feel that they may get a better result with a judge alone.

4. Listing for trial

Rule 48 establishes the procedure by which actions are listed for trial. Any party to the proceeding who is ready for trial may set the action down for trial after the close of pleadings, provided they are not in default under these rules or an order of the court (r. 48.01). Therefore, the parties have some control over when an action is heard for trial.

An undefended action is set down simply by filing a trial record prepared in accordance with r. 48.03 (r. 48.02(2)). It is then immediately placed on the trial list, pursuant to r. 48.05.

A defended action must be “set down” for trial before it is placed on the trial list. This is accomplished by serving a trial record prepared in accordance with r. 48.03 on every other party and, forthwith, filing it with the court with proof of service (r. 48.02(1)). Defended actions shall be placed on the trial list 60 days after the action has been set down for trial or immediately if the written consent of every other party is filed earlier (r. 48.06(1)).

Rule 48.09 makes provision for a special list for expedited trials. An expedited trial may be ordered pursuant to rr. 20.05(1) and (2)(n) on a motion for summary judgment or pursuant to r. 37.13(1)(a) on the disposition of any motion.

For proceedings in Toronto, the lawyer must also refer to the new Practice Direction for Civil Applications, Motions and other Matters in the Toronto Region, effective January 1, 2010 (Toronto Practice Direction). Paragraph 38 of the practice direction confirms that the practice of certifying an action ready for trial continues in the Toronto Region. The Civil Trial Office will send a “certification form to set pre-trial and trial dates,” together with a list of available trial dates, to the party who set the action down for trial approximately 60 days after the trial record is filed. The party who receives the certification form must consult with the opposing counsel or party and complete and return the form to the Civil Trial Office. The action will be struck from the trial list if the completed certification form is not returned by the date specified in the covering memo (Toronto Practice Direction, para. 39). The practice direction deals with the procedures to be followed if an opposing party will not co-operate in completing the certification form or if an action has been struck from the trial list (Toronto Practice Direction, paras. 40–41).

Actions on the Commercial List in Toronto are subject to the revised Practice Direction Concerning the Commercial List, Toronto, dated June 10, 2010 (Commercial List Practice Direction). The current version of this practice direction can be found on the

Ontario Courts website. A motion is required to obtain a trial date in such cases (Commercial List Practice Direction, para. 18). A trial date will not be set unless the parties have completed a trial requirements memorandum, available from the Commercial List Office (Commercial List Practice Direction, para. 18).

4.1 Consequences of listing for trial

All parties are deemed ready to proceed with a trial once the action has been placed on the trial list (r. 48.07). For proceedings in Toronto, the Toronto Practice Direction provides that once trial dates have been set, no adjournments will be granted except in the case of emergency (Toronto Practice Direction, para. 42). Therefore, it is important that counsel ensure they are in fact ready for trial before initiating the filing of the trial record or consenting to the matter being placed on the trial list. This is important because any party who sets an action down for trial or consents to the action being placed on the trial list is prohibited from taking further interlocutory steps without leave of the court. A party who sets the matter down for trial or consents to the matter being placed on a trial list will be barred from initiating or continuing any form of motion or discovery except with leave of the court. There are certain limited exceptions to this rule, which does not relieve a party from

- complying with undertakings given on its examination for discovery (r. 48.04(2)(a)); or
- any of a variety of discovery and other obligations under the *Rules* (rr. 48.04(2)(b) and (c)).

Leave of the court is not, however, required for a motion to compel compliance with any obligation imposed by r. 48.04(2)(b) (r. 48.04(3)). The Toronto Practice Direction states that leave under r. 48.04 will only be granted in rare circumstances (Toronto Practice Direction, para. 43).

The objectives of this rule are both to ensure that trials are not delayed by last-minute interlocutory motions and to emphasize the importance of compliance with continuing disclosure obligations. Lawyers should be aware, however, that the overriding discretion of the court under r. 2.01(1) to permit non-compliance with any rule in the interest of justice leaves room for a party to seek leave to take interlocutory steps after filing or consenting to the filing of a trial record.

There is considerable case law that addresses when such leave should be granted. The authorities generally suggest that leave for further interlocutory proceedings or discovery will be given only if there is a substantial or unexpected change in circumstances so that refusal would be manifestly unjust. Where there has been a

change in counsel and new counsel wishes to amend the pleadings in order to restructure the action, leave will be refused if there has been no change in circumstances. Nor will the court give effect to agreements between counsel purporting to preserve the right to examination for discovery.

4.2 Action not on trial list within two years

Where an action has not been placed on a trial list or terminated within two years after the filing of the first defence (where “defence” means a statement of defence, notice of intent to defend, or notice of motion in response to an action other than a motion challenging the court’s jurisdiction), the court will intervene to have the action dismissed for delay or terminated. In such cases, r. 48.14(1) requires the registrar to serve a status notice (Form 48C.1) to the parties indicating that the action will be dismissed for delay unless, within 90 days, it is set down for trial or terminated, or documents are filed in accordance with r. 48.10. Where an action is placed on a trial list, subsequently struck off, and not restored to a trial list within 180 days after being struck, the registrar must, unless the court orders otherwise, serve a status notice (Form 48C.2) stating that the action will be dismissed for delay unless, within 90 days, the action is restored to the trial list or terminated, or documents are filed pursuant to r. 48.10 (r. 48.14(2)). Upon receipt of the status notice, a lawyer shall forthwith give a copy of the status notice to the client (r. 48.14(3)).

Once a status notice has been served, any party may request that the registrar arrange a status hearing, in which case the registrar shall mail to all parties a notice of the hearing to be held before a judge or case management master (r. 48.14(8)). A lawyer who receives a notice of status hearing shall forthwith give a copy of the notice to the client (r. 48.14(9)). The status hearing will be held in writing and without the attendance of the parties if a party files a timetable, signed by all the parties, with a draft order establishing the timetable at least seven days before the date of the status hearing, unless the presiding judge or case management master orders otherwise (r. 48.14(10)). The timetable shall identify the steps to be completed before the action may be set down for trial or restored to a trial list, show the date or dates by which the steps will be completed, and show a date, no more than 12 months after the date of the status hearing, before which the action will be set down for trial or restored to the trial list (r. 48.14(11)). Where a status hearing is not to be held in writing, the lawyers of record are required to attend the status hearing, and the parties themselves may also attend (r. 48.14(12)).

The onus at a status hearing is on the plaintiff to show cause why the action should not be dismissed for delay. If

satisfied that the action should proceed, the presiding judge or case management master has the discretion to set time periods for the completion of the remaining steps necessary to have the action placed on or restored to a trial list; order that the action be placed on a trial list within a specified time; adjourn the status hearing to a specified date; if the action is one to which R. 77 may apply under r. 77.02, assign the action for case management, subject to the direction of the senior regional judge; or make such order as is just (r. 48.14(13)(a)). If the presiding judge or case management master is not satisfied that the action should proceed, the presiding judge or case management master may dismiss the action for delay (r. 48.14(13)(b)). A registrar shall dismiss an action for delay, with costs, 90 days after the service of a status notice, unless the action has been set down for trial or restored to a trial list, the action has been terminated by any means, documents have been filed in accordance with r. 48.14(1), or the judge or case management master presiding at a status hearing has ordered otherwise (r. 48.14(4)). The registrar shall serve a copy of the order on the parties (Form 48D) (r. 48.14(6)). Similarly, where the parties fail to comply with an order made at a status hearing, the registrar shall dismiss the action for delay, with costs, and shall serve a copy of the order on the parties (Form 48D) (rr. 48.14(5)–(6)). A lawyer who is served with an order dismissing an action for delay shall forthwith provide a copy of the order to his or her client (r. 48.14(7)).

The court has jurisdiction to set aside a status hearing order dismissing an action for delay (r. 48.14(16)). The criteria to be applied are those set forth in r. 37.14 (motion to set aside or vary an order) as interpreted and applied by the courts.

4.3 Abandoned actions

The new r. 48.15 deals with abandoned actions. Unless the court orders otherwise, the registrar shall make an order dismissing an action as abandoned if the following conditions have been satisfied (r. 48.15(1)):

- More than 180 days have passed since the originating process was issued.
- No statement of defence, notice of intent to defend, or notice of motion in response to an action, other than a motion challenging the court's jurisdiction, has been filed.
- The action has not been disposed of by final order or judgment.
- The action has not been set down for trial.
- The registrar has given 45 days' notice in Form 48E that the action will be dismissed as abandoned.

The registrar is required to serve a copy of the order made under r. 48.15(1) in Form 48F on the parties (r. 48.15(2)). The dismissal of an action as abandoned has the same effect as a dismissal for delay under r. 24.05 (r. 48.15(3)). An order made under r. 48.15 may be set aside pursuant to r. 37.14 (r. 48.15(5)).

Rule 48.15 includes provisions to deal with those proceedings caught in the transition period. Unless the court orders otherwise, in the case of an action commenced before January 1, 2010, other than an action governed by R. 76 or 77, the following rules apply:

- If a step is taken in the action on or after January 1, 2010 and before January 1, 2012, r. 48.15(1) applies as if the action started on the date on which the step was taken (r. 48.15(6)1).
- If no step is taken on or after January 1, 2010 and before January 1, 2012, the action is deemed dismissed as abandoned on January 1, 2012, unless the plaintiff is under disability (r. 48.15(6)2).

A deemed dismissal under r. 48.15(6)2 is treated as a registrar's order and may be set aside under r. 37.14 (r. 48.15(6)3).

For actions governed by R. 78 (Toronto Civil Case Management Project) immediately before January 1, 2010, the date it was revoked, r. 78.06 will continue to apply (r. 48.15(7)). Subrule 78.06(1) provides that, unless the court orders otherwise, the registrar shall make an order dismissing an action as abandoned if more than two years has passed since the originating process was issued, no statement of defence has been filed, the action has not been disposed of by final order or judgment, or the action has not been set down for trial or summary judgment. The registrar is required to give 45 days' notice that the action will be dismissed as abandoned (r. 78.06(1)5). The registrar is required to serve a copy of the order dismissing the action as abandoned on the parties (r. 78.06(2)). The dismissal of the action as abandoned has the same effect as a dismissal for delay under r. 24.05 (r. 78.06(3)).

5. Offers to settle — R. 49

5.1 Introduction

The vast majority of cases are settled at some point prior to trial. It is one of the basic policies of the *Rules* to encourage settlement in order to avoid the high legal and personal costs to the parties that a trial entails and reduce the burden on our trial courts.

Rule 49 was introduced in 1985 and has had a significant impact on the conduct of litigation in terms of encouraging and facilitating settlements. The rule governs all offers to settle made in writing. It applies to

actions and applications, counterclaims, crossclaims, and third party claims and is not restricted to monetary claims. It applies to all plaintiffs, defendants, applicants, and respondents.

The purpose of R. 49 is to encourage parties to make reasonable offers to settle. The principal incentive for either party to do so is the significant cost consequences imposed by R. 49 on a party who fails to accept what turns out at the end of the day to have been an offer that should have been accepted. If the result at a trial or hearing shows that it would have been better for the recipient of an offer to have accepted it, then the party that made the offer will secure a better costs order.

A R. 49 offer need not be made with respect to an entire action or application; rather, a party may make an offer to settle any one or more of the claims in a proceeding (r. 49.02(1)). Such an offer falls within the purview of R. 49, and the cost consequences of r. 49.10 will apply to the costs associated with that part of the action that deals with the subject matter of the offer.

In light of the significant cost consequences associated with a R. 49 offer, counsel must discuss the principles and effect of the rule with the client and advise the client, at regular intervals throughout the proceeding, of the prospects and advantages of settlement. In addition, counsel must consider serving a R. 49 offer at an appropriate stage in a proceeding.

A R. 49 offer can be made by one party on any other party through service of a written offer to settle any one or more of the claims in a proceeding (r. 49.02(1)). The offer must be in writing, since an oral offer to settle does not attract the cost consequences of R. 49. The need for the offer to be in writing is reinforced by r. 49.13, which permits the court to take into account any written offer to settle in exercising its discretion with respect to costs. While the offer should be in the prescribed form (Form 49A), the court has enforced settlements under the rule based on an offer and acceptance contained in letters. The case law now appears clear that any offer to settle made in writing of any form will be considered as an offer made under and subject to the provisions of R. 49, unless the offer explicitly states to the contrary. Therefore, any party who wishes to make an offer outside the framework of the rule that will not attract the cost consequences associated with a R. 49 offer must be certain this intention is very clear.

5.2 Offer, acceptance, and motions for judgment

A R. 49 settlement agreement is a binding contract. An offer to settle a lawsuit is just like an offer to enter into any other contract under the general common law. If

such an offer is accepted, a binding contract to settle the litigation is created.

Before issuing an offer to settle, counsel have a professional responsibility to ensure that he or she has instructions from a client who is fully informed about the value of his or her case and the practical ramifications of issuing the proposed offer to settle. If time permits, counsel should do their best to obtain a written acknowledgement from the client regarding the advice given and confirming that counsel has instructions to deliver the agreed upon offer to settle. A lawyer has similar ethical and professional obligations with respect to any offer to settle that the lawyer receives. The lawyer has a duty to convey all settlement offers to the client in a timely manner, regardless of their worth. Subrule 2.02(2) of the *Rules of Professional Conduct* provides that lawyers “shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis.”

A settlement offer should be communicated to a represented party through counsel. This raises a question as to the ability of counsel to independently bind their client through offer or acceptance. The authorities suggest that a lawyer may bind his or her client in a settlement unless the client has given limited authority and the opposing side has knowledge of the limitation. However, if there is clear and uncontradicted evidence that the lawyer did not have authority, the court will not grant judgment pursuant to r. 49.09(a), even though opposing counsel had no knowledge of the lack of authority. Where an offer to settle has been accepted based on a lawyer’s misconception of the offer and the offeror will suffer no prejudice, it would be inequitable to allow the moving party to take advantage of the mistake.

Acceptance of an offer is governed by r. 49.07, which specifies certain procedures for and effects of acceptance. An offer to settle may be accepted by serving an acceptance of offer (Form 49C) before it is withdrawn or the court disposes of the claim. An offer is not terminated by a counter-offer or rejection. Subrule 49.07(2) provides that where a person to whom an offer to settle is made rejects the offer or makes a counter-offer that is not accepted, such person may thereafter accept the original offer, unless it has been withdrawn or the court has already disposed of the claim in respect of which it was made. In general, a R. 49 offer must be withdrawn in writing. Subrules 49.04(1)–(2) provide that an offer to settle may be withdrawn at any time prior to acceptance by serving a notice of withdrawal in writing (Form 49B).

Quite often, offers to settle are silent on the matter of costs and are confined instead to claims for principal, interest, and other claims. Where an accepted offer does

not provide for costs, r. 49.07(5) is applicable. In such a case, the plaintiff is entitled to receive its costs of the proceeding (implicitly, on a partial indemnity scale), either

- to the date when the defendant accepted the offer, in the case of an offer made by the plaintiff; or
- to the date when the defendant served the plaintiff with the offer.

On occasion, a party does not fulfill its obligations under an accepted offer to settle. While most settlements resolve the underlying litigation, there are cases where a party will change its mind or some other issue arises in which case the settlement agreement itself may give rise to a further need for litigation. This situation may arise in any of the following cases:

- There is a dispute as to whether settlement has actually been reached.
- One party has entered into an agreement as a result of some form of mistake.
- The parties have differing views as to the terms of the release.
- A party takes the position that the lawyer who agreed to the settlement on his behalf was acting without proper authority.
- A party learns, after entering into an agreement, that he has misapprehended the value of his claim.

If a party fails to comply with the terms of an accepted offer, r. 49.09 allows the other party to bring a motion before a judge to enforce the settlement agreement or continue the proceeding as if there had been no accepted offer. Where a motion is brought under r. 49.09, evidence will be put before the court by both parties, and the court must decide whether the parties have, in fact, settled the case. Sometimes the affidavit evidence will be contradictory, and there will be issues of credibility. If a court finds it cannot make any findings of fact based on the evidence before it, it can order the trial of an issue on the settlement.

5.3 Costs consequences of rejecting a reasonable offer — r. 49.10

Rule 49.10 is the key part of R. 49 and imposes the *prima facie* cost consequences that result if an offer to settle is not accepted and the party making the offer obtains a result at trial that is as favourable as or more favourable than the offer to settle. An understanding of the basic concept of legal costs in our system of civil litigation will assist with counsel's ability to appreciate and inform the client of the effect of R. 49.

The effect of the rule is different for a plaintiff's offer than for a defendant's offer. In both cases, however, a financial penalty is imposed on the party who rejects a

reasonable offer to settle. An unaccepted offer incurs the following costs consequences:

- Where a plaintiff makes an offer that is refused and subsequently obtains a judgment which is as favourable or more favourable than the terms of the offer, then unless the court orders otherwise, the plaintiff is entitled to
 - partial indemnity from the outset of the lawsuit to the date the offer was served; and
 - substantial indemnity costs from the date the offer was served to the end of the proceeding (r. 49.10(1)).
- Where an offer to settle is made by a defendant that is refused and the plaintiff subsequently obtains a judgment that is only as favourable as or less favourable than the terms of the offer, then unless the court orders otherwise,
 - the plaintiff is entitled to partial indemnity costs from the outset of the lawsuit to the date the offer was served; and
 - the defendant is entitled to partial indemnity costs from the date the offer was served to the end of the proceeding (r. 49.10(2)).

In the absence of an offer to settle, a plaintiff who obtained a judgment at trial would ordinarily receive partial indemnity scale costs for the entire action. Therefore, the benefit the plaintiff receives for making a reasonable offer the defendant rejects is the increase in the scale of costs from partial indemnity to substantial indemnity for that part of the lawsuit after the plaintiff made the offer. The benefit the defendant receives for making a reasonable offer the plaintiff rejects is the defendant, rather than the plaintiff, receives its partial indemnity scale costs for that part of the lawsuit after the defendant made the offer.

In determining whether the judgment at trial is as favourable as or more favourable than the offer to settle, the court must consider the matter of accruing prejudgment interest. The amount of the damage award at trial (which will include both a principal and an interest component) is being compared with an offer that in many cases will have been made many months or even years before. The interest component of the offer to settle will probably be less than the amount of interest awarded at trial because the interest to which the plaintiff is entitled increases with the passage of time.

It would be unfair to the party making an offer to compare the result at trial with the amount of an offer made earlier. The jurisprudence is clear that in performing the comparison between the offer to settle and the subsequent judgment, the court is to consider what the judgment would have been if it had been made at the time of the offer to settle so as to disregard the

effect of accruing interest after the date of the offer to settle.

The cost consequences of r. 49.10 do not apply where

- the plaintiff does not obtain a judgment at all if, for instance, the action is dismissed altogether; or
- the amount of the judgment falls between the amounts offered by the defendant and the plaintiff, respectively.

In these cases, the requirements of r. 49.10 have not been met, and the offers to settle have no effect on the cost award that will be made. In the circumstances, general cost principles will apply.

5.4 Prerequisites to applicability of r. 49.10

There are three fundamental prerequisites to the applicability of r. 49.10. In order for the cost consequences of the rule to apply to an offer to settle, the offer must

- have been made at least seven days before the commencement of the hearing (rr. 49.10(1)(a) and (2)(a));
- not have been withdrawn and not have expired before the commencement of the hearing (rr. 49.10(1)(b) and (2)(b)); and
- not have been accepted (rr. 49.10(1)(c) and (2)(c)).

Rule 49.03 provides that unless the offer is made at least seven days before the hearing commences, the costs consequences referred to in r. 49.10 do not apply. Therefore the offer must be left open and available for acceptance for a period of at least seven days before the hearing, up to and including the commencement of the hearing. The court may, however, take into account a written offer that is made less than seven days before the commencement of the hearing, or is withdrawn or has expired before the commencement of the hearing, in exercising its discretion with respect to costs so long as the other party had a reasonable opportunity to consider whether to accept or reject it. The seven day requirement is governed by r. 3.01(1)(a)–(b). This means that an offer to settle made exactly seven days before trial will have cost consequences.

The r. 49.10 provisions must be applied unless there is a compelling reason not to do so. The Ontario Court of Appeal has held that the courts should depart from the *prima facie* cost consequences imposed by r. 49.10, only where after giving due weight to the policy of the rule, the importance and necessity of reasonable predictability, and the even application of the rule, the interests of justice require such a departure.

5.5 Exercise of discretion — rr. 49.10 and 49.13

Rule 49.13 gives the court discretion to take into account any offer to settle in writing even though it may not comply with rr. 49.03 and 49.10–49.11. Thus, the court may take into account the date and terms of any written offer to settle. The Court of Appeal has held that even though offers do not fall within the provisions of r. 49.10, it is a serious error for a trial judge to ignore the substance of such offers when deciding the appropriate order as to costs, particularly when the offers reveal a genuine effort to settle the case.

Rule 49.10 itself provides that the court may “order otherwise” and not apply the cost consequences associated with the rule. Early jurisprudence after 1985 suggested that any offer to settle that did not constitute a compromise (i.e., in the case of a plaintiff’s offer, an offer providing a discount from the full amount claimed in the lawsuit; in the case of a defendant’s offer, an offer for some money rather than nothing) would not attract r. 49.10 consequences. More recent case law suggests that, although there is no requirement that an offer to settle represent a compromise, its absence is a relevant consideration the court may appropriately take into account when considering whether to apply the discretionary exception afforded in r. 49.10.

A single offer to settle made to all plaintiffs must be accepted by all plaintiffs in order to be effective.

5.6 Multiple defendants and offers to contribute — rr. 49.11–49.12

Rules 49.11 and 49.12 apply to claims where there are two or more defendants. The application of R. 49 is more complicated in any case in which there are multiple defendants, not all of whom may want to join in an offer to settle that is proposed by some of them. Rule 49.11 regulates offers made by both plaintiffs and defendants in cases involving more than one defendant. Rule 49.12 applies to cases involving multiple defendants where an offer to contribute is made between parties in the position of defendants towards settlement of the plaintiff’s claim.

In an action with multiple defendants, the plaintiff may make an offer to settle to one or more of the defendants. The offer need not be to all the defendants; the offer may settle some or all claims; and whether r. 49.10 applies as between any plaintiff and the defendant to whom the offer was made is determined by comparing the amount of the offer with the judgment against that defendant without regard to the circumstances of any other defendant. Similarly, any defendant may make an offer to settle with the plaintiff. The offer to settle procedure is

modified, and different rules apply in determining whether the cost consequences of r. 49.10 apply where the defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim and rights of contribution or indemnity may exist between the defendants. The cost consequences will not apply unless

- in the case of an offer to settle made by the plaintiff, the offer must be made to all the defendants and offer a complete settlement of the claim against all the defendants (r. 49.11(a)); or
- in the case of an offer made to the plaintiff
 - the offer is an offer to settle the plaintiff's claim against all the defendants and to pay the costs of any defendant who does not join in making the offer (r. 49.11(b)(i)); or
 - the offer is made by all the defendants and is an offer to settle the claim against all the defendants and provides that all defendants are jointly and severally liable to the plaintiff for the whole amount of the offer (r. 49.11(b)(ii)).

The application of this rule is best illustrated with an example. Assume that Plaintiff A sues Defendants B and C for general damages for breach of contract in the amount of \$100,000 and alleges that they are jointly (or jointly and severally) liable. Let us also assume that the real amount of A's provable damages is \$80,000. B feels that both defendants are vulnerable in the lawsuit, recognizes that the damages sought by A are too high, and realizes that a fair amount would be \$80,000. As a result, B proposes to C that they jointly make an offer to settle to the plaintiff, in which each will contribute \$40,000, for a total offer of \$80,000. At this point, there are two possibilities. The first is that C will agree to B's proposal, and they will make a joint offer of \$80,000. This first possibility illustrates r. 49.11(b)(ii). The second possibility is that C may be more confident than B in the outcome of the litigation and will refuse to join in the offer. In that case, C says to B that B may make an offer to settle if B is so inclined, but that B will have to pay the full amount of any settlement to A. The second possibility illustrates r. 49.11(b)(i).

Let us first consider the second possibility (r. 49.11(b)(i)); B decides to make an offer to settle all of A's claims and offers to pay the full amount of \$80,000 itself. At that point, A has a choice. A can accept the offer, settle with B, and receive \$80,000, or it can reject the offer and force a trial. If A accepts the offer and settles with B, that is not the end of the lawsuit; A would still have to seek a discontinuance of the action against C under R. 23. Previously, the old r. 23.05 provided that where a plaintiff discontinued an action against a defendant, the

defendant would be entitled to the costs of the action. Thus, A would be liable for C's costs, unless the court ordered otherwise. (While the current r. 23.05(1) now allows any party to a discontinued action to make a motion respecting costs, A could still be held liable for C's costs since this issue is at the court's discretion.) It would be unreasonable to require A to incur, or risk incurring, such a cost liability to C as a consequence of accepting B's offer. A would therefore be justified in refusing to accept the offer, even though the monetary amount offered by B might be reasonable. This is why r. 49.11(b)(i) provides that if B makes an offer alone, the r. 49.10 cost consequences will not apply against A unless B also offers to pay C's costs; if B were to do so, then A would have no good reason for rejecting B's offer, and A should be liable to B for r. 49.10 costs if it rejects the offer and forces an unnecessary trial.

As for the first possibility (r. 49.11(b)(ii)), B and C decide to make an offer of \$80,000 together. The offer that they make, however, provides that each of them will contribute \$40,000 to the overall settlement. Again, A has the choice of accepting the offer or of rejecting the offer and proceeding to trial. A accepts the offer and settles the entire lawsuit; however, one of the defendants (say, C) may renege on the settlement agreement and refuse to pay its \$40,000 share or be impecunious and unable to pay its share. In that case, A would have recourse against B only for B's own share and would be left with only half of the amount for which A agreed to settle. Therefore, unless the defendants' offer provides that both defendants are jointly and severally liable to A for the full amount of the offer, A would be justified in refusing to accept the offer, even though the monetary amount might itself be reasonable. This is why r. 49.11(b)(ii) provides that, if all defendants make an offer, the cost consequences of r. 49.10 do not apply unless they are all made jointly and severally liable to the plaintiff for the full amount of the offer.

In cases involving multiple defendants who are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim, any defendant may serve on any other defendant an offer to contribute toward a settlement of the claim (Form 49D). Rule 49.12 applies in circumstances where Defendant B wishes to join with Defendant C and make a joint offer to the Plaintiff A, but C refuses to do so. In that case, B may not wish to incur the obligation to pay C's costs by making a r. 49.11(b)(i) offer, but may feel strongly that both defendants should participate in the offer to A. In that case, B may make an offer to contribute to C under r. 49.12, rather than an offer to settle to A. In the example above, B may make an offer to C to contribute the sum of \$40,000 toward a joint offer to the plaintiff. In that case, C has a choice. It

may accept the offer to contribute and join with B in making a r. 49.11(b)(ii) offer to A. On the other hand, it may refuse to join in an offer with B and instead force a trial. If it forces a trial, the trial judgment and the findings of the court will probably make it clear whether C was justified in refusing to accept the offer to contribute. If the court finds that A's damages are \$80,000 and that both B and C are jointly and severally liable to A, then by implication B's offer was reasonable, and C should have accepted the offer and made a joint offer to settle to A. In that case, B will have a strong argument under r. 49.12(2) that C should

- pay B's costs of the unnecessary trial;
- indemnify B with respect to B's liability for costs to A; or
- both.

5.7 Application to counterclaims, crossclaims, and third party claims

Rules 49.01–49.13 apply, with necessary modifications, to counterclaims, crossclaims, and third party claims (r. 49.14).

5.8 Parties under disability

Pursuant to r. 49.08, a party under disability may make, withdraw, or accept an offer to settle, but no acceptance of an offer made by the party and no acceptance by the party of an offer made by another party is binding on the party until the settlement has been approved by a judge as provided for in r. 7.08.

5.9 Duty to inform registrar of settlement

All counsel should be aware that under r. 48.12, it is mandatory to promptly inform the registrar of the settlement of any action and to confirm this in writing, whether or not the action has been placed on the trial list.

6. Pre-trial conferences — R. 50

On January 1, 2010, R. 50 governing pre-trial conferences was revoked and replaced with a significantly enhanced new rule. The purpose of the new rule is to provide an opportunity for any or all of the issues in a proceeding to be settled without a hearing and, with respect to any issues that are not settled, to obtain from the court orders or directions to assist in the just, most expeditious, and least expensive disposition of the proceeding, including orders or directions to ensure that any hearing proceeds in an orderly and efficient manner (r. 50.01).

Rule 50 permits a pre-trial conference to be conducted by a judge or case management master. This is an opportunity for counsel to meet with a judicial officer a

short time before trial to obtain his or her views on the various aspects of the case. Pre-trial conferences are intended to shorten trials by reducing the issues and to encourage settlement. They also have the practical effect of forcing the lawyer to review the case a reasonable time in advance of trial. Counsel should prepare carefully for the pre-trial conference so that it is productive.

In the case of an action, the parties must schedule with the registrar a date and time acceptable to all parties to appear before a judge or case management master for a pre-trial conference within 180 days after an action is set down for trial, unless the court orders otherwise (r. 50.02(1)). In the event the parties do not schedule the pre-trial conference in the time stated, the registrar must, subject to any previous order, schedule a time and place for the parties to appear before a judge or case management master for the pre-trial conference and give notice to the parties to appear at the scheduled date and time (r. 50.02(2)). In the case of an application, a judge may direct that a pre-trial conference under R. 50 be held before a judge or case management master (r. 50.03)).

The parties are required to file pre-trial briefs in accordance with r. 50.04. At least five days before the pre-trial conference each party must file with proof of service a pre-trial conference brief containing concise statements, without argument, of the following matters:

- the nature of the proceeding (r. 50.04(1));
- the issues raised and the party's position (r. 50.04(2));
- in the case of an action, the names of the witnesses that the party is likely to call at the trial and the length of time that the evidence of each of those witnesses is estimated to take (r. 50.04(3)); and
- the steps that need to be completed before the action is ready for trial or the application is ready to be heard and the length of time that it is estimated that the completion of those steps will take (r. 50.04(4)).

In addition, r. 50.11 requires all documents intended to be used at the trial or hearing that may be of assistance in achieving the purposes of a pre-trial conference, such as any medical and experts' reports, to be made available at the pre-trial conference. Often, counsel attach these key documents to their pre-trial brief. The new r. 53.03(1) directs a party who intends to call an expert witness at trial to, not less than 90 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert and containing the prescribed information listed in r. 53.03(2.1). A party who intends to call an expert at trial to respond to the expert witness of another party must serve, not less than 60 days before the pre-trial conference, on every other

party to the action a report, signed by the expert, containing the prescribed information (rr. 53.03(2)–(2.1)).

The pre-trial conference itself is a relatively informal meeting, usually in chambers, and counsel do not gown. The new r. 50.05(1) directs that the lawyers for the parties appear at the pre-trial conference and, unless the presiding judge or case management master orders otherwise, the parties must participate by personal attendance or, if personal attendance would require undue amounts of travel time or expense, by telephone or video conference pursuant to r. 1.08. In those instances where a party requires another person's approval before agreeing to a settlement, the party must, before the pre-trial conference, arrange to have ready telephone access to the other person throughout the conference, whether it takes place during or after regular business hours (r. 50.05(2)).

After all counsel outline their positions, the pre-trial conference judge or case management master normally expresses an opinion on the likely outcome of various issues. Under the old rule, the approaches taken by judges to pre-trial conferences varied widely. According to the new r. 50.06, the following matters shall be discussed at the pre-trial conference:

- the possibility of settlement of any or all of the issues in the proceeding;
- simplification of the issues;
- the possibility of obtaining admissions that may facilitate the hearing;
- the question of liability;
- the amount of damages, if damages are claimed;
- the estimated duration of the trial or hearing;
- the advisability of having the court appoint an expert;
- in the case of an action, the number of expert witnesses and other witnesses that may be called by each party and the dates for the service of any outstanding or supplementary experts' reports;
- the advisability of fixing a date for the trial or hearing;
- the advisability of directing a reference; and
- any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding.

At the pre-trial conference, the judge or case management master may make such order as he or she considers necessary or advisable with respect to the conduct of the proceeding including any order under the new r. 20.05(1) or (2) concerning expedited trial orders arising from an unsuccessful motion for summary

judgment (r. 50.07(1)(c)). As a general rule, pre-trial conference judges or case management masters should not make significant, contentious rulings in the absence of clear notice and the opportunity to meet and respond to the order sought. If the proceeding is not settled at the pre-trial conference, the presiding judge or case management master may establish a timetable and, subject to the direction of the regional senior judge or judge designated by him or her, fix a date for the trial or hearing (r. 50.07(1)(a)) or order a case conference under r. 77.08 if it is impractical to establish a timetable and the proceeding is governed by R. 77 (r. 50.07(1)(b)).

The judge who conducts the pre-trial conference shall not preside at the trial or hearing, except with the written consent of all the parties (r. 50.10(1)). Further, r. 50.09 directs that nothing should be communicated to the judge or officer presiding at the hearing of the proceeding or a motion or reference in the proceeding regarding what was discussed at the pre-trial conference except as disclosed in an order made under r. 50.07 or in the pre-trial conference report under r. 50.08. These provisions are intended to ensure that parties can speak freely, negotiate openly, and consider recommendations from the pre-trial judge or case management master without concern that anything that is said may be used against them later in the proceeding.

If a trial or hearing date is fixed under r. 50.07(1)(a), the presiding judge or case management master must complete a pre-trial conference report. The report shall state what steps need to be completed before the action is ready for the trial or hearing, how much time is needed to complete those steps, the anticipated length of the trial or hearing, and any other matter relevant to scheduling the trial or hearing (r. 50.08(1)). Each party or the party's lawyer must certify on the copy of the pre-trial conference report that is placed with the trial or application record that he or she understands the contents of the report and acknowledges the obligation to be ready to proceed on the date fixed for the trial or hearing (r. 50.08(3)). In addition, each lawyer who represents a party must undertake to the court to advise the party of the contents of the pre-trial conference report and the obligation to be ready to proceed on the date fixed for the trial or hearing (r. 50.08(4)).

In addition to R. 50, counsel should be aware of practice directions that prescribe pre-trial requirements that are specific to a particular type of proceeding or region. For instance, the Commercial List Practice Direction, provides that the court may schedule intensive pre-trials for entire cases or significant matters within cases; these pre-trials are booked through the Commercial List Office (Commercial List Practice Direction, para. 47). The

Commercial List Practice Direction requires each party to deliver to the other parties at least five days before the pre-trial a pre-trial brief containing information described at para. 47. For Toronto proceedings, Part IV of the Toronto Practice Direction stipulates that the party who receives a certification form to set pre-trial and trial dates from the Civil Trial Office, sent approximately 60 days after the trial record is filed, must complete and return the form after consultation with the opposing counsel or party. Since practice directions are introduced, amended, and revoked from time to time, counsel should ensure that they are aware of current practice directions that apply to their practice.

Pre-trial conferences are very useful. Litigation often acquires a momentum of its own. Parties can become set in their positions or unwilling to accept negative advice from their counsel. Therefore, the opportunity for an expression of opinion from an experienced trial judge or case management master, without actually going to trial, can be of great assistance in adding a more realistic perspective to the parties' assessment of their cases.

7. Admissions – R. 51

Any party to an action or application may serve a request to admit on another party (Form 51A) pursuant to R. 51, requesting that the truth of a fact or the authenticity of a document be admitted (r. 51.02(1)). The purpose of this procedure is to limit the issues at a trial or hearing by obtaining admissions on matters that otherwise would incur time and expense to be formally proved at trial. Thus, it is both a useful tool in the discovery process and an excellent method of reducing the issues at trial.

Requests to admit may be used in different ways by different counsel. While they can be very useful in the right case, counsel should be selective in when they serve requests to admit and for what purpose. There are two general situations where a request to admit can be particularly useful. First, in situations where obtaining the admission may save you either time or money or allow you to avoid calling a witness who might otherwise damage your case. Second, in situations where you know the other side will not admit a fact but proving the fact will be expensive. Service of a request to admit in the second situation may allow you to recover additional costs for proving the fact pursuant to r. 51.04.

A party should serve a request to admit the authenticity of business records and the requisite notice under s. 35(3) of the *Evidence Act*. While r. 51.02(1) suggests that the request to admit may be served at any time, a request to admit must be served more than 20 days prior to the start of a trial so that the time for response expires before the commencement of trial.

The party on whom a request to admit is served is required by r. 51.03(1) to respond within 20 days (Form 51B). Failure to do so will result in the party being deemed, for the purposes of the proceeding only, to admit the truth of the facts or the authenticity of the document in question (r. 51.03(2)). The response must be specific. The responding party will be deemed to have admitted the truth of the facts or the authenticity of the documents unless the response contains a specific denial or a refusal to admit the truth setting out the reason for that refusal (r. 51.03(3)). Parties are discouraged from making blanket denials by the cost provisions in r. 51.04. This rule confers a general discretion on the court to take an unreasonable denial into account when awarding costs.

An admission, whether it is deemed, made deliberately in response to a request to admit, or contained in a pleading, can be withdrawn on consent or with leave of the court (r. 51.05). Under the current *Rules*, an amendment to a pleading withdrawing an admission will be permitted where it is shown that

- what is proposed to replace the admission raises a triable issue;
- the party seeking to withdraw the admission has a reasonable explanation for its change of position; and
- any prejudice to the other party caused by the withdrawal can be compensated by costs.

Under r. 51.06, a party may bring a motion for judgment or other relief to which it is entitled as a result of admissions obtained from a party, whether in response to a request to admit, in an affidavit, at discovery, or at some other examination. The same is true of admissions in pleadings, although the motion can be made only in the same proceeding (r. 51.06(2)). Such motions can be brought without waiting for the determination of any other question between the parties.

Rule 51.06 can be usefully combined with a summary judgment motion under R. 20. This strategy can be employed when the admissions made by a party in the proceeding support an argument that there is no genuine issue for trial. In particular, a party to the proceeding can put forward motion evidence, using the sorts of admissions enumerated in r. 51.06, to pursue summary judgment. If successful, the moving party may dispense with the proceeding without a trial on the basis of admissions made in affidavits, on examination for discovery, or in responses to requests to admit.

8. Simplified procedure – R. 76

Counsel should be aware that there are specific provisions governing actions commenced under the simplified procedure mandated by R. 76.

Preparing for trial: marshalling the evidence

1. Overview

The first step in preparing for the trial of an action is gathering the evidence. That evidence consists of the testimony of witnesses, admissions, and documentary evidence. You should prepare a trial brief of all necessary material for use during the trial. Likewise, a law brief for the judge's reference is strongly recommended.

2. Witnesses

The primary consideration in deciding which witnesses to call at trial is that the facts constituting the cause of action or the defence must be proved. Facts proven by the other side that are harmful to your case must not be left uncontradicted or unexplained. You must know the evidence to which witnesses will testify.

Responsible lawyers will review with their clients the witnesses who will be called so as to obtain instructions. It is important that the client have some input into the choice of witnesses.

2.1 Simplified procedure – Rule 76

If the trial is proceeding under the simplified procedure of R. 76 of the *Rules of Civil Procedure (Rules)*, each party must include a list of names and addresses of persons who might reasonably be expected to have knowledge of matters in issue in the action in each party's affidavit of documents, unless the court orders otherwise (r. 76.03(2)).

A party may not call as a witness at trial any person whose name has not been included in such list unless the court orders otherwise (r. 76.03(3)). This means that consideration of witnesses must begin very early on in the process.

2.2 Statements

It is good practice to get a complete statement from every witness who might have knowledge of the facts. You may interview any witness (other than the opposite party or its experts) and take a statement from the witness. It does not matter that a witness may have been summoned by another party or that the witness may have already given a statement to another party. Be cautious in your dealings with any witness to avoid any suggestion of witness tampering or of persuading a witness to misstate the evidence.

Although not necessary, it is preferable to obtain written statements from witnesses. Some witnesses feel uncomfortable providing a written statement.

2.2.1 Contact

When taking a statement, remember that the *Rules of Professional Conduct* prohibit a lawyer from contacting a person who is represented by another lawyer, except through or with the consent of that person's lawyer (r. 6.03(7)). The *Rules of Professional Conduct* also require that you disclose to the witness your interest in the litigation, regardless of whether the witness is represented by a lawyer (r. 4.03).

2.2.2 Questioning

Interview witnesses separately. When you first speak with a witness, do not ask leading questions (i.e., questions that suggest their own answers). This will ensure that you get an honest reflection of the witness's memory, uninfluenced by the presence or recollection of other witnesses or your own statement of the facts.

2.2.3 Content

The statement should be taken down as it is given. It must be as precise as possible, particularly if the witness is adverse. At the beginning, the statement should contain personal information about the witness, i.e., age, date, and place of birth, occupation, and present (and perhaps previous) address. Including this information will make it difficult for the witness to deny the making of the statement or of its contents later on.

The statement should also set out facts about which the witness has no recollection and those matters that the witness did not or could not perceive. It is important to "tie the witness down"; if a witness testifies in court at variance with a previous written statement, the witness may be cross-examined on it.

2.2.4 Verification

When completed, the statement should be handed to the witness for verification and correction in the witness's own handwriting. The witness should also be asked to sign the statement. If a witness verifies and signs the statement, it will be difficult for the witness to say later on that the witness did not understand the statement,

was misquoted, or meant something else. A witness who refuses to sign the statement may still agree to initial it.

2.2.5 Assessment

All of the witness statements should be analyzed and assessed in light of each other. You will have to address apparent inconsistencies and consider how to deal with them at trial.

A lawyer should advise the client about the assessment of the witness so that the client can make an accurate decision when evaluating the relative strengths and weaknesses of the case.

2.3 Experts

Consider whether expert opinion is necessary. If so, be sure to retain an individual with the proper expertise—ideally, both academic and practical—for the issue at hand. If your chosen expert has not been involved in the earlier investigation and preparation of the case, apprise him or her of all the facts, documents, and other materials necessary for the expert to make a fully informed assessment and on which to base the expert's opinion.

Likewise, ensure that any charts, diagrams, or other demonstrative evidence that will be used by the expert to illustrate the expert's testimony are prepared well before trial.

Note that every expert engaged by or on behalf of a party to provide evidence concerning a proceeding under the *Rules* has a duty to provide opinion evidence that is fair, objective, non-partisan, and related only to matters within the expert's area of expertise. Every expert so engaged also has a duty to provide such additional assistance as the court may require to determine a matter in issue (r.4.1.01).

2.3.1 Service of expert report — r. 53.03

Any party who intends to call an expert witness at trial must serve, on every other party to the action, a report signed by the expert and containing the information required under r. 53.03(2.1) not less than 90 days before the pre-trial conference required under R. 50 (r. 53.03(1)).

Likewise, a party who intends to call an expert witness at trial to respond to the expert witness of another party must serve, on every other party to the action, a report signed by the expert and containing the information required under r. 53.03(2.1) not less than 60 days before the pre-trial conference (r. 53.03(2)).

The parties shall agree to a schedule setting out dates for the service of experts' reports to meet the requirements

of rr. 53.03(1) and (2) within 60 days after the action is set down for trial, unless the court orders otherwise (r. 53.03(2.2)).

Late service of an expert's report is subject to court order. From time to time, both sides have served reports "out of time," and an accommodation can be made.

2.3.2 Prepare the expert

Prepare the expert for examination and cross-examination. Some experts will be thoroughly familiar with the courtroom, while others may require the same kind of initial preparation as any other witness.

Review the expert's report and *curriculum vitae* thoroughly with the expert. You may need considerable time with the expert to understand the report and to acquire enough background in the area it addresses to pose the questions necessary so that the trier of fact will understand the report, too. You may even want to have the expert help you frame the questions to be asked.

When preparing for the direct examination of an expert, ensure that any terminology used by the expert will be explained and understood by the judge or jury. Simplify the evidence of the expert as much as possible.

2.3.3 Other expert reports

Review all of the other experts' reports that have been obtained from the other parties with your expert. Your expert may be able to point out frailties in the other reports and suggest other materials that may help you to understand the other reports.

2.3.4 Attendance and fee

Arrange the expert's attendance at trial. Have a clear understanding about the fee to be charged by the expert so that you may get proper authorization from your client and sufficient funds to pay the expert when the expert's services have been rendered.

2.4 Choice of witnesses

When more than one witness is available to establish a particular fact or facts, you must decide which witness to call at trial. In making this decision, consider the following:

- the basic credibility, demeanour, and reputation of the witness.
- the witness's ability to testify effectively, including the extent of the witness's knowledge of the subject matter and any vulnerability that the witness may have on cross-examination.
- whether the opposing lawyer is likely to call the witness. Note that there is no property in a witness,

which means that no party to a proceeding “owns” any witness.

- whether the witness can be harmful on other issues. If a witness is helpful on some points but harmful on others, it may be better not to call the witness if the opposite side can be “forced” to call the same witness. That way, you can elicit the helpful testimony you seek on cross-examination (rather than on examination-in-chief) of the witness. Since it is assumed that a witness is favourably disposed to the party who calls him or her, favourable evidence obtained on cross-examination is usually more effective than evidence given in chief.
- whether the witness will be considered independent. If a witness is independent, the witness’s testimony will usually be considered to be more persuasive.
- whether the witness has given evidence about the same issue at another hearing. If this is the case, the witness should review the transcript of the previous testimony before trial since the witness may be cross-examined about the prior testimony.

The lawyer should obtain clear instructions from the client, especially if not calling a potentially important (but possibly unhelpful) witness.

2.5 Taking evidence before trial — R. 36

There may be some witnesses whose testimony you want to have at trial, but who may not be able to attend at trial. For example, if a witness’s health would prevent him or her from attending or if it is possible that a particular witness will be outside the jurisdiction of the court at the time of trial, other arrangements will have to be made.

Rule 36 provides for the evidence of a witness to be taken by examination before trial, with leave of the court or the consent of the parties. The person’s testimony may then be tendered as evidence at trial. The rule also sets out the circumstances that the court will take into account in considering whether to exercise its discretion to order such an examination.

2.5.1 Outside Ontario

Evidence may be taken from a witness who resides in or outside Ontario. Where the witness resides outside Ontario, r. 36.03 provides that the order permitting the examination shall, if the moving party requests it, provide for the issuing of a commission and letter of request under r. 34.07.

2.5.2 Evidence not discovery

Evidence taken before trial under R. 36 is not a form of discovery. It is evidence obtained other than by calling the witness at trial. In an examination under R. 36, a witness may be examined, cross-examined, and re-examined in the same manner as at trial.

2.5.3 Use of evidence — r. 36.04

Any party may use the transcript (or videotape or other recording) of an examination under r. 36.01 or 36.03 of a witness who is not a party as the evidence of the witness at trial, unless the court orders otherwise. The court may order otherwise if the witness ought to give evidence at the trial or for any other sufficient reason.

If the witness who has been examined under r. 36.01 is a party, the transcript (or videotape or other recording) of the examination may be used at trial as the evidence of that witness only with leave of the trial judge or the consent of the parties (r. 36.04(4)).

2.5.4 Rules of evidence apply

Evidence taken before trial, like evidence given at trial, may not be used at trial if there are valid objections to it. Rulings that may have been made by a commissioner appointed to take the evidence before trial are not binding on the trial judge, who may rule on the admissibility of the evidence (r. 36.04(6)).

2.5.5 Affidavit evidence — r. 53.02(1)

Note that r. 53.02(1) provides that before or at the trial of an action, the court may make an order allowing the evidence of a witness, or proof of a particular fact or document, to be given by affidavit, unless an adverse party reasonably requires the attendance of the deponent—that is, the person making the sworn statement—at trial for cross-examination.

2.6 Order of witnesses

Plan the order of calling your witnesses carefully so that your evidence will be adduced in the most effective manner possible. Usually, chronological presentation of the facts is the most logical order. This means that the story will simply be told from the beginning to end.

Be aware that there may be a good reason to develop the case in a non-chronological way. As a matter of strategy, you may want to start off with the evidence that has the most impact. This evidence may not “start the story.”

2.6.1 Party as first witness

Often, the first witness will be the party himself or herself. The party normally has had the most involvement in the facts and usually will be the source of most of the evidence on which you intend to rely.

If the party is the first witness called, that party will set the tone for trial. Since a party is entitled to be present during the testimony of other witnesses, having the party testify first may bolster the impression that the party’s evidence is uninfluenced by the evidence of other

witnesses to follow. Therefore, the party's testimony may appear to be more credible.

2.6.2 Strong finish

Consider carefully where the party best fits in your order of witnesses to be called. If the party is not particularly strong for some reason, it may be better to start with a witness who will give good evidence and who is not likely to be harmed in cross-examination. Often, it is advantageous to have a strong witness testify towards (or even at) the end of your case, so that the case ends on a positive note.

2.7 Failure to call witness or party

If a witness is equally available to both sides, little can be inferred from the failure of either side to call the witness. However, there are circumstances in which the court may draw an adverse inference from the failure of a witness to testify.

If a witness who was not called to testify was an employee, friend, or relative of a party and adverse evidence was given by other witnesses about facts of which the witness who was not called has knowledge, the court may infer that the testimony, if given, would not have supported (or would have been unfavourable to) the party who should have tendered it. This may be the case, unless the witness's failure to testify is explained satisfactorily.

The failure of a party to testify does not, in itself, constitute evidence or lead to an unfavourable inference. If a party fails to testify where adverse evidence has been given and the party is taken to have knowledge of the facts such that the party would be a useful and important witness, the party's failure to testify may be regarded as an admission of the truth of the adverse testimony.

2.8 Re-interview

At a reasonable time before trial, you should re-interview important witnesses to prepare them to give their evidence at trial. It is improper to suggest what a witness's testimony ought to be; but where a prospective witness makes statements in conflict with other witnesses, physical facts, or documentary evidence, it is perfectly proper to review any discrepancy with the witness and make an honest attempt to explain, reconcile, or eliminate these conflicts.

2.8.1 Weak evidence

Where there appears to be any inaccuracy or indefiniteness, a witness should be politely cross-examined, informed of the weaknesses in the witness's testimony, and given an opportunity to clarify the

evidence and explain himself or herself. If the evidence is still unsatisfactory, consider whether the witness should be called or whether further testimony should be secured to clarify or amplify the witness's testimony.

2.8.2 Acknowledge discussion

Tell witnesses whom you intend to call at trial that they may be asked in cross-examination whether they have discussed their evidence with you before trial. Contrary to what many witnesses may think, there is nothing improper about such prior discussion. Tell the witness to acknowledge, if asked, that the witness has discussed the evidence with a lawyer and was told to tell the truth.

2.9 Instructions to witnesses

2.9.1 Dress

Witnesses should be told that they need to dress neatly and appropriately for court. How they look will have an effect on the judge or jury's assessment of the credibility and reliability of their testimony. Similarly, how they express themselves will also have an impact. Addressing a judge as "Sir" or "Madam" is acceptable and should be encouraged.

2.9.2 Speaking voice

Witnesses should be told to speak up so that they will be heard by the judge and jury and to not speak too quickly, since the judge will be taking notes. You can lead by example in court, speaking at a proper pace and at sufficient volume. It is your responsibility to ensure that the witness can be heard.

2.9.3 No memorization

During your final preparation of a witness you will be calling, put your questions to the witness in the same manner as you expect to ask the questions at trial. This will enable the witness to become comfortable with the form and style of your questioning as the witness will hear it in court.

Be conscious of whether the witness appears to have memorized responses. Memorization makes the witness an easy target for an effective cross-examination. You are preparing the witness to be able to express the facts to which the witness can testify in the witness's own words, not by rote.

2.9.4 Review exhibits and documents

You should review all of the documents and transcripts from all parties to the action with your client prior to trial. In the case of a non-party witness, go over any exhibits or documents that the witness will have to identify, interpret, or testify about during the course of

the witness's examination. If the witness has to testify about a physical fact, such as the description of an accident location, the witness should go to the scene of the accident to refresh the witness's recollection about the physical details.

You should visit the scene with the witness so that you will have the same picture in your mind of it as the witness does during the course of the examination. Since you will be looking at the scene from a fresh viewpoint, you may pick up on important details that may not be immediately obvious to the witness.

2.9.5 Cross-examination

Prepare each witness to be called for both direct examination and cross-examination. If you assume the role of the opposing lawyer and cross-examine the witness in preparation for trial, you may guard against the witness becoming excited, flustered, or embarrassed on actual cross-examination at trial, a situation that could jeopardize the witness's credibility.

Some witnesses may be especially vulnerable to an attack on their credibility during cross-examination by opposing counsel due to a pecuniary interest in the case, friendship with your client, bias, a previous conviction, etc.

2.9.6 Guidelines

Provide each witness with the following guidelines about answering questions during cross-examination:

- Listen to every question carefully and do not answer it until the question has been concluded. This will allow you to be sure of the intent of the question and to avoid falling into any traps.
- Answer questions truthfully, but respond only to the questions being asked. Do not volunteer answers to questions that are not being asked.
- Readily admit to errors or inaccuracies in your testimony, and correct them at the first possible opportunity. A forthright correction should not mar your credibility.
- Answer politely. Avoid arguing with the opposing lawyer.
- Do not guess at or assume any answers. Where appropriate, state that you do not know the answer to a particular question, are uncertain, or have forgotten.
- Refresh your memory prior to testifying by reviewing any previous testimony you have given about the issues, such as on an examination for discovery or at an inquest. Also, review any statements you have given and any documents relating to your evidence.

- If the lawyer objects to a question put to you, do not answer the question. Wait until the judge has dealt with the objection.

2.9.7 Trial date

Keep witnesses informed of the probable trial date of the action. They must be prepared to attend when the matter is called to trial.

2.10 Summons to witness — r. 53.04(1)

Take the necessary steps to ensure that all of the witnesses required for trial will attend. Subrule 53.04(1) provides that a party who requires the attendance of a person in Ontario as a witness at trial may serve the witness with a summons to witness (at hearing) set out in Form 53A.

The summons requires the witness to attend at the trial at the time and place stated in the summons. It also may require the witness to produce, at trial, the documents or other things in the witness's possession, control, or power relating to the matters in question in the action that are specified in the summons.

2.10.1 Issuance and service

The summons is issued by the registrar, who signs and seals it in blank on payment of the prescribed fee. Complete the summons and insert the names of the witnesses (r. 53.04(2)).

The summons to a witness must be served on the witness personally. Attendance money, as calculated in accordance with the tariff, must be paid or tendered to the witness when the summons is served (r. 53.04(4)). Once served, a summons to a witness continues to have effect until the attendance of the witness is no longer required (r. 53.04(6)).

2.10.2 Outside Ontario

Rule 53.05 provides for a summons to a witness outside Ontario under the *Interprovincial Summonses Act*. Such a summons may be enforced in any other province that has similar reciprocal legislation. Since an application may have to be made to the Superior Court to have the summons adopted in another province, the summons should be prepared and sent to the other province well before trial.

A summons (referred to as a “*subpoena*”) to a person located in Quebec is governed by, and remains effective pursuant to, the provisions of a pre-Confederation statute, which are reproduced in ss. 19–20 of Ontario's *Evidence Act*.

2.10.3 Adverse party — Evidence Act, s. 8

Under s. 8 of the *Evidence Act*, an adverse party is a compellable witness. The attendance at trial of an adverse party or of an officer, director, employee, partner, or sole proprietor of an adverse party may be secured by serving a summons to witness. Alternatively, you may serve on the adverse party (or the adverse party's lawyer) a notice of intention to call the person as a witness (r. 53.07(2)).

2.10.4 Notice of intention to call — r. 53.07(2)

A notice of intention to call a person as a witness must be served at least 10 days before the commencement of the trial. Where a summons to witness or a notice of intention is served, the appropriate attendance money calculated in accordance with Tariff A must be paid or tendered.

3. Admissions

3.1 Pleadings — rr. 25.07 and 25.09

Where facts are clearly admitted, no further proof (i.e., in the form of witness testimony) is needed. The first place to look for admissions is in the pleadings of the opposite parties. Rule 25.07 obliges a party to admit in a defence every allegation of fact in the opposite party's pleading that the party does not dispute.

Silence in a statement of defence about any allegation of fact in the statement of claim is deemed to be an admission, unless the party pleads that the party has no knowledge of the fact alleged (r. 25.07(2)).

Similarly, r. 25.09 requires a party who delivers a reply to admit every allegation of fact in the opposite party's defence that the party does not dispute.

3.2 Discovery transcript — r. 31.11

A second place that the lawyer should look for admissions by an opposing party is in the examination for discovery transcript. At the trial, a party may read into evidence as part of the party's case against an adverse party any part of the evidence given on the examination for discovery of the adverse party that is otherwise admissible. The admission may be read into evidence whether or not the party has already given evidence in the proceedings (r. 31.11).

3.2.1 Hearsay

Note that a hearsay statement that a party makes on an examination for discovery is "otherwise admissible" and may be read in as part of the case. It constitutes an admission against interest—and will be properly characterized as such if the opposite party wishes to use

it—and is therefore admissible as an exception to the hearsay rule.

3.2.2 Context

Carefully analyze all admissions obtained on discovery to determine whether and to what extent they should be read in as part of the case. Ensure that no part of the subject of the admission is harmful to the case or is so connected with a harmful part of the examination for discovery that the trial judge may direct that the harmful part also be read in. When answers to questions asked on discovery are read in, all of the answers equally may be relied on and accepted by the trial judge.

3.2.3 Impeachment — Evidence Act, ss. 20–21

Evidence given on an examination for discovery may be used to impeach the testimony of the deponent as a witness in the same manner as any previous inconsistent statement by that witness (r. 31.11(2)). Sections 20–21 of the *Evidence Act* require that a prior inconsistent statement be put to the witness before its introduction into evidence.

A defendant may read admissions into evidence from the plaintiff's examination for discovery, but the defendant cannot read in parts of the examination for impeachment purposes without first complying with the provisions of the *Evidence Act*.

3.2.4 Admissions of "adverse party"

Only the evidence on discovery of an "adverse party" may be introduced at trial (r. 31.11(1)). This means that the plaintiff or defendant may only introduce evidence given on examination for discovery of such a party. Evidence given by Defendant A on examination for discovery regarding the conduct of Defendant B may be read into the trial record by the plaintiff against Defendant B, if Defendants A and B are adverse in interest. Otherwise, the plaintiff may not read into the trial record such evidence.

3.3 Other sources — RR. 50 and 51

Admissions may also be obtained about facts and the authenticity of documents by serving a request to admit under R. 51. Further, under R. 50, admissions may be obtained at the pre-trial conference. Such admissions may be noted on the record by the pre-trial conference judge.

3.4 Agreed statement of facts

In some cases, you may want to consider using an agreed statement of facts. Such a statement is voluntarily worked out by the lawyers for all parties and is submitted

to the court as a mutually acceptable statement of facts on which the case is to be decided. This mechanism is particularly useful in cases involving the interpretation of a contract or statute in which there is little or no dispute about the facts. Be sure to get specific authority from your client before drafting and submitting an agreed statement of facts.

Lawyers should be exceptionally vigilant in agreeing on any facts and should consider all possible ramifications of making such agreements.

4. Documentary evidence

In addition to obtaining all relevant documentation in your client's possession, you also should have obtained all of the other parties' relevant documentation through the discovery process. All documentary evidence—including both paper documents and documents created, received, or stored electronically within an electronic system—needs to be properly assembled, organized, and preserved. The size and volume of electronic documents, coupled with the variety of formats in which such documents are stored, may render the preservation of such documents especially challenging.

4.1 Privacy legislation

Where the gathering of information involves the collection, use, or disclosure of *personal* information or access to such information, the requirements of applicable privacy legislation must be met. The *Personal Information and Electronic Documents Act (PIPEDA)* regulates the collection, use, and disclosure of personal information for federally regulated private sector commercial entities and for private sector organizations in provinces such as Ontario that have not enacted substantially similar legislation to *PIPEDA*. Ontario also has specific legislation that governs the collection, use, and disclosure of personal health information via the public health care system.

4.2 Organization

How you organize this evidence may vary depending on the type of case involved and your preference. The following are guidelines for organizing documentary evidence:

- Original documents should be kept in their original state and should never be written on or otherwise marked. Similarly, the original file should not be broken up nor should documents be removed from it, since the file's original integrity is itself a valuable source of information. When you want to work with the documents, use photocopies. When receiving photocopies from an opposite party, be sure to inspect the original documents. There may have been notations, interlineations, underlining, or

other marks on the originals that were not photocopied but that may be of great importance in understanding and meeting the case of the opposite party.

- Each document should be assigned a separate code number. Depending on the case, you may wish to put the code number in one corner of the document or, alternatively, have a numbered file folder for each document. Documents for which privilege is claimed may be separately identified through the coding system (i.e., by adding the initial "P" to the code number).
- There should be an index to help find specific documents and to organize the documents into subject areas.
- Particularly where there is a large number of documents, some form of cross-indexing is necessary so that any document may be found by reference to its code number, the number in your affidavit of documents or that of your opposite party's affidavit of documents, etc. A subject cross-index may also be helpful at trial if topic areas have been sufficiently well defined to enable documents to be classified but not so narrowly defined that the borderline between topics becomes too obscure.
- A computer may be of great assistance in organizing the documents and allowing lawyers to assemble the relevant evidence.

4.3 Brief of documents

Where possible, it generally is a good idea to co-operate with the opposing lawyer and consent to the introduction of as many documents as possible. In such circumstances, a brief of documents will save a great deal of trial time and assist the judge in easily working with and referring to the documents during the course of the trial.

If the parties' lawyers have agreed to submit a documents brief, admissibility is usually admitted.

4.4 Proof of documents

Where the lawyers cannot agree on the documentation to be admitted, either informally or through a request to admit under R. 51, they must determine how and by whom documents are to be proved at trial. Statutory provisions relating to evidence and the common law will have to be considered.

4.4.1 Proving documents — Evidence Act, ss. 24–29 and 31–35

Sections 24–29 and 31–35 of the *Evidence Act* contain provisions for the proof (in the absence of evidence to the contrary) of documents such as letters patent; copies of statutes; copies of official or public documents where the original record could be received in evidence; copies of

entries in a book of record kept in a bank; electronic records; and any writing or record made of any act, transaction, occurrence, or event if made in the usual and ordinary course of any business.

4.4.2 Business records — s. 35

Business records are admissible under s. 35 of the *Evidence Act* only if at least seven days' notice of the intention to introduce them has been given to all other parties in the action and an opportunity to inspect the documents has been provided within five days after notice being given to produce same.

4.4.3 Medical reports — s. 52

Similarly, medical reports are admissible under s. 52 with leave of the court after at least 10 days' notice has been given to all other parties.

4.4.4 Telegrams, letters, etc. — s. 55

Section 55 stipulates that at least 10 days' notice must be given to other parties where a party intends to prove the original of a telegram, letter, shipping bill, bill of lading, delivery order, receipt, account, or other written instrument used in business or other transactions. The notice must name a convenient time and place for the inspection of same.

4.4.5 Canada Evidence Act

If the *Canada Evidence Act*—which is not identical to Ontario's *Evidence Act*—applies to the proceedings, ensure that its provisions have been complied with for the introduction of documentary evidence.

5. The trial brief

You should prepare a trial brief of all necessary materials for easy reference at trial. The brief should be indexed and divided by tabs. It should contain the following material:

- copies of all pleadings in the state of their final amendments (except where the amendments indicate a material change in position, in which case you will want to have a copy of the pleading both before and after amendment).
- copies of all relevant orders or other proceedings that may affect the conduct of the trial. Affidavits and other material in support of motions are

relevant and should be included in the brief if they contain statements about the facts in issue in the action or if you may want to use them in preparation for cross-examination.

- copies of all affidavits of documents and requests to admit, with responses.
- copies of the essential documents.
- a master index of documents.
- all witness statements or a summary of the evidence of each witness.
- all expert reports and opinions.
- an analysis of the case and the issues (i.e., how the case is to be proved or defended).
- a collation of the evidence, including
 - a statement of all material facts;
 - a chronology of events;
 - summaries of and an index to examinations for discovery;
 - a prepared list of exhibits and memorandum as to proof;
 - any memoranda of law;
 - any memoranda to the other parties' lawyers; and
 - agreements and court orders about the conduct of the trial.

5.1 Other items

Your notes for the opening statement and closing argument, as well as for examination and cross-examination of witnesses, should be prepared and kept in the same (or a separate) brief.

5.2 Brief of law

You should also prepare a brief of law for the judge, including any statutes, regulations, and cases that you have properly indexed, tabbed, highlighted, and paginated. Since there may be argument on the admissibility of particular items of evidence at trial, you may want to prepare a brief of law for any such argument.

The brief of law should ordinarily be submitted to the trial judge at the beginning of the trial so that the trial judge can read the relevant case law while the trial is progressing.

1. Overview

After all of the evidence for trial has been marshalled, a number of preliminary matters need to be considered immediately before (or at the start of) trial. These matters may include any of the following: the consequences of a failure to attend at trial; a request for an adjournment; a motion to amend the pleadings, to strike the jury notice, or for leave to call more than three witnesses; jury selection; and a request to exclude witnesses.

In addition, the following aspects of the conduct of the trial should be considered: the order of presentation; marking documents as exhibits; and adducing evidence at trial—the applicable statutory and common-law rules, evidence by affidavit, expert witnesses, compelling attendance at trial, calling an adverse party as a witness, evidence that is admissible only with leave, and the failure to prove a fact or document.

Finally, consider the presentation of the case:

- the opening statements;
- examination-in-chief;
- cross-examination;
- re-examination (if any);
- objections; and
- closing arguments.

2. Preliminary matters

2.1 Failure to attend at trial — r. 52.01

Subrule 52.01(1) of the *Rules of Civil Procedure (Rules)* authorizes the judge to strike an action off the trial list if all parties fail to attend when the action is called for trial. The judge also may proceed with the trial in the absence of one of the parties.

If the defendant has failed to attend, the trial judge may allow the plaintiff to prove the claim and dismiss any counterclaim. In such case, the plaintiff must prove sufficient facts to entitle the plaintiff to judgment. The proof should be brief, except perhaps for damages, which may require the same type of proof that would be adduced if the defendant had appeared.

Where the plaintiff has failed to attend, the judge may dismiss the action and allow the defendant to prove any counterclaim. Any judgment obtained against a party who has failed to attend at the trial may be set aside or

varied by a judge on such terms as are just (rr. 52.01(2)–(3)).

2.2 Adjournment of trial

A judge has the discretion to postpone or adjourn a trial to such time and place and on such terms as are just (r. 52.02). If a lawyer needs to request an adjournment, all other parties and the court must be alerted about the request as soon as possible.

The lawyer should be prepared to proceed should the adjournment not be granted. Trial judges generally are reluctant to grant adjournments, particularly where one party is prepared and anxious to proceed.

2.2.1 Compelling reason

An adjournment may not be granted, even where both parties request it, unless there is a compelling reason for it (i.e., the sudden illness of a party or essential witness or the departure of an essential witness under summons).

If there is any doubt about a witness attending voluntarily, serve a summons on the witness. If the witness fails to attend and no summons has been served, an adjournment may not be granted.

2.2.2 Discretion

An adjournment is entirely at the discretion of the trial judge; the exercise of that discretion usually is not interfered with on appeal. If a party does obtain an adjournment, the opposing lawyer may ask for terms, including costs of the day. “Costs of the day” can range as high as \$5,000 to \$10,000 or greater. A prudent lawyer will make sure that the lawyer’s client is aware that the cost consequences for an adjournment might be very significant.

2.2.3 Notice of motion

As a general practice, the court will accept a lawyer’s word about the facts on which an adjournment is sought. Where a lawyer knows in advance that the lawyer will be seeking an adjournment and anticipates (or knows) that it will be opposed, the lawyer should prepare an affidavit(s) setting out the reasons for the adjournment. The affidavit material must be served with a formal notice of motion before the action is called for trial.

Many times the affidavits that are filed in support of motions to adjourn a trial come from lawyers. Lawyers

are not permitted to submit an affidavit and then appear to argue the motion.

2.3 Motion to amend pleadings

2.3.1 Rule 26.01

A motion to amend pleadings should be made well before trial or, at the latest, at the pre-trial conference. If absolutely necessary, such motion may be made at the start of trial. While it may be made informally, without supporting material, to do so is risky.

A motion to amend pleadings should be made with a notice of motion and affidavit evidence showing why the issue was not raised earlier and why the amendment is necessary.

2.3.2 Prejudice

Rule 26.01 provides that, at any stage of an action, the court shall grant leave to amend a pleading on such terms as are just, unless to do so would result in prejudice that could not be compensated for by costs or an adjournment.

The responding party's expense of revising pleadings or of incurring further discovery, production, or trial preparation costs is not a form of prejudice that cannot be compensated for by costs or an adjournment under r. 26.01.

2.4 Motion regarding expert witnesses

2.4.1 Ontario's Evidence Act, s. 12; Canada Evidence Act, s. 7

Section 12 of Ontario's *Evidence Act* provides that no more than three witnesses who will give opinion evidence may be called by any one party without leave of the trial judge. Section 7 of the *Canada Evidence Act* provides that no more than five experts may be called without leave.

2.4.2 Application of limits

It is not clear whether these limits apply to each issue of fact or to a party's entire case. In *Bank of America Canada v. Mutual Trust Co.*, Farley, J. of the Ontario Court (General Division) held that each side in a trial is restricted to a total of three expert witnesses on all aspects of the case, unless the court grants leave to call more.

In practice, leave is generally given. It should be requested at the opening of trial, rather than after a party's first three experts have testified.

2.5 Motion to strike out jury notice — rr. 47.01 and 47.02

Rule 47.02 provides that a motion may be made to strike out a jury notice on the ground that a statute requires a trial without a jury or on the ground that the jury notice was not delivered in accordance with r. 47.01. Such motion usually is made well in advance of the trial.

If the notice is not struck out before the trial, the motion may be renewed at the start of the trial. The trial judge has the discretion to try the action without a jury "in a proper case" (r. 47.02(3)).

A motion to strike out a jury notice also may be made for the first time at the opening of trial. Likewise, if it becomes clear during the hearing that a trial by jury may be inappropriate, the motion may be brought at that time.

The trial judge may rule on the motion or reserve the decision and allow the case to proceed before the jury until the difficulties alleged by the lawyer as militating against a jury trial come to pass.

Motions to strike out a jury during the trial are usually based on "complexity," and often these motions are brought for strategic reasons.

2.6 Jury selection

2.6.1 Juries Act

Under the *Juries Act*, a jury panel usually consisting of about 100 prospective jurors is selected before the case is called to trial. Under that *Act*, a juror must reside in Ontario, be a Canadian citizen, and be at least 18 years of age in the year before the year for which the jury is selected.

2.6.2 Ineligible persons

Persons who are not eligible to serve as jurors include federal and provincial cabinet ministers and legislators; barristers, solicitors, and students-at-law; health practitioners and veterinary surgeons actively engaged in practice; coroners; and all law enforcement officers, including sheriffs, prison wardens, firefighters, and officers of the court of justice.

In addition, a person with a physical or mental disability (i.e., blindness, deafness, or any other disability that would seriously affect a person's ability to discharge his or her duties) as well as anyone convicted of an indictable offence who has not been pardoned is ineligible. Note that the spouses and common-law partners of those who are ineligible to serve on juries are eligible to serve.

2.6.3 Selection

The clerk or registrar of the court randomly selects the names of six persons from a drum or box containing the names of all persons on the jury panel. Those six people then take their place in the jury box.

Lawyers may wish to keep track of who is in the jury box at any given time during jury selection by writing the name, juror number, and occupation of each juror in the jury box. Lawyers can update this information as the composition of the jury box changes.

2.6.4 Challenges — Juries Act, s. 33

The lawyer for the plaintiff is then asked for a challenge, if any, of any juror in the jury box. The lawyer should respond by challenging the juror by juror number (as stated by the registrar at the time of selection). A juror who has been successfully challenged by the lawyer must leave the jury box and be replaced by another prospective juror.

The lawyer for the defendant is then asked for a first challenge, if any. The process is repeated until both sides indicate that they have no further challenges or until they have used the four peremptory challenges (challenges that need not be proved or supported by reasons) available to each side in a civil case.

There is no challenge for cause procedure in selecting civil juries. There is also no questioning of prospective jurors for bias, as in a criminal context.

Note that where there is more than one plaintiff or defendant separately represented, each side still has only four peremptory challenges among them. The lawyers may need to reach an agreement among themselves about the division and handling of challenges.

2.6.5 Information

In a civil case, lawyers usually have very little information on which to challenge prospective jurors and may not question jurors. A list of the panel of prospective jurors can be obtained from the sheriff on request. It will set out each prospective juror's name, address, and occupation.

This information may be the only information available to lawyers in selecting the jury. The lawyers may each carry out an independent investigation to obtain information about panel members, provided that they do not approach members of the panel. Lawyers are not advised to presume that they can “predict” the outcome of any civil trial based on their own views of the jurors' past behaviours.

2.6.6 Guidelines

The following guidelines may assist in selecting a jury:

- The prospective juror's occupation may provide some indication about the manner in which the juror would approach the case (i.e., the juror's reaction to the claim and allegations) and how the juror may deal with the evidence. Note that the description of occupations set out in the sheriff's list may be misleading or inadequate.
- Consider whether the prospective juror has anything in common with the client or with an adverse party, i.e., whether they come from the same neighbourhood, have the same occupation, are roughly the same age, etc.
- Consider the likely income levels of prospective jurors that may be suggested by their occupation or home address. Income levels may affect the level of damages that a juror would be prepared to award.

Once a jury has been selected, the trial judge will inform the jury of its duties and responsibilities and briefly explain the course and conduct of the trial. The judge will also probably provide a brief account of what the case is about. A lawyer should keep this in mind when preparing an opening address (if any).

The lawyer should consider if it is in the client's interest to have someone knowledgeable in medical issues (such as a registered nurse) on the jury. Another consideration is whether the lawyer wishes to have a self-employed individual as opposed to someone who may work in a factory or union environment.

2.7 Exclusion of witnesses — r. 52.06

A motion to exclude witnesses should be made before any evidence has been tendered. It is commonly made where there are issues of credibility to be determined. An order to exclude witnesses prevents subsequent witnesses from knowing the evidence that has been given before them.

Rule 52.06 permits the trial judge, at the request of any party, to order that a witness be excluded from the courtroom until called to give evidence. The order excluding witnesses may not include a party to the action or a witness whose presence is essential to instruct the lawyer for the party calling the witness (r. 52.06(2)).

When seeking an order to exclude witnesses, a lawyer should also seek (as part of the order) an exemption for any expert whose presence is essential to instruct the lawyer throughout the trial. In such case, the trial judge may require the party and/or the expert witness to give evidence before any other witnesses are called to give evidence on behalf of the client.

Where an order is made excluding a witness from the courtroom, none of the evidence given during the

witness's absence from the courtroom is to be communicated to the witness until after the witness has been called and has given evidence, except with leave of the trial judge (r. 52.06(3)). This prohibition applies strictly to all communication of trial evidence, either directly or indirectly, and whether explicitly or by intimation.

3. Order of presentation

The lawyer who has the onus of proof must begin and may open the case by addressing the judge or jury. Usually, it is the plaintiff who has the right to begin, even if the plaintiff has the burden of proving only one issue in the action (i.e., damages).

Where the plaintiff has nothing to prove (i.e., the defendant has admitted all of the facts in the statement of claim but has raised some other facts that, if proved, will defeat the plaintiff's claim), the defendant will have the right to begin, since the burden of proof lies on the defendant.

3.1 Opening and closing address — r. 52.07(1)

Subrule 52.07(1) provides that unless the trial judge directs otherwise, the plaintiff may make an opening address and then adduce evidence. A defendant may, with leave of the trial judge, make an opening address immediately after the plaintiff's opening address but before the plaintiff adduces any evidence.

When the plaintiff's evidence is concluded, the defendant may make an opening address (unless the defendant has already done so) and then adduce evidence. When the defendant's evidence is concluded, the plaintiff may then call any reply evidence. The defendant shall then make a closing address, followed by the closing address of the plaintiff. Where the defendant adduces no evidence, the plaintiff shall make the first closing address.

3.2 Order determined by judge — r. 52.07(2)

Subrule 52.07(2) permits the trial judge to reverse the order of presentation where the burden of proof in respect of all matters at issue in the action lies on the defendant. Where there are two or more defendants separately represented, the order of presentation shall be directed by the trial judge.

4. Exhibits

4.1 Marking and numbering — r. 52.04

Rule 52.04 governs the mechanical aspects of marking and numbering exhibits. Exhibits are to be numbered consecutively, and the registrar shall prepare a list

describing each exhibit and stating by whom each exhibit was put into evidence.

4.2 Foundation

In most cases, the necessary foundation to have a document marked as an exhibit can be established in one or two questions, such as the following:

Q: Do you recognize this document?

A: Yes.

Q: What is it?

A: It's a letter that I wrote to the defendant.

Lawyer: Your Honour, I ask that this letter be made the next exhibit.

4.3 Marking document as exhibit

The lawyer should be sure to ask the judge to have the document marked as an exhibit as soon as the witness has identified it and before any substantive questioning on the document. In making the request, succinctly describe the document for the court. This way, the judge may properly make a note of it, and the registrar will have and the transcript will contain an accurate description of it.

Since there will be no dispute about the authenticity or origin of most documents, it is proper and quicker to elicit the necessary information using leading questions, even in examination-in-chief of the lawyer's own witness:

Q: I'm showing you a copy of a letter dated June 20, 2011, addressed to the defendant, apparently signed by you. Do you recognize it?

A: Yes.

Q: Did you send this letter to the defendant?

A: Yes.

Lawyer: Your Honour, I ask that this letter be made the next exhibit.

4.4 Return of exhibits — r. 52.04(2)

Subrule 52.04(2) provides for the return of exhibits after the trial judgment on requisition by the lawyer or party who put the exhibit in evidence or the person who produced it and on the filing of the consent of all parties represented at the trial.

Otherwise, the exhibits remain in the possession of the registrar or the registrar of the court to which an appeal is taken until the time for an appeal has expired or the appeal has been disposed of. At that point, the registrar is to return the exhibits to the respective lawyers or parties who put the exhibits in evidence at the trial (r. 52.04(4)).

5. Evidence at trial

5.1 Evidence Act; Canada Evidence Act; R. 53

The provisions of Ontario's *Evidence Act*, the *Canada Evidence Act*, the common-law of evidence, and R. 53 apply to evidence adduced at trial. The *Evidence Act* applies to civil trials concerning matters that are within the jurisdiction of the provincial government (Ontario Legislature), whereas the *Canada Evidence Act* applies to all civil and criminal proceedings concerning matters over which the federal government (Parliament) has jurisdiction. Recall that s. 91 of the *Constitution Act, 1867* enumerates the subject matter over which Parliament may exclusively make laws (e.g., banking, criminal law, copyright, and any matter not assigned exclusively to the legislatures of the provinces). Likewise, ss. 92 and 93 of the *Constitution Act, 1867* list the subject matter over which the provincial legislatures may exclusively make laws (e.g., property, education, and municipal institutions).

The general rule is that witnesses at trial shall be examined orally by direct examination, followed by cross-examination, and then re-examination (r. 53.01(1)).

The trial judge is to exercise control over the questioning to prevent undue harassment or embarrassment (r. 53.01(2)). The trial judge may disallow any vexatious or irrelevant questions. Where a witness appears unwilling or unable to give responsive answers, the trial judge has discretion to permit the party calling the witness to use leading questions (r. 53.01(4)).

5.2 Interpreter

Where the witness does not understand the language in which the examination is to be conducted or is deaf or mute, a competent and independent interpreter shall be provided by the party calling the witness, unless the interpretation is to be from English to French or vice versa, in which case an interpreter is provided by the Ministry of the Attorney General (rr. 53.01(5)–(6)).

5.3 Telephone or video conference — r. 1.08(1)4

With the parties' consent and the presiding judge's permission, the oral evidence of a witness and argument may be heard or conducted by telephone or video conference (r. 1.08(1)4).

5.4 Evidence by affidavit

While oral examination of witnesses in court is the general rule, the court has discretion to make an order allowing the evidence of a witness or proof of a particular fact or document to be given by affidavit.

Such order may be made before or at the trial of an action, unless an adverse party reasonably requires the attendance of the deponent at trial for cross-examination (r. 53.02(1)).

Where the order has been made before the trial of the action, the trial judge may set it aside or vary it where it appears necessary to do so in the interest of justice (r. 53.02(2)).

5.5 Expert witnesses

5.5.1 Service of expert report — r. 53.03

Any party who intends to call an expert witness at trial must serve, on every other party to the action, a report signed by the expert and containing the information required under r. 53.03(2.1) not less than 90 days before the pre-trial conference required under R. 50 (r. 53.03(1)).

A party that intends to call an expert witness to respond to the expert witness of another party must serve, on every other party to the action, a report signed by the expert and containing the information required under r. 53.03(2.1) not less than 60 days before the pre-trial conference (r. 53.03(2)).

The parties shall agree to a schedule setting out dates for the service of experts' reports to meet the requirements of rr. 53.03(1)–(2) within 60 days after the action is set down for trial, unless the court orders otherwise (r. 53.03(2.2)).

Where such report—or a supplementary report under r. 53.03(3)—has not been so served, an expert witness may not testify with respect to an issue, except with leave of the trial judge (r. 53.03(3)). Subrule 53.03(3) states that a supplementary report should be served 30 days prior to the trial.

The decision in *Thorogood v. Bowden* stands for the proposition that an expert may expand and amplify the points raised in the expert's report and that the expert is not narrowly confined to the matters set out in that report. However, the expert may not open a new field that was not contained in the original report.

5.5.2 Evidence of expert

Before a witness may give expert testimony at trial, the witness must first be qualified by the court as an expert. The party who has called the witness to testify will engage in a detailed review of the witness's *curriculum vitae* with the witness on examination-in-chief. This includes a review of the witness's education, training, experience, publishing credits, etc.

If the witness has been qualified as an expert on other occasions, particularly regarding the same area of expertise about which the witness is now being called to testify, the party examining the witness will elicit details about these other occasions, which may help persuade the court to qualify the witness as an expert.

Once the party who has called the witness to testify is done establishing this foundation, that party will ask the court to find that the witness is qualified as an expert in the area in which the witness has been called to testify.

The opposing lawyer may object to this request and challenge any aspect of the foundation established on examination-in-chief in support of a finding of expertise (i.e., the credentials of the witness, the relevance of the witness's experience and/or training to any aspect of the dispute between the parties, etc.). It is then up to the trial judge to determine whether the witness is qualified to testify as an expert and to make a ruling accordingly.

In qualifying experts, it is important to be aware of the exact area of expertise. For example, a doctor may not be qualified as an expert in medicine, but rather narrowly qualified in the field of orthopaedics.

Note that every expert engaged by or on behalf of a party to provide evidence concerning a proceeding under the *Rules* has a duty to provide opinion evidence that is fair, objective, non-partisan, and related only to matters within the expert's area of expertise. Every expert so engaged also has a duty to provide such additional assistance as the court may require to determine a matter in issue (r. 4.1.01).

5.6 Medical reports — Evidence Act, s. 52

Medical reports prepared by “practitioners” are governed by s. 52 of the *Evidence Act*. A “practitioner” is defined under s. 52 as

- a member of a College as defined in the *Regulated Health Professions Act, 1991*;
- a drugless practitioner registered under the *Drugless Practitioners Act*; or
- a person licensed or registered to practise in another part of Canada under an Act that is similar to the *Regulated Health Professions Act, 1991* or the *Drugless Practitioners Act*.

5.6.1 Leave and notice regarding medical report

Section 52 of the *Evidence Act* provides that a practitioner report is admissible as evidence in an action with leave of the court and on at least 10 days' notice to all other parties. Along with notice, a party to the action is entitled to a copy of the report to be used as evidence,

as well as any other report of the practitioner that relates to the action, unless the court orders otherwise.

5.6.2 Evidence of practitioner

Except by leave of the judge presiding at the trial, a practitioner who signs a report about a party shall not give evidence at the trial unless the report has been given to all other parties at least 10 days before the start of trial.

If the practitioner gives evidence that the court is of the opinion could have been produced as effectively by way of a report, the court may order the party that required the attendance of the practitioner to pay costs in an amount that the court considers appropriate.

Where a medical report is filed by a party, the opposing party can demand that the doctor/expert be produced for cross-examination (see for example, *Stribbell v. Bhalla*).

Also, a party is not ordinarily required to both file a medical report and call the doctor (*Ferraro v. Lee*).

5.6.3 Rules vs. Evidence Act

It is not clear whether the shorter time requirements for filing medical reports under the *Evidence Act* apply to medical reports that are also expert reports. If a medical report deals only with issues of fact, with no opinion, diagnosis, or prognosis (i.e., a report about the condition of the plaintiff when brought into the emergency room), it would appear that the report would not be an expert report within the meaning of r. 53.03.

If the report does contain an opinion, then the report would be considered both a medical report and an expert report. Regardless of whether it could be successfully argued that r. 53.03, as part of a regulation, cannot alter a complete scheme pertaining to medical reports enacted by statute, the most prudent course would be to deliver all medical reports within the time frame set out in r. 53.03 for expert reports.

5.7 Compelling attendance at trial — r. 53.04(7)

5.7.1 Summons to witness

Where a witness whose evidence is material to an action has been served with a summons and the proper attendance money has been paid or tendered and the witness fails to attend the trial or to remain in attendance as required, the trial judge may cause the witness to be apprehended anywhere within Ontario and brought before the court by a warrant for arrest (r. 53.04(7)).

If apprehended, the witness may be detained in custody until the witness's presence is no longer required, or the witness may be released on terms. The witness may also

be ordered to pay the costs arising from the failure to attend or remain in attendance at the trial (r. 53.04(8)).

5.7.2 Witness in custody — r. 53.06; Administration of Justice Act

The court also has discretion under r. 53.06 to make an order for the attendance of a witness who is in custody where the witness's evidence is material to an action. In such case, the court will direct the officer having custody of the prisoner to produce the prisoner on payment of the fee prescribed under the *Administration of Justice Act*. The court has jurisdiction only over witnesses who are in custody in Ontario.

5.8 Calling adverse party as witness — r. 53.07

An adverse party who is in attendance at trial may be called as a witness without previous notice and without the payment of attendance money, unless the adverse party has already testified or the opposing lawyer undertakes to call the adverse party as a witness.

If an adverse party must be called, the lawyer should serve notice on the adverse party before the trial to ensure attendance.

The party calling an adverse party, and any other adverse party, has the right to cross-examine the adverse party called as a witness under r. 53.07(5). They are not limited to an examination-in-chief. Rule 53.07 also sets out sanctions for the failure of the adverse party to testify. These sanctions include granting judgment in favour of the party calling the witness, adjourning the trial, or making such other order as is just (r. 53.07(7)).

5.9 Evidence admissible with leave — r. 53.07

Several rules provide that a failure or refusal to do a certain thing will result in evidence being admissible only with leave of the trial judge. Examples of matters covered by such rules include

- a failure to disclose documents on discovery (r. 30.08(1));
- a failure to abandon a claim of privilege (r. 30.09);
- a refusal to disclose information on discovery (r. 31.07);
- a failure to correct answers on discovery (r. 31.09); and
- a failure to serve an expert's report (r. 53.03(3)).

The trial judge shall grant leave to admit the evidence in these circumstances on such terms as are just, and he or she will adjourn the trial, if necessary, unless an adjournment would cause prejudice to the opposite party

or would cause undue delay in the conduct of the trial (r. 53.08).

5.10 Failure to prove fact or document — r. 52.10

Sometimes, a party fails to prove a material fact or document at trial through accident, mistake, or other cause. When this happens, under r. 52.10, the trial judge has discretion to proceed with the trial, subject to proof of the fact or document at a later time, on such terms as the judge directs.

Where the case is being tried by a jury, the judge has discretion to direct the jury to find a verdict as if the fact or document had been proved. The verdict shall take effect on proof of the fact or document afterwards, as directed by the judge.

If the document or fact is not so proved, judgment is to be granted to the opposite party, unless the trial judge directs otherwise.

6. Presenting the case

6.1 Opening statements

An opening statement places before the trier of fact a succinct summary of the theory of the case and the expected evidence in support of it. In jury trials in particular, the lawyer for the plaintiff has the substantial advantage of being able to address the triers of fact when they are fresh and have not yet heard much about the case.

Opening statements (especially in front of a jury) ought not to be inflammatory; opening statements may refer to evidence that is expected to be proven at trial. A serious problem may arise if evidence referred to in an opening statement is not proven. Lawyers ought not to refer to the pleadings in an opening statement as pleadings are not evidence. Generally speaking, lawyers are not permitted to express their personal opinion; rather, they make submissions in accordance with the evidence.

6.1.1 Overview

The nature and length of the opening statement will vary depending on the nature and complexity of the case and whether the trial is by judge alone or by judge and jury. It often begins with an overview of the events giving rise to the action and an introduction of the parties and their lawyers.

Opening statements are often compared to the picture on the box of a jigsaw puzzle—it is an overview of the finished product. The particular pieces of evidence during the trial are the pieces of the puzzle.

6.1.2 Evidence and issues

The overview may be followed by an outline of the issues in the case and the evidence expected to be called. If there is more than one issue in the case, the lawyers should consider outlining the evidence that they propose to call on each issue, and then follow the summary of the evidence with a clear and concise statement of the issue.

The effect of the evidence that will be called should not be overstated, or the lawyer will run the risk of the opposing lawyer, in closing, pointing out the gap between what the other side “promised” and what was delivered.

If the lawyer decides to provide an outline of the defence, clearly and fairly present the issues raised by the defendant. A jury, in particular, will benefit from an early understanding of the entire case.

In an opening to a jury, the lawyer should state the law in simple language and point out that the judge has the exclusive right to instruct them on the law.

Lawyers should always have a leading evidence text in court during a civil trial. When conducting civil trials, lawyers should understand the importance of the law and rules of evidence. Most of these rules flow from the rule respecting hearsay and the exceptions to that rule.

6.1.3 No argument

Opening statements should not be used as an opportunity for argument, even though there is often little difference between an opening and a closing argument to a jury.

Lawyers should be very cautious about references to the law before a jury because this is strictly within the bailiwick of the trial judge.

6.2 Examination-in-chief

The examination-in-chief is the lawyer’s opportunity to present crucial evidence to the trier of fact through witnesses who are called to testify. The examination allows a witness to tell the witness’s story in the most natural, understandable, and convincing way. It focuses attention on the witness, not on the lawyer, and should appear almost as a kind of conversation between the two.

A carefully planned examination will elicit critical testimony, free of extraneous, irrelevant, or inadmissible matters. Lawyers should know what their witnesses’ testimony should be, so the lawyers should be reasonably certain of what the answers will be to the questions asked.

Questions should be short and incisive. Do not ask the same question twice, as a different answer may be given each time. Likewise, if an answer is repeated, a further

response from the witness that may be damaging may be unwittingly invited.

6.2.1 Leading questions

The questions asked should not suggest an answer to the witness. Such questions are known as “leading” questions. They are only permitted in eliciting information on preliminary matters from a witness (i.e., the witness’s identity, address, and background) and on matters not in dispute.

As a preliminary matter, an expert witness can be led through his or her education, degrees, work experience, and publications by going over the expert’s *curriculum vitae* and then making it an exhibit.

Asking non-expert witnesses leading questions on preliminary matters may put such witnesses at ease; these matters can be put to them, and they can simply agree or disagree with them.

6.2.2 Anticipating cross-examination

Try to anticipate cross-examination, if any, which follows examination-in-chief of a witness and provides the opposing lawyer the opportunity to probe matters further with the witness. One way to consider doing this is by dealing with potentially damaging evidence on examination-in-chief, with an explanation.

This may minimize the impact of the evidence, rather than allowing the cross-examiner to bring it out for the first time and without seeking an explanation. If the matter is immaterial or concerns a collateral issue, it may be better to leave it to the cross-examiner, who may get bogged down in trifling matters.

6.2.3 Omission

If a witness omits some important detail from the witness’s evidence, despite repeated attempts to obtain that detail, the lawyer may ultimately end up leading the witness. In doing so, the lawyer runs the risk of the opposing lawyer objecting to a leading question. Moreover, an answer to a leading question is not considered as persuasive as an answer readily volunteered in response to a non-leading question.

6.2.4 Refreshing memory

Where a witness cannot recollect a fact, the witness may refresh his or her memory by looking at a written instrument, memorandum, or book, if the writing contained in it was made by the witness when the fact occurred or immediately thereafter or at a time when the fact was fresh in the witness’s memory.

A witness may even use notes made by some other person in the witness's presence if the accuracy of the notes was recognized at the time the fact occurred or immediately thereafter or when the fact was fresh in the witness's memory.

The document being relied on by the witness to refresh the witness's memory must have been made contemporaneously with (i.e., at the same time as or very soon after) the event on which the document is based. Otherwise, the witness will not be allowed to use it.

The contemporaneity and accuracy of the document should be established in evidence before the witness uses the document to refresh the witness's memory. The document is not evidence, nor will it be made an exhibit, but it must be produced and may be seen by the opposing lawyer, who may cross-examine on it and require it to be marked as an exhibit.

Note that the right to cross-examine on a document used to refresh memory extends to the whole document—not just those portions referred to by the witness in refreshing the witness's memory.

6.2.5 Prior inconsistent statement: adverse witness

(a) Evidence Act, s. 23

Generally, a lawyer may not impeach the credibility of the lawyer's own witness by general evidence of bad character; however, the witness may be contradicted by other evidence. Alternatively, with leave of the judge and where the judge makes a finding that the witness is adverse, the lawyer may prove that the witness made a statement inconsistent with the present testimony at some other time.

Before proof may be given, the circumstances of the proposed statement, sufficient to designate the particular occasion on which it supposedly was made, must be mentioned to the witness. Then, the witness must be asked whether the witness made the statement (*Evidence Act*, s. 23).

(b) Meaning of "adverse"

There has been substantial discussion about whether an "adverse" witness need be hostile or merely unfavourable to the party calling the adverse witness. In *Reference Re R. v. Coffin*, Kellock J. defined "hostile" as "not giving the evidence fairly and with a desire to tell the truth because of a hostile *animus* towards the prosecution."

Nevertheless, in *Wawanesa Mutual Insurance Co. v. Hanes*, a majority of the Ontario Court of Appeal held that the expression "adverse witness" meant "unfavourable." A majority of the Supreme Court of

Canada found it unnecessary to consider the issue on further appeal.

Since the decision in *Coffin*, "adverse" has been interpreted to include a case where a witness's testimony merely contradicts a prior statement or any case in which the witness, in evidence, has assumed the position opposite to that of the party calling the witness and where it can be shown that the witness made a prior inconsistent statement.

The current position in Ontario appears to be that proof of a prior inconsistent statement is of itself evidence of adversity and that the trial judge may, on that basis alone, allow the witness to be cross-examined on the prior statement.

(c) Canada Evidence Act — s. 9(2)

Under s. 9(2) of the *Canada Evidence Act*, which differs from s. 23 of Ontario's *Evidence Act*, where the party producing a witness alleges that the witness made a prior inconsistent statement in writing, reduced to writing, or recorded on audiotape or videotape or otherwise, the court may, without proof that the witness is adverse, grant leave to cross-examine the witness about the statement.

The court may consider such cross-examination in determining whether the witness is adverse. This means that leave to cross-examine about the statement does not give rise to cross-examination in general, unless the court makes a finding the witness is adverse.

6.3 Cross-examination

A party may cross-examine any party adverse in interest, not just an opposite party. For example, a defendant may cross-examine a co-defendant or any other witness who has given evidence against the defendant, and not just the plaintiff and the plaintiff's witnesses.

6.3.1 "Adverse" party

A party is adverse in interest to another party where the party has a direct pecuniary or other substantial legal interest adverse to the legal interest of the other party, even though the parties may be on the same side of the record and/or there may be no issue between the two parties on which the court will adjudicate.

While co-defendants who are separately represented are both entitled to cross-examine the plaintiff, co-plaintiffs must appear by the same lawyer, and only one lawyer for the plaintiff(s) is allowed to cross-examine a witness.

Where there are several defendants, the order in which they are permitted to cross-examine witnesses is a matter in the discretion of the trial judge. Usually, the order in

which the defendants' names appear on the record is the order followed.

Generally speaking, a judge has a wide discretion as to which witnesses a lawyer may cross-examine and will usually decide on the basis of fairness.

6.3.2 Purpose

The two main purposes of cross-examination are to obtain admissions or proof of acts advantageous to the cross-examiner's case and to discredit or contradict a witness.

6.3.3 Collateral matters

A witness may be discredited by demonstrating that the witness is unworthy of belief based on what the witness says. This may be done by cross-examining the witness on a collateral matter.

Note that once the witness leaves the witness box, the witness's evidence cannot be contradicted on a purely collateral matter, subject to certain limited exceptions. A cross-examining lawyer must ask questions, produce documents, or deal with prior statements made by the witness in an effort to shake the witness on the collateral issue while the witness is still in the witness box.

6.3.4 Bias, partiality, etc.

Another technique for discrediting a witness based on what the witness says is to show the witness's bias or partiality or simply show that the witness was not in a position to be able to observe or perceive that to which the witness is testifying.

6.3.5 Prior inconsistent statement

Likewise, a witness may be discredited by demonstrating that the witness's testimony in chief is inconsistent with other testimony or statements that the witness has made before. A witness may be contradicted by using a transcript of the witness's examination for discovery or any other previous statement(s), whether sworn or unsworn, made orally or in writing.

First, the cross-examiner should put the statement to the witness (i.e., read verbatim the question and answer from examination for discovery) and then ask the witness to confirm that the statement was made.

6.3.6 Proof

Where the witness has denied or does not admit making either a written or oral statement, the cross-examiner must prove that the statement was made as part of the cross-examiner's case. Where the witness does admit making the statement, the lawyer must decide whether

merely to attack the credibility of the witness or to establish the previous statement as a fact.

If the lawyer wants to prove the contents of the previous statement as a fact, the witness should be asked (with appropriately leading questions, as is the general rule on cross-examination) whether the witness now accepts the earlier statement as correct and true.

If the witness answers in the affirmative, then the statement is proved. If the witness does not affirm the previous statement, no definitive version of the fact has been proved; the witness will have testified one way on examination-in-chief and will have been shown on cross-examination to have made a previous contradictory statement.

6.3.7 Evidence Act, ss. 20–21; Canada Evidence Act, ss. 10–11

Where the cross-examining lawyer intends to prove an oral statement before such proof is given, the circumstances of the supposed statement, sufficient to designate the particular occasion on which it supposedly was made, must be mentioned to the witness. Then, the witness must be asked if the witness made such a statement (*Evidence Act*, ss. 20–21; *Canada Evidence Act*, ss. 10–11).

6.3.8 Conviction — Evidence Act, s. 22; Canada Evidence Act, s. 12

A witness's credibility may also be attacked by cross-examining the witness about a previous conviction. In a civil trial concerning matters that are within the jurisdiction of the provincial government (the Ontario Legislature), s. 22(1) of Ontario's *Evidence Act* provides that a witness may be asked whether the witness has been convicted of any crime. This type of questioning is permissible since it bears on the credibility of the witness (i.e., whether the witness is believable). If the witness either denies the fact or refuses to answer, the conviction may be proved via a certificate of conviction and the identification of the witness as the person previously convicted. The identification would be made by another witness (e.g., the police officer who was in charge of the conviction). (For similar provisions regarding civil and criminal proceedings concerning matters over which the federal government (Parliament) has jurisdiction, see the *Canada Evidence Act*, s. 12).

6.3.9 Guidelines

A cross-examination should be very carefully prepared. The lawyer must consider how the lawyer wants to attack the witness and then frame the questions, one after another, to achieve that goal and to demonstrate the theory of the case.

The point of cross-examination is to build the case by suggesting or putting certain propositions to the witness, through a series of statements or leading questions, and then asking the witness to agree with them one by one. The best cross-examinations are those in which the only answers given by the witness are “yes” and “no.”

Questions on cross-examination should be short, clear, and definite so that it is impossible for a witness to misinterpret them or claim confusion. Unlike on examination-in-chief, the lawyer should ask leading questions to build an item-by-item factual structure. The lawyer should not ask “open” questions, since they simply invite the witness to explain the witness’s evidence. As a general rule, the lawyer should not ask the witness questions to which the lawyer does not already know the answer.

In February 2004, the Supreme Court of Canada, in its decision in *R. v. Lyttle*, held that a cross-examiner is entitled to put any proposition of fact to a witness. This is so, even if the cross-examiner has no other way of proving the fact, as long as the cross-examiner has a “good-faith basis” for asking the question.

Many experienced lawyers believe that in cross-examination, the question is often more important than the answer. The opposite is true for examinations-in-chief.

6.3.10 Harassment of witness — r. 53.01(2)

While the right of cross-examination is very broad, with few limitations placed on it, the trial judge generally will protect any witness who is being harassed or demeaned (r. 53.01(2)).

6.3.11 Listen

The answers given by the witness must be listened to very carefully; the lawyer should not be in a hurry to move on to the next question. The lawyer must consider what has been said and reflect on how that evidence influences where the lawyer is headed.

6.3.12 Watch

Watching the witness may help the lawyer determine whether the witness is lying. Eye contact with the witness also can be very important in asserting control so that the witness responds as desired.

6.3.13 Substantial points

A cross-examination will appear more effective if it begins on a strong point and ends on a strong point. The lawyer should not dwell on minor discrepancies in the witness’s testimony unless there are so many of them that it is clear the witness is simply unreliable. The

lawyer must concentrate on the substantial points to be made. When the lawyer succeeds in making these points, the lawyer should stop.

If the lawyer obtains a very unfavourable answer in cross-examination, the lawyer should simply move on. Also, brevity is usually well advised. The most experienced cross-examiners are often very brief. Many experienced lawyers feel that they do not have to challenge every single aspect of the witness’s testimony.

6.3.14 Expert witnesses

Exceptional preparation generally is necessary to cross-examine an expert effectively. Be sure to use simple language that will be readily understood by the trier of fact.

Since it is unlikely that the lawyer will be able to discredit an expert completely, the goal in cross-examining an expert witness usually is to illuminate flaws in the opposing expert’s testimony and to demonstrate that the lawyer’s own expert’s testimony should be preferred.

It may be possible to do this by refuting the basic assumptions or facts on which the expert bases the expert’s opinion. The lawyer should get help from the lawyer’s own expert to plan this type of cross-examination.

6.4 Re-examination

At the conclusion of cross-examination, a witness may be re-examined. This may be necessary to try to restore the previous testimony of the witness and to rehabilitate the witness’s credibility. Re-examination may explain, clarify, minimize, or limit the effect of testimony given on cross-examination.

6.4.1 Scope of re-examination

On re-examination, the lawyer may not ask a question that calls on the witness to solely repeat or reiterate what was said in chief. The rules of evidence only permit questions related to subjects that have been raised in the cross-examination to be asked. Leave of the judge is necessary to re-examine on matters not dealt with on the cross-examination. If leave is granted, it is subject to the right of further cross-examination on the new matter raised on re-examination.

It is proper to allow a witness an opportunity to correct a mistake or to ask a witness if the witness understood a question asked on cross-examination. If the witness was interrupted by the opposing lawyer while answering a question on cross-examination, on re-examination the lawyer may ask the witness to complete the witness’s answer.

A witness who has admitted making a prior inconsistent statement may be re-examined to explain the reasons or motives for having made the statement.

6.4.2 Re-examination after cross-examination

The rules of evidence also provide that any re-examination must proceed immediately after the cross-examination has concluded. The lawyer may not discuss the proposed re-examination evidence with the witness beforehand. (Note: in British Columbia, the general rule permits such discussion with leave of the trial judge.)

6.4.3 Pitfalls

The witness may have no idea what questions the lawyer intends to ask on re-examination, and thus, the lawyer may have no idea how the witness will answer. The witness may end up repeating damaging evidence elicited on cross-examination or giving more damaging evidence while trying to explain.

Since re-examination often is marked by surprise on all sides, the lawyer must consider carefully whether to refrain from re-examination, leaving the matter alone and providing any explanation necessary through another witness.

6.5 Objections

An objection to a question being asked on examination-in-chief, cross-examination, or re-examination of a witness must be made instantaneously. It should only be made after considering a number of practical factors that may militate against making it.

These factors include the impact on the jury if the lawyer is seen to be substantially interrupting or interfering with the evidence, whether the answer to the question will be damaging, whether the objection may be necessary to protect the court record for purposes of an appeal, and whether the objection may be used as a tactical device to break the pace of the opposing lawyer's examination.

If a question is being objected to as being improper (i.e., it calls for an answer that is hearsay), the objection must be made before the answer is given, or the damage will have been done. If the question is proper but the answer is improper (i.e., hearsay), an objection must be made as soon as the impropriety becomes apparent.

If the objectionable evidence is wholly insignificant, it may well be wise not to object.

6.5.1 How to object

When making an objection, the lawyer should get up and announce to the court that the lawyer objects to the question. The lawyer should be prepared to state

succinctly the basis for the objection. If the reason for objecting appears obvious, the judge may rule on the objection—sustaining (i.e., agreeing with) the objection or overruling it—without requiring the lawyer to provide the basis for the objection.

With jury trials, it may be important to quickly state the reason for the objection in a manner that can be understood by a jury (so a jury does not think that the objecting lawyer is suppressing evidence).

Many experienced lawyers will anticipate contentious areas of questions and will raise it with the judge in the absence of the jury (on a break) so that the objecting lawyer does not appear to be obstructing the free flow of evidence to the jury.

6.5.2 Excusing jury or witness

In a jury trial, the lawyer should consider whether to ask that the jury be excused. Similarly, in a jury or non-jury trial, the lawyer should consider whether to ask for the witness to be excused if the lawyer does not want the witness to hear the lawyer's arguments. In this case, the judge usually will comply with the request to have the witness excused.

6.5.3 Common objections

Questions to which objections are commonly made at trial include any question that

- calls for an irrelevant answer;
- calls for a privileged communication;
- calls for a hearsay answer that does not fall within any of the exceptions to the hearsay rule;
- calls for an opinion by an unqualified witness;
- is an improperly leading question;
- is a repetitive question;
- is a speculative question; or
- misquotes the witness or misstates the evidence.

Similarly, answers may be objected to as being irrelevant, privileged, an improper opinion, hearsay, etc. Where the judge requires the basis for the objection to be stated, the lawyer should so state succinctly.

6.5.4 Response to an objection

Where the judge does not automatically rule on the objection but, instead, asks for a response to the objection, the lawyer who asked the question that is the subject of the objection responds *to the judge* (not to the lawyer who raised the objection) demonstrating, as a matter of law, the appropriateness of the question.

If, after hearing the response, the judge ultimately sustains the objection, the lawyer who asked the original

question must rephrase the question (so as to avoid the basis for the objection) or move on to the next question. If the witness has already responded to the question, the lawyer raising the objection should ask that the witness's answer be struck from the court record.

If the judge overrules the objection, the lawyer who asked the original question continues with the questioning. If the objection followed the witness's answer to the question, it may be helpful for the lawyer to ask the question again or have the witness repeat his or her answer to ensure that the information contained in the question or answer has been clearly conveyed despite the disruption of the objection.

6.6 Closing arguments

Once all of the evidence has been adduced and the case has been closed, the lawyer will have the opportunity to persuade the court of the lawyer's case in the form of a closing argument.

6.6.1 Presentation

A closing argument should be presented in a logical and compelling manner. It usually consists of an introduction, a concise statement of the issues and the client's position on each issue, and an analysis of the facts and evidence relating to those issues. The review of the evidence should draw all of the evidence together and underline the significance of the facts already heard.

If the trial is before a judge alone, the argument should help the trial judge organize reasons for judgment. If the trial is before a jury, the lawyer will want to address the specific answers to the questions that the jury will be called on to answer.

6.6.2 Points of law

Once the factual issues have been developed, it is customary to develop the points of law that will be relied on and the conclusions that follow when the law is applied to the facts. Be sure to discuss specifically the relief sought, together with any ancillary relief necessary.

6.6.3 Approach

Make the closing argument as crisp and pointed as possible. It is the final opportunity to persuade the trier of fact.

The case should not be overstated, and the lawyer should not advance propositions that are untenable. The lawyer should not make personal observations or indicate their belief or opinions. Be frank with the court, and deal with difficulties in the case with candour.

6.6.4 Questions

The lawyer should listen carefully to any question from the bench. Then, the lawyer should decide whether it is possible and appropriate to answer the question immediately or whether it is best to advise the judge that the issues raised in the question will be dealt with later on. The lawyer should be sure to address the issues raised later on if they do not answer the question immediately.

6.6.5 Delivery

A lawyer should

- be sure that the lawyer's style of delivery does not detract from the argument;
- speak clearly and audibly, avoiding irritating mannerisms;
- proceed at a manageable pace;
- address the judge or jury directly, relying on and referring to notes only when absolutely necessary.

A lawyer cannot be watching the judge or jury and looking them in the eye to convince them of the lawyer's position while reading notes.

6.7 Simplified procedure — R. 76

Where the trial of the action is governed by simplified procedure under R. 76, the action may proceed by way of a summary trial, either where the parties agree to it or where the pre-trial conference judge or case management master so orders.

In a summary trial, evidence-in-chief is primarily given by affidavit. Unless the trial judge orders otherwise, any examination of the deponent of an affidavit by the party who served such affidavit, as well as any cross-examination and re-examination of such deponents, are strictly time-limited. Also, the court must decide the case at the end of the hearing (r. 76.12).

Judgments, orders, appeals, enforcement and costs

1. Judgments and orders

1.1 Use of the terms “judgment” and “order”

A “judgment” is one kind of “order” that a court might issue.

An “order” can be considered as a pronouncement or adjudication on an issue between or among parties, including an interim procedural matter. The term order appears in s. 1 of the *Courts of Justice Act (CJA)* and r. 1.03 of the *Rules of Civil Procedure (Rules)*, but the definitions are not exhaustive and simply state that the term includes a judgment or decree.

A “judgment” is given at the end of a proceeding. Rule 1.03 defines it as a decision that finally disposes of an application or action on its merits and includes a judgment entered in consequence of the default of a party. A judgment does not include an adjudication on an interlocutory motion that arises during the course of a proceeding. For example, where a motion for summary judgment under R. 20 is granted, the court will grant a judgment in favour of the moving party. Where the motion for summary judgment is dismissed, however, the adjudication will be by way of order. Unless the context requires otherwise, the term “order” will be used in this chapter as it is defined in the *CJA*, that is, as including a judgment.

In most cases, there will be only one judgment in an action. On appeal from a judgment, the appellate court will generally make an order dismissing the appeal or varying or setting aside the judgment of the court below. In exceptional cases, an appellate court may substitute its judgment for the judgment of the court below. More than one final judgment may be given in a proceeding if several causes of action or issues are decided at different times. For example, a plaintiff may obtain

- a default judgment against one defendant under R. 19;
- a summary judgment against a second defendant under R. 20 on one of the causes of action pleaded against that defendant;
- a judgment against a third defendant under r. 21.01; and
- a judgment against the second defendant (and any other defendants) on the remaining causes of action at trial.

If there is only one cause of action and one plaintiff and one defendant, then only one judgment will be given.

It is not necessary that every proceeding conclude by a judgment. It is often the case that proceedings, whether commenced by statement of claim or by notice of application, are disposed of by means of an order. Examples include the following:

- Certain applications, such as an application to wind up a pension plan, do not involve a suit between parties. If an application does not dispose of or determine a right between parties, the disposition of it will be in the form of an order.
- A decision that determines the result of an action may not involve a determination of the *lis* or issue between the parties. For example, if the action is disposed of without a trial by reason of some default (i.e., an order dismissing an action before trial by reason of improper joinder or a missed limitation period), then there has been no disposition of the action on its merits. In that case, the principle of *res judicata* does not apply. On the other hand, if a defendant defaults by failing to enter an appearance or deliver a defence, the defendant will be deemed to admit the plaintiff’s claim and a default judgment may be obtained.
- Where a proceeding is instituted under a particular statute, the statute itself may provide that relief is to be given in the form of an order.

1.2 Endorsements and reasons — r. 59.02

Every order made by a court, judge, or officer must be endorsed on the appeal book and compendium, record, notice of motion, or notice of application, unless circumstances make it impractical to do so (r. 59.02(1)). This notation by the judge, master, or officer of the disposition made is often referred to as the “endorsement.” Where written reasons are delivered, if they are given in an appellate court, an endorsement is not required (r. 59.02(2)(a)). When written reasons are given in any other court, the endorsement may consist of a reference to the reasons (r. 59.02(2)(b)). In either case, the reasons must be filed in the court file (r. 59.02(2)).

“Reasons for judgment” or “reasons for decision” do not constitute the judgment or order of the court, but are the reasons underlying the judgment or order. An appeal is taken not from the reasons, but from the order itself. It is the order of the court appealed from that binds the parties, not the reasons given for making it. The reasons

may be wrong, but the order correct. The reasons may be examined in order to determine

- what matters were considered;
- upon what grounds the order was made; and
- what has been settled or adjudicated on for the purpose of further disposition of the case.

In order to determine whether *res judicata* applies to a subsequent proceeding, it is usually necessary to consider not only the formal order of the court in the prior proceeding, but also the pleadings and the reasons for judgment. The formal order may be amended where there has been an accidental slip or omission, or where the order requires amendment in any particular on which the court did not adjudicate (r. 59.06(1)). The order can be set aside or varied on limited grounds, including fraud and facts discovered after it was made (r. 59.06(2)). If a party is dissatisfied with an order and it does not fit into the categories of r. 59.06, the proper form of review is an appeal.

1.3 Retrospective orders

The court has inherent power to order the entry of an order with retrospective effect or *nunc pro tunc* (meaning “now for then”). The term is applied to acts that the court permits to be done after the time when they should have been done, with a retroactive effect, i.e., with the same effect as if regularly done. If service of a document was not properly effected but the document came to the attention of the party to be served, a court may order that service of the document be deemed to have been properly effected *nunc pro tunc*. Entry of such an order should not be permitted where another party would thereby be prejudiced or where the moving party has failed to take a step on time due to his or her own delay.

1.4 Final and interlocutory orders

The distinction between final and interlocutory orders is an important one, particularly when it comes to determining which is the correct route of appeal under ss. 6, 17, and 19 of the *CJA*. This is often a difficult matter to ascertain, and cases continue to go to court for a determination as to whether the order in question was final or interlocutory. In this area, perhaps more than any other area of civil procedure, reference to decided cases is indispensable.

An order is considered to be final if it finally disposes of the plaintiff's or applicant's entire claim or an important issue in the overall dispute between the parties. If it does not do so, it is considered to be interlocutory.

The question of whether an order is interlocutory or final is determined by looking at the order itself and

considering its effect, rather than at the pleading or notice of motion that brought it about.

An interlocutory motion may result in either a final or interlocutory order, depending on the nature and disposition of the motion. The determining factor is the character of the order and its effect, not the nature of the motion brought. For example, if a defendant moved under R. 21 to strike a statement of claim on the basis that it did not disclose a reasonable cause of action and was successful, the order would be final; the effect of the court's adjudication would have been to dispose finally of the plaintiff's claim. That order could be appealed directly to the Court of Appeal by the plaintiff (assuming it was within the monetary jurisdiction of that court). If, however, the motion was dismissed, the action would proceed along as though the motion had never been brought; the order would be interlocutory, and the defendant's appeal route would be to the Divisional Court with leave. There are many different motions that can result in either final or interlocutory orders, the determining factor being the effect of the disposition by the court. Other examples are motions for default judgment under R. 19, for summary judgment under R. 20, and to dismiss an action for delay under R. 24.

The following orders have been held to be interlocutory:

- an order upholding an order of an assessment officer as to the scale of costs;
- an order reversing an order staying proceedings on a reference and refusing to stay the proceedings;
- an order appointing a receiver by way of equitable execution;
- an order setting aside a default judgment and permitting the defendant to defend;
- an order dismissing a motion to stay an action on the ground it was settled;
- an order striking out a statement of claim with leave to amend;
- an order dismissing a motion for judgment on admissions in the pleadings and on discovery;
- an order dismissing a motion to set aside a statement of claim on the ground that the action was not maintainable;
- an order granting or dismissing a motion for an interlocutory injunction;
- an order directing security for costs;
- an order granting relief from a default judgment on terms;
- an order striking out certain paragraphs of a statement of claim;
- an order refusing an order of partition but directing the trial of an issue as to title; and

- an order directing a judgment debtor to attend for examination.

The following orders have been held to be final:

- an order awarding custody of a child “until further order,” because the order finally determines the rights of the parties to custody as of the time it was made;
- an order dismissing an application to vary the award of spousal support granted on the dissolution of a marriage;
- an order dismissing a motion to set aside a default judgment on the ground of fraud;
- an order striking out a statement of claim as disclosing no reasonable cause of action and dismissing the action without prejudice to a further action being brought;
- an order striking out certain paragraphs of a statement of defence as disclosing no reasonable defence to the claim;
- an order directing execution of a conveyance directed by a previous judgment;
- an order dismissing an action at the trial of a preliminary question of liability;
- an order that determines a preliminary threshold factual matter relevant to a defendant’s liability;
- an order denying an *Arbitration Act, 1991* stay;
- an order giving the plaintiff leave to sign judgment unless a sum of money be paid into court;
- an order dismissing an action for delay;
- an order reinstating a default judgment;
- a finding of contempt;
- a consent order implementing a settlement agreement;
- an order affecting the rights of persons who are not parties to the action; and
- an order dismissing a summary judgment motion on a point of law.

Even if it may appear to be interlocutory on its face, an order may for some purposes be considered final with regard to persons not already parties to the action. For example, an order under r. 30.10 requiring a non-party to make documentary discovery or under r. 31.10 requiring a non-party to be examined for discovery is final *vis-à-vis* the non-party, because there is no other issue in the proceeding between the non-party and the moving party. Where a party appeals such an order, however, the order is considered interlocutory.

1.5 Final and interlocutory judgments

Generally, a judgment is final, but some judgments, such as a judgment directing a reference, have been held to be interlocutory.

1.6 Drafting, settling, and signing orders — rr. 59.03–59.04

Once a judicial officer has made an order, the order must be formally drafted, signed, and entered by the registrar of the court. Unless an order provides otherwise, it is effective from the date on which it is made (r. 59.01). If a decision is reserved, the date on which it is finally made/released is considered to be the date of the decision.

The form of an order is prescribed by the *Rules* and appears in Forms 59A (Order) and 59B (Judgment). Orders must clearly express what the court has ordered to be done. This is particularly so in the case of injunctions or orders affecting the liberty of the subject.

In construing an order, the language used must be interpreted according to its ordinary meaning. Where the language used in the formal order is clear and unambiguous, a person acting on it has no right to go beyond it to look at the pleadings. In the case where an assessment officer is trying to assess the costs of an action, if the formal order is ambiguous, the assessment officer may use the written reasons of the judge who tried the action to assist in interpreting the costs order.

Each order must contain the name of the judge or officer who made it and the date on which it was made (r. 59.03(3)). It must also contain a recital or preamble disclosing with particularity the nature of the relief that was sought in the notice of motion (r. 59.03(3)). If the relief sought was prescribed under a statute or rule, the language of the statute or rule should be followed as closely as possible in describing the relief granted.

Where liability not existing at common law is created by a statute and the statute provides a particular and special remedy, that remedy must be sought; no other is open. That is the remedy that should be claimed in the claim for relief of the notice of motion and, if granted, embodied in the preamble of the order. This is important because it may subsequently be necessary to use the order to show what was determined, and unless the relief asked for is set out in the preamble, the order may not be meaningful, particularly if a long period of time elapses between the date of the motion and the date of the order. In addition, under the *Evidence Act*, an order may be proved by exemplification of a certified copy thereof. A notice of motion cannot be proved in this way, and any order should therefore be complete without reference to any extraneous document.

The preamble must also contain the names of those persons appearing personally or by counsel, the names of any person served who did not appear, any consents, waivers, undertakings, or admissions, and all of the

evidentiary documents referred to or considered by the court in reaching its conclusion. If the decision was reserved, the preamble should state the day or days upon which the matter was heard and conclude with words to show that the decision was reserved.

Orders must be divided into convenient paragraphs, numbered consecutively (r. 59.03(4)). The substantive part should contain the complete disposition of the matter by the court in the following order:

- (1) the decision as to the rights of the parties;
- (2) any directions providing for or giving effect to those rights and any consequential directions; and
- (3) any disposition of costs.

The order is usually drafted by the successful party, although any party affected may prepare a draft of the formal order (r. 59.03(1)). If an appeal is to be taken, it is not unusual for the unsuccessful party to draft the order under appeal if the successful party fails to do so promptly, since the responsibility of perfecting the appeal on time is on the appellant and no appeal will be heard unless the order has been signed and entered and is before the court.

The draft order should then be submitted to the opposite party or parties for approval, and if the form of the order is disputed, not approved, or not approved within a reasonable time, a party may obtain an appointment to have the order settled by the registrar on notice to all parties represented on the hearing (rr. 59.04(10) and (12)).

In settling any order, the registrar may introduce such alterations as from experience he or she believes to be the usual practice of the court and which the court would sanction. While alterations of this kind, in theory, should not be made without a subsequent order of the court or at least without communication with the judge or master, it has become usual for the registrar to allow them. In this way and without expense, many such alterations are properly made. However, the registrar has no jurisdiction whatever to make any substantive additions to the order or change any disposition made by the court. If any party is not satisfied with the draft order as settled by the registrar, an appointment may be made to settle it before the judge or officer that made it (r. 59.04(12)).

Once the form of the order is either approved by the parties or settled as above, the order is signed by either the registrar of the appropriate court or the judicial officer who heard the matter (rr. 59.04(1) and (16)). The act of having an order signed is often described as having it “issued,” although this term is colloquial and does not appear in the *Rules*.

1.7 Entry of orders

Every order must be “entered” at full length by the registrar in the office in which the action or application was commenced (rr. 59.05(1)–(3)). Entering an order means recording it in the court office by either inserting a copy in an entry book or microfilming it. Certain orders will have to be filed in other court offices as well (rr. 59.05(4)–(6)). This rule is for purposes of record; entry makes the order one of record and facilitates its proof. Still, an order may otherwise be verified. Recent authorities have held that it is not necessary to enter an order for purposes of appeal or execution.

1.8 Interest on orders

Sections 127–130 of the *CJA* address the issue of interest payable on awards made by the court. Key terms are defined in s. 127, including “bank rate,” “date of order,” “postjudgment interest rate,” “prejudgment interest rate,” and “quarter.”

Generally, a person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order (s. 128(1)). There is an exception for damages for non-pecuniary loss in a personal injury action: s. 128(2) provides that this particular rate is to be determined by the rules of court, and r. 53.10 does specify that the prejudgment interest rate on damages for non-pecuniary loss in a personal injury action is currently 5%.

If the order includes an amount for past pecuniary loss, the interest must be calculated on the total past pecuniary loss at the end of each six-month period (s. 128(3)). Prejudgment interest is not available in a number of specifically enumerated provisions set out in s. 128(4).

Awards for future pecuniary damages must be calculated with reference to the discount rate prescribed in r. 53.09, and the gross-up for income tax set out in that rule should also be used.

A request for prejudgment interest should be included in the prayer for relief in the statement of claim. While the interest is calculated from the date the cause of action arose, the rate is determined when the action is commenced. The commercially available *Ontario Annual Practice* volumes that most practitioners use include tables setting out relevant prejudgment interest rates by quarter, and that information is also available on the website of the Ontario Attorney General.

Section 129 of the *CJA* provides for the accrual of postjudgment interest on orders, calculated from the

date of the order. Postjudgment interest accrues even though the entry of the order has been suspended by a proceeding in the action, including an appeal. Every order providing for the payment of money on which postjudgment interest is payable must show on its face the rate of interest and the date from which interest is payable (r. 59.03(7)). Costs bear interest at the rate the order bears interest, from the date of the order awarding the costs (*CJA*, s. 129(1)).

Section 130 allows the court to use discretion in respect of the whole or any part of the amount on which interest is payable under ss. 128–129, and provides a number of considerations the court should take into account in exercising its discretion.

Experienced counsel will calculate a “per diem” interest rate on judgments in order to calculate postjudgment interest.

Prudent counsel will make sure that clients are aware of the calculations.

1.9 Certificates of orders

Only an officer of the same court in which the action or proceeding was commenced can properly issue an order. An order of the Court of Appeal made in respect of an action pending in the Superior Court of Justice or a proceeding before the Ontario Municipal Board is made in the form of a certificate. The preamble commences with the words “This is to certify that,” and the operative parts of the order are stated in the past tense. However, this form is not used with regard to orders appealed from the Superior Court of Justice to the Ontario Court of Appeal.

1.10 Amending, setting aside, or varying orders

A judge or master may change or amend his or her order at any time before it is issued. The jurisdiction to vary before entry arises from an inherent power in every court to vary its own order so as to carry out what was intended and to render the language used free from doubt. In exercising that jurisdiction, the court has power to reconsider and even to withdraw the order made. An order or part of it may be recalled and a term imposed or a change made at any time before it has been issued and entered. Although this type of amendment is unusual, circumstances may justify it. After it has been issued, however, an order cannot be changed if it is in accordance with the actual decree, and the proper course is an appeal. The judge’s power to recall or modify an order before it has been issued and entered is restricted in circumstances where the order has been acted upon or

where the parties have changed their position because of it.

On a motion to vary an order, the court has jurisdiction to permit re-argument before the formal order is issued, and if the court makes a change of substance, the time for commencing an appeal of an order will run from the time the change is made. The judge or master may refuse to vary the order by reason of delay in making the motion.

After the order has been issued, the judge or master is said to be *functus officio* (completed his or her duty and exhausted the authority to make the order) and has no power to make any changes except in the particular instances set out in the *Rules* (r. 59.06). Apart from the provisions of r. 59.06, a formal order that is made with notice and that clearly sets out the intention of the court or judicial officer making it cannot, after issuance, be varied, amended, or rescinded on a new application to the same court. The power to vary or amend an order after it has been issued and entered should generally be exercised only in four cases:

- (1) where there has been an error in drawing it up or in expressing the manifest intention of the court;
- (2) where the court has not adjudicated on all the matters before it;
- (3) where a ground or matter arises subsequent to the making of the order that would probably have changed the result; or
- (4) on the ground of fraud.

2. Appeals

2.1 Scope of appeals under the Courts of Justice Act

A number of issues must be considered in the context of appeals, including whether leave to appeal is required, jurisdiction of the courts to hear appeals, timing, and filing requirements. Counsel should be aware that practice directions govern the procedure on appeals (and other procedural matters as well). These practice directions are published in the *Ontario Reports*, appear in the consolidated and annotated versions of the *Rules*, and are posted on the Ontario Courts website.

The *CJA* provides that a judge may not sit as a member of a court hearing an appeal from the judge’s own decision (s. 132). Unless the law provides otherwise, s. 134(1) gives a court to which an appeal is taken three options. It may

- make any order or decision that ought to or could have been made by the court or tribunal appealed from;
- order a new trial;
- make any other order or decision that is considered just.

New trials are generally not ordered in civil matters unless some substantial wrong or miscarriage of justice has occurred, and if the wrong or miscarriage only affects part of an order or decision or some of the parties, the new trial may only be in respect of that part or those parties (ss. 134(6)–(7)). The court to which an appeal is taken also has the power, on a motion, to make any interim order that is considered just to prevent prejudice to a party pending an appeal (s. 134(2)) or to quash the appeal altogether (s. 134(3)).

Generally, on appeals, the appellate court makes its decision on the basis of the record that was before the court below. Unless otherwise provided, a court to which an appeal is taken may, in a proper case, draw inferences of fact from the evidence, but it must not draw any inference that is inconsistent with a finding that has not been set aside (s. 134(4)(a)). The court may also receive further evidence by affidavit, transcript of oral examination, oral examination before the court, or in such manner as the court directs (s. 134(4)(b)). Finally, the court may direct a reference or the trial of an issue (s. 134(4)(c)). Before relying on any of these provisions, it is essential for counsel to refer to the relevant case law.

In addition to the *CJA*, R. 61 provides the procedure for appeals to an appellate court, and R. 62 governs appeals from interlocutory orders.

2.2 Leave to appeal

Some appeals are of right and others require leave of the court to which the party wishes to appeal. There are two specific contexts in which the need for leave is legislated by s. 133 of the *CJA*: where the order to be appealed was made on the parties' consent, and where the appeal is only as to costs that are in the discretion of the court that made the costs order. More generally, whether leave is required depends on the appellate jurisdiction set out in the *CJA* in ss. 6, 17, 19, and 40.

Where an order is interlocutory and leave to appeal is required, there must be compliance with the provisions of r. 62.02(4). Leave to appeal will not be granted unless either of the following is true:

- There is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved *and* it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted.
- There appears to the judge hearing the motion to be good reason to doubt the correctness of the order in question *and* the proposed appeal involves matters of such importance that, in the opinion of the judge, leave to appeal should be granted.

2.3 Appellate jurisdiction — forum

The appellate jurisdiction of courts in Ontario is governed by five sections of the *CJA*:

- Court of Appeal, s. 6;
- Superior Court, ss. 17 and 40; and
- Divisional Court, ss. 19 and 31.

The forum for an appeal depends on two principal factors: the identity of the court that made the order appealed from and whether the order appealed from was interlocutory or final. In certain appeals, the amount in issue determines the correct appellate forum.

Under s. 19(1)(b) of the *CJA*, all appeals from interlocutory orders of a judge of the Superior Court of Justice are heard by the Divisional Court, with leave obtained under r. 62.02(1). For motions properly made in Toronto, leave is sought from a judge of the Divisional Court sitting as a Superior Court of Justice judge (r. 62.02(1.1)). For motions properly made outside Toronto, leave is sought from a judge other than the judge who made the interlocutory order (r. 62.02(1)).

A final order of a judge of the Superior Court of Justice is appealable directly to the Court of Appeal, provided the amount involved exceeds \$50,000, exclusive of costs (s. 6(1)(b)); otherwise, the appeal lies to the Divisional Court (s. 19(1)(a)). Under ss. 17(a) and (b), an interlocutory order of a master or case management master or an appeal of a certificate of assessment of costs issued in a proceeding in the Superior Court of Justice is appealable to a single judge of the Superior Court of Justice. A final order of a master or case management master is appealable to the Divisional Court; leave is not required (s. 19(1)(c)). Under the provisions of s. 6(1)(a), an appeal may be taken to the Court of Appeal from an order of the Divisional Court with leave, provided that the question is not a question of fact alone. Under s. 31, an appeal from final orders of the Small Claims Court, either for the payment of money in excess of \$2,500 exclusive of costs or for the recovery of possession of personal property exceeding \$2,500, lies to the Divisional Court (*Small Claims Court Jurisdiction and Appeal Limit*, O. Reg. 626/00, made under the *CJA*, s. 2).

2.4 Timing of appeals

Where an appeal to either the Divisional Court or the Court of Appeal requires leave of that court, the notice of motion for leave must be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise (rr. 61.03(1)(b) and 61.03.1(3)(a), respectively). Where leave is granted, the notice of appeal must be delivered

within seven days after the granting of leave (rr. 61.03(6) and 61.03.1(16), respectively).

In the Divisional Court, the motion for leave is heard orally on a date fixed by the registrar (r. 61.03(1)(a)). However, in the Court of Appeal, where the appeal requires leave, it is initially dealt with in writing, without the attendance of counsel (r. 61.03.1(1)). After reviewing the written material filed on the leave application, if the Court of Appeal determines that no oral hearing is required, it will determine the motion for leave based on the written material filed. Otherwise, the Court of Appeal will order an oral hearing (r. 61.03.1(14)).

In cases where an appeal on a matter of costs alone under s. 133 of the *CJA* is joined with an appeal as of right, the question of leave is determined by the Divisional Court or the Court of Appeal at the same time as the appeal on the merits of the appeal as of right (rr. 61.03(7) and 61.03.1(17), respectively).

No leave is required

- in an appeal from an interlocutory order of a master or case management master;
- from a certificate of assessment of costs; or
- in any other appeal that is made to a judge under any statute (unless the statute or a rule provides for another procedure).

The appeal in these specific cases is heard by a single judge of the Superior Court and is commenced by serving a notice of appeal (Form 62A) on all parties whose interests may be affected by the appeal, within seven days after the making of the order or certificate appealed from (rr. 62.01(1)–(2)).

In other cases where no leave is required in an appeal to an appellate court, the appeal is commenced by serving a notice of appeal (Form 61A) with the certificate respecting evidence required for the appeal (r. 61.05(1)) within 30 days after the making of the order appealed from, unless a statute or the *Rules* provide otherwise (r. 61.04(1)).

2.5 Filing requirements

Filing requirements for motions for leave to appeal and for appeals themselves are very particular, right down to the colour of the cover that binds the materials to be filed in court. Perfecting the appeal, including preparation of the notice of appeal, ordering of the transcript from the original hearing, preparing paper copies of the appeal book, compendium, exhibit book, and factum, and preparing electronic copies of the transcript and factum must all be done in accordance with particular details specified in the *Rules* and practice directions. It is essential to read the provisions of the relevant rule, R. 61

or 62, to ensure compliance. Practice directions must be followed as well.

2.6 Statutory appeal routes

Generally, one must determine whether an order is final or interlocutory in order to know which appeal route to follow. However this is not always the case. Some statutes provide for appeal routes that are not necessarily consistent with those that would otherwise apply under the *CJA* and the *Rules*; i.e., that any order made by a court pursuant to the provisions of that statute must be appealed to a particular court. It is therefore important to be familiar with the provisions of any relevant legislation that may have a bearing on the proper appeal routes. For example, Ontario's *Business Corporations Act* (s. 255) provides: "An appeal lies to the Divisional Court from any order made by the court under this Act."

2.7 Stay pending appeal — R. 63

The delivery of a notice of appeal from either an interlocutory or final order stays, until the disposition of the appeal, any provision of the order for the payment of money, except a provision that awards support or enforces a support order (r. 63.01). Rule 63.01 also makes reference to orders made under several specific statutes. However, a judge of the court to which the appeal is taken has discretion to order, on such terms as are just, that the above stays do not apply (r. 63.01(5)).

Where an interlocutory or final order is not automatically stayed, a stay may still be granted on such terms as are just. This must be done by order of the court whose decision is to be appealed, in which case the stay expires when a notice of appeal or notice of motion for leave to appeal is delivered or the time for delivery has expired, whichever event occurs earlier; or by an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken (rr. 63.02(1)–(2)). These stays may be set aside or varied on such terms as are just by a judge of the court to which a motion for leave to appeal may be or has been made or to which an appeal has been taken (r. 63.02(3)).

The significance of a stay is that no steps may be taken under the order or for its enforcement, except by order of a judge. That said, a stay does not prevent the settling, signing, and entering of the order or the assessment of costs, nor does it prevent the issue of a writ of execution or the filing of the writ with the sheriff or land registry office. No instruction or direction to enforce the writ may be given, however, while the stay is in effect (rr. 63.03(1)–(3)).

The Supreme Court of Canada has ruled on the criteria that should be applied in determining whether an order

should be stayed pending appeal. In both *RJR-MacDonald Inc. v. Canada (Attorney General)* and *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, the court said that the tests governing an interlocutory injunction motion and a motion to stay a judgment are generally the same. In summary, there is a three-part test. In the case of a motion for a stay, the court must

- undertake a preliminary assessment of the merits to ensure that there is a serious question to be determined on appeal;
- determine whether the appellant who is seeking the stay would suffer irreparable harm (that is, harm not readily compensable in money damages) if the stay were not granted; and
- make a comparison as to which of the parties would suffer the greater harm from the granting or refusing of the stay sought (this is often referred to as the “balance of convenience” or, in the words of Ontario courts from time to time, the “balance of inconvenience” test).

These requirements are not to be treated as separate tests but as interrelated considerations so that the strength of one consideration may compensate for the weakness of another. The ultimate consideration is whether the interests of justice call for a stay.

3. Enforcement of orders

3.1 Introduction

Rule 60 outlines the basic procedures relevant to enforcing orders and addresses orders that deal with the recovery of property, as well as the payment of money. In this chapter, we address only procedures to enforce money judgments. The primary mechanisms for the enforcement of such judgments are the issuance of a *writ of seizure and sale* and *garnishment*.

These mechanisms permit a judgment creditor to invoke the power of the court to take control of assets of the judgment debtor. The writ of seizure and sale is directed at assets that may be seized and sold to satisfy judgment debts. Garnishment is a mechanism for intercepting payments of debts owing to the debtor by third parties. In addition, orders can be enforced in the following ways:

- a writ of possession;
- a writ of sequestration;
- a writ of delivery;
- receivers; or
- contempt proceedings.

If a client has been noted in default and judgment has been obtained, an order staying execution in addition to an order setting aside the judgment should be sought.

3.2 Writ of seizure and sale

A writ of seizure and sale is obtained by filing a requisition with the registrar of the court after judgment has been obtained (r. 60.07(1)). A creditor is entitled to the electronic issue of one or more writs of seizure and sale on filing a requisition electronically under r. 4.05.1(2) (r. 60.07(1.1)). The requisition sets out the amount owing at the time of filing, taking into account any payments made after judgment.

When obtained, the writ of seizure and sale is delivered to the sheriff, and a copy may be made available to the land registrar in the sheriff’s territorial jurisdiction through access to the sheriff’s database of executions under the *Land Titles Act*. Under the *Execution Act*, when a writ is delivered to the sheriff, it binds all of the real and personal property of the judgment debtor within the jurisdiction of the sheriff, that is, the judicial district or county for which the sheriff is appointed. The writ also binds real property registered under the *Land Titles Act* once it is properly registered by the sheriff in the execution database (s. 136(2)).

Only the debtor’s interest in its assets is bound by the writ. Therefore, if the debtor’s assets are subject to a security interest, mortgage, lien, or other encumbrance created by agreement or by statute, the writ only entitles the sheriff to seize it subject to the rights of the holder of the security interest, mortgage, lien, or encumbrance. The writ does not give judgment creditors priority over the claims of secured creditors holding perfected security interests in personal property nor does it give judgment creditors priority over existing charges over real estate.

Identifying the interest in personal property available for execution is no simple task. In Ontario, there is no public title register for personal property. Vehicle ownership requires registration for regulatory purposes that are not designed to assist creditors seeking to recover debts. The *Personal Property Security Act* and the *Repair and Storage Liens Act* require secured creditors and repair and storage lien holders to register non-possessory interests in assets that are intended to secure payment. However, searches of these registrations can assist a creditor only in identifying property that is subject either to security or to a repair and storage lien.

Because there is no reliable public search to identify ownership in personal property, when acting on the instructions of the judgment creditor, the sheriff is at risk of seizing assets that do not belong to the judgment debtor and are therefore not subject to the writ. For this reason, before acting on a creditor’s instructions, the sheriff insists that the judgment creditor provide specific instructions identifying the assets to be seized and a bond

of indemnity making the judgment creditor responsible for any damages caused if the seizure was wrongful. The sheriff may decline to enforce the writ if the sheriff is uncertain whether the writ has been properly issued or filed, and the creditor may make a motion to the court for directions (r. 60.07(13.1)).

3.3 Examinations in aid of execution

Any judgment creditor is entitled to examine the judgment debtor, or an officer or director of a corporate judgment debtor, under oath concerning his or her means of repaying the judgment debt (r. 60.18). The judgment debtor may be compelled, without order, to attend such an examination once in every 12-month period simply by the issuance of an appointment under R. 34. If more frequent examination of the judgment debtor is required, the judgment creditor may move for an order compelling them. If any difficulty arises concerning the enforcement of an order, the judgment creditor may move for an order compelling the attendance of any person the court is satisfied may have knowledge of the affairs of the judgment debtor. The term “judgment debtor examination” or, colloquially, a “J.D.,” which was the former term for an examination in aid of execution, is still used by some lawyers.

3.4 Procedures for sale

The procedures for sale of the debtor’s property under a writ are set out in r. 60.07 and the *Execution Act*. Notice of the sale must be given to the debtor and must be published. In the case of personal property, notice of the time and place of the sale must be mailed by the sheriff to the debtor and to the creditor at least 10 days prior to the sale and must be published in a newspaper of general circulation in the place where the property is seized (r. 60.07(16)).

In the case of real property, no steps may be taken to sell under the writ until four months after the writ was filed or refiled if it was withdrawn (r. 60.07(17)). Notice of the time and place of sale must be mailed to the debtor and to the creditor and published in the *Ontario Gazette* at least 30 days prior to any sale. The sheriff must also place two notices in a newspaper with general circulation in the place where the land is situate, the last such notice not more than three weeks and not less than one week before the sale, and must post a notice prominently in the sheriff’s office (r. 60.07(19)). If the property is not sold at the sale, the sheriff notifies the creditor, who then may instruct the sheriff to sell the property “in such manner as the sheriff considers will realize the best price that can be obtained” (rr. 60.07(23)–(24)).

These sale procedures are designed to ensure that the debtor has every opportunity to prevent the sale by

payment of the debt and, in the event that payment or a settlement cannot be achieved, to ensure public notice of the sale.

3.5 Garnishment

Garnishment can be a very effective mechanism for the enforcement of a judgment debt, particularly if the debt owing is recurring pursuant to a long-term contract such as an employment contract or a licence agreement. Rule 60.08 permits a judgment creditor to garnish debts payable to the debtor by other persons. Where a debt is payable to the debtor and to one or more co-owners, one-half of the indebtedness or an amount specified by order may be garnished (r. 60.08(1.1)).

Notices of garnishment are issued by the registrar of the court on receipt of a requisition by the judgment creditor. The requisition must be supported by an affidavit stating the amount outstanding on the judgment (after taking into account any payments and postjudgment interest), the names and addresses of persons that the judgment creditor believes are or will become indebted to the judgment debtor (garnishees), and the particulars of such debts known to the judgment creditor (r. 60.08(4)).

The issued notice of garnishment is served by the judgment creditor on the garnishee, together with a blank garnishee’s statement (Form 60I). If the garnishee is a deposit-taking institution, such as a bank or trust company, the notice of garnishment must be served on the branch at which the debt (i.e., the account or deposit) is payable (r. 60.08(10)).

On being served with a notice of garnishment, the garnishee must pay any amounts it owes to the judgment debtor to the sheriff up to the amount of the judgment debt. The notice of garnishment is effective from the time it is served and for six years after service, so that each time an amount becomes payable to the judgment debtor by the garnishee during the six years following service of the notice of garnishment or until the judgment debt has been paid, the garnishee must make the payment to the sheriff.

If the garnishee denies owing the judgment debtor the amount the judgment creditor believed was owing as stated in its requisition, because the debt is owed to the debtor and one or more co-owners or for any other reason, the garnishee must serve and file with the court a garnishee’s statement (Form 60I) on the judgment creditor setting out the particulars of the dispute (r. 60.08(15)). A copy of the garnishee’s statement must be filed with the court. Where a creditor is served with a garnishee’s statement that indicates the debt is owed to the debtor and to one or more co-owners, the creditor is required to serve the co-owners with a notice to co-

owners of the debt (Form 60I.1) and a copy of the garnishee's statement as soon as possible, either personally or by an alternative to personal service under r. 16.03 (rr. 60.08(15.1)–(15.2)).

The *Rules* permit interested parties to bring any disputes concerning the garnishment before the court by a motion (r. 60.08(16)). A copy of the notice of motion for a garnishment hearing must be served on the sheriff by ordinary mail or by personal service or an alternative to personal service under r. 16.03 (r. 60.08(16.1)). A person served with a notice to co-owner who wishes to dispute the enforcement of the creditor's order for the payment or recovery of money or a payment made in accordance with the *Creditors' Relief Act, 2010* must move for a garnishment hearing within 30 days after being served with the notice (r. 60.08(16.2)). The judgment creditor is also permitted to seek an order compelling the garnishee to make a payment to the sheriff if the garnishee does not serve and file a garnishee's statement (r. 60.08(17)). Where payment of a debt owed to the debtor and one or more co-owners has been made to the sheriff and no notice of motion for a garnishment hearing has been delivered within the time for doing so, the creditor may file with the sheriff proof of service of the notice to the co-owner and an affidavit deposing to the creditor's belief that no co-owner is a person under disability. If the creditor does not do this within 30 days, the sheriff must return the money to the garnishee (rr. 60.08(21)–(23)).

3.6 Exemptions from execution

Certain statutory provisions provide limited protection to judgment debtors, thereby permitting the preservation of some assets.

The *Execution Act* exempts certain personal property of judgment debtors in Ontario from seizure. These exemptions include necessary wearing apparel up to a value of \$5,650, household furniture and equipment up to a value of \$11,300, and tools and other assets normally used by the debtor in his or her business up to a value of \$11,300 or \$28,300 for farmers. There is a motor vehicle exemption of up to \$5,650. Aids and devices owned by a debtor and used by the debtor or the debtor's family to assist with a disability, medical or dental condition are also exempt.

Significantly, in 2010, an exemption for the equity value of the principal residence of a debtor was added. This exemption is applicable to the debtor's equity value provided that the value does not exceed the prescribed amount. Since there is currently no prescribed amount, the equity value of any principal residence is exempt from forced seizure or sale by any process at law or in equity (s. 2(2)). Once an amount is prescribed, where the

equity value of the principal residence exceeds the prescribed amount, the entire residence is subject to seizure and sale under the *Act* (s. 2(3)).

Eighty percent of an employee's net wages are exempt from execution (*Wages Act*, s. 7(2)). However, if the debt claimed is for family support or maintenance, the exemption is decreased to 50 percent (*Wages Act*, s. 7(3)). Payments of benefits under some government programs are exempt as are pension benefits (*Pension Benefits Act*).

3.7 Distribution of recoveries

Under the *Creditors' Relief Act, 2010* recoveries made by the sheriff through any execution procedure are distributed among all ordinary creditors who have filed executions or proven their claims with the sheriff on a *pro rata* basis. This equality of treatment among creditors of the same class is consistent with a basic principle of creditor and debtor law that is carried through into the *Bankruptcy and Insolvency Act* and the common law concerning the priority of claims in proceedings under the *Winding-up and Restructuring Act*.

Because the sheriff distributes the recoveries made under any execution only to the creditors who have filed executions or proved their claims at the time of the distribution, not all creditors of a judgment debtor benefit from the seizure, and there remains an incentive on judgment creditors to act promptly so as to avoid dilution of the recoveries by the filing of further executions or claims with the sheriff. However, no distribution is made by the sheriff until 30 days have passed after making the recovery and until a notice of the sheriff's proposed distribution to creditors has been served on the debtor and on any other creditors who have filed executions with the sheriff.

4. Costs

4.1 Jurisdiction: Courts of Justice Act — s. 131

Subject to the provisions of an Act or rules of court, the costs incidental to a proceeding or a step in a proceeding are at the discretion of the court, and the court may determine by whom and to what extent the costs must be paid (s. 131).

4.2 Basic principles of costs

The general principle in our system of civil litigation is that "costs follow the cause," meaning that the successful party in a legal proceeding will be awarded and entitled to collect from the unsuccessful party its legal costs, which usually represent only a portion of its actual legal

expenses. The decision about costs, however, is discretionary, and the factors that the court is required to weigh are set out in r. 57.01(1). The court may even order costs against a successful party in a “proper case” (r. 57.01(2)).

The general rule regarding costs is subject to any offers to settle under R. 49. The term “costs” refers to the fees charged by the party’s lawyer, together with many disbursements that must be incurred throughout the proceeding. Contrary to some popular belief, there is no such thing as “court costs,” in the sense of any fee or charge that any party must pay for the use of court facilities or the time of the presiding judge (other than the relatively modest court filing fees set out in the schedule of fees under the *Administration of Justice Act*).

Costs are payable on either of two scales, which are now called “partial indemnity” and “substantial indemnity” (formerly, party-and-party and lawyer-client scale costs). In the vast majority of cases, costs are awarded on the lower partial indemnity scale. Substantial indemnity scale costs, which usually amount to an almost complete recovery of a party’s legal costs, are awarded only rarely (outside R. 49) and are usually imposed as a measure of disapproval by the court of the conduct of a party or its counsel with respect to either the transactions or events that are the subject matter of the proceeding or the conduct of the litigation itself.

Partial indemnity scale costs never constitute a complete recovery of actual costs by the successful party. Usually partial indemnity scale costs amount to between 30% and 60% of the actual lawyer’s fees and disbursements that a party incurs. The proportion varies significantly from case to case. The fact that a successful party in a lawsuit is limited to partial recovery of its actual legal costs means that victory in litigation frequently comes at a high and even crippling financial cost. One reason that partial indemnity scale costs is the norm is to avoid the situation where parties of meagre means but with arguable claims may be discouraged from resorting to the legal process out of fear of financially ruinous costs orders in the event that they lose their lawsuits.

The limitation of most cost awards to the partial indemnity scale is a real deterrent to bringing claims for modest amounts. Take the example of a potential wrongful dismissal action. If an ex-employee believes, for example, that he or she has been dismissed without adequate notice and should have received an additional several months’ notice (or pay in lieu thereof), the ex-employee may be advised by the lawyer that the damages that could be awarded should the ex-employee sue the ex-employer might be in the range of \$30,000. The legal

costs of obtaining such an award, however, could easily amount to \$25,000. Of this \$25,000 amount, only half or so might be recoverable from the defendant should the plaintiff win the lawsuit and be awarded partial indemnity scale costs, as is usual. Her net financial position, then, might well be in the range of the \$30,000 judgment, less \$10,000-\$15,000 in unrecoverable legal fees and disbursements. Of course, if she were to lose the lawsuit, not only would she have to pay her own lawyer’s fees and disbursements, she would be exposed to liability for the partial indemnity costs of the winning defendant. It is little wonder, therefore, that properly advised potential plaintiffs think long and hard before embarking on expensive, time-consuming, emotionally draining litigation, the outcome of which is uncertain, and especially where the monetary recovery, net of unrecoverable costs, may be modest.

There are provisions in the *Rules* that can help to mitigate the adverse financial impact of the partial indemnity scale of costs for a successful plaintiff or applicant. For actions involving amounts less than \$100,000, the simplified procedure under R. 76 can significantly reduce the cost of litigation. Further, a plaintiff can enhance his or her position considerably by making a reasonable offer to settle under R. 49 at an early stage in the proceeding. If the defendant rejects the offer and forces a trial and the plaintiff obtains a judgment at least as favourable as its offer to settle, then the plaintiff will be entitled to substantial indemnity scale costs of that part of the action that followed the making of the offer.

4.3 Factors in the court’s discretion

In exercising its discretion under s. 131 of the *CJA* to award costs, the court may consider, in addition to the result of the proceeding and any offer to settle made in writing,

- the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to costs, as well as rates charged and the hours spent by that lawyer;
- the reasonable expectations of what an unsuccessful party could expect to pay for the step in the proceedings for which costs are being fixed;
- the amount claimed and the amount recovered in the proceeding;
- the apportionment of liability;
- the complexity of the proceeding;
- the importance of the issues;
- the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

- whether any step in the proceeding was
 - improper, vexatious, or unnecessary; or
 - taken through negligence, mistake, or excessive caution;
- a party's denial of or refusal to admit anything that should have been admitted;
- whether it was appropriate to award any costs or more than one set of costs where a party
 - commenced separate proceedings for claims that should have been made in one proceeding; or
 - in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
- any other matter relevant to the question of costs (r. 57.01(1)).

Under rr. 57.03(1)–(2), the court is required to fix costs and may refer costs to assessment only in exceptional circumstances. This overcomes two basic issues in the litigation process. First, the delay in obtaining a date for the assessment of costs is substantial (many months); and second, the presiding judge or master has all of the information necessary to make a speedy adjudication on the issue of costs of a proceeding, whereas an assessment officer has no such information and must be fully briefed on the matter before being in a position to make an informed determination.

Every party who intends to seek costs for that step must give to every other party involved in the same step a costs outline (Form 57B) that may not exceed three pages (r. 57.01(6)). The court must devise and adopt the simplest, least expensive, and most expeditious process for fixing costs, and costs may be fixed after receiving written submissions, without the parties' attendance (r. 57.01(7)).

Under the simplified procedure, where the plaintiff obtains a judgment that falls within the claims described in r. 76.02(1), i.e., \$100,000 or less, the plaintiff recovers no costs unless

- the action was under the simplified procedure at the commencement of the trial; or
- the court is satisfied that it was reasonable for the plaintiff to have commenced and continued the action under the ordinary procedure (rr. 76.13(2)–(3)).

Where the action should have been under the simplified procedure at the commencement of the trial but was not, the trial judge has the discretion to order the plaintiff to pay all or part of the defendant's costs, including substantial indemnity costs, in addition to any costs the plaintiff may be required to pay under r. 49.10(2) (defendant's offer) (r. 76.13(6)). These costs sanctions do

not apply if the simplified procedure was not available because a counterclaim, crossclaim, or third party claim took the case out of the simplified procedure (r. 76.13(5)). The adverse costs sanctions for the plaintiff apply despite any offer to settle that might have given the plaintiff costs advantages under r. 49.10 (r. 76.13(4)).

4.4 Liability of lawyer for costs — r. 57.07

While the court has jurisdiction to award costs against any party to a proceeding, it also has the jurisdiction to order costs against non-parties personally, including the lawyer for any party. Such an order may be made on motion by the court or any party where the lawyer has caused costs to be incurred without reasonable cause or to be wasted by unreasonable delay, negligence, or other default. The form of order may be by

- disallowing costs between the lawyer and client or directing the lawyer to repay the client money paid on account of costs;
- directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; or
- requiring the lawyer personally to pay the costs of any party (r. 57.07(1)).

This power is exercised only rarely and generally only in extreme situations resulting from outrageous conduct or incompetence.

4.5 Assessment of costs — R. 58

Where costs are not fixed by the court, they are assessed by an assessment officer in the place where the proceeding was commenced in accordance with rr. 58.01–58.02. An assessment is commenced by the party entitled to costs filing a bill of costs and a copy of the order that gave rise to the entitlement to costs and obtaining a notice of appointment for assessment. The notice and bill of costs are to be served on every party interested at least seven days before the date fixed for the assessment (r. 58.03). Where the party entitled to costs fails or refuses to serve or file a bill of costs within a reasonable time, the party liable may obtain and serve a notice to deliver a bill of costs at least 21 days before the date fixed for assessment. If the party entitled thereafter does not deliver a bill of costs, the assessment officer may fix the costs in any event to prevent further prejudice to the party liable (r. 58.04).

In assessing partial indemnity costs, the assessment officer must assess lawyers' fees and disbursements in accordance with the Tariffs established under the *Rules* and must assess disbursements for fees paid to the court, a court reporter, an official examiner, or a sheriff in accordance with the regulations under the *Administration of Justice Act*, unless the court orders

otherwise (r. 58.05(1)). The Tariff permits the assessment officer to award Goods and Services Tax (GST) actually paid or payable on the lawyers' fees and disbursements allowable under r. 58.05. While the GST has been replaced by the Harmonized Sales Tax (HST), formal updates to authorize awards of the full HST have not yet been implemented. The assessment officer may set off costs owed between parties (r. 58.05(5)) or may also award or refuse the costs of an assessment to either party (r. 58.05(6)).

The Court of Appeal has said that substantial indemnity does not compensate for all fees incurred but is intended to be a significant contribution based on the factors in R. 57.

In assessing costs generally, the assessment officer may take into consideration some of the same matters that a court may consider under r. 57.01(1) and must follow any direction provided in this regard by the court under r. 57.02 (r. 58.06).

Where an assessment of partial indemnity costs has been made, the assessment officer must set out in a certificate of assessment of costs the amount of costs assessed and allowed (r. 58.09). Where a party is dissatisfied with the decision of the assessment officer, the party may request that the certificate be withheld for seven days so that the party may serve objections on every other interested party (r. 58.10(1)). The other parties may serve a reply. The assessment officer must review the decision and hear further evidence, if necessary, and then rule on the objections and complete the certificate accordingly (r. 58.10(3)).

A certificate of assessment may be appealed to either the Superior Court of Justice or the Court of Appeal, depending on the court from which the assessment originated on an issue in respect of which an objection was served (r. 58.11).

4.6 Security for costs

In addition to authorizing the court to award costs in relation to proceedings, once the proceeding or the stage

in the proceeding has concluded, the *Rules* also empower the court to direct that a party be required to post security for costs during the course of the proceeding as a term of continuing with the prosecution of a proceeding (r. 56.01). When the plaintiff posts the amount of money or other security ordered by the court, that assures the defendant that there will be funds available to compensate the defendant for costs if the plaintiff is ordered to pay the defendant's costs.

A defendant or respondent in a proceeding may make a motion for an order for security for costs, and the court may make the order it considers to be just where it appears that any of the conditions set out in r. 56.01(1) applies:

- The plaintiff or applicant is ordinarily resident outside Ontario.
- The plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere.
- The defendant or respondent has an order against the same plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part.
- The plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent.
- There is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent.
- A statute entitles the defendant or respondent to security for costs.

An appellant can also be ordered to post security for costs, both in relation to the appeal and with respect to the costs awarded by the court of first instance where there is good reason to believe that the appeal is frivolous or vexatious and the appellant has insufficient assets to pay the costs of the appeal, or where any of the grounds of r. 56.01 is applicable (r. 61.06).

Alternative dispute resolution, case management, and mandatory mediation

1. Introduction

This chapter provides an overview of the procedures, other than traditional litigation, that are available as a means of settling disputes. Mediation, in particular, has become a significant feature of civil litigation in this province, and counsel must ensure that they are well equipped to advise their clients about this process. The introduction of case management and mandatory mediation are consistent with the objective of the *Rules of Civil Procedure (Rules)*: "... to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits" (r. 1.04(1)).

On January 1, 2010, significant amendments to R. 77 (case management) and R. 24.1 (mandatory mediation) came into force, and R. 78 (Toronto Civil Case Management Project) was revoked. These changes are explored below. Case law considering the former RR. 24.1, 77, and 78 should be read with care.

2. Alternative dispute resolution

2.1 Background

Alternative dispute resolution (ADR) refers to procedures for settling disputes between parties by means other than traditional litigation and court adjudication. ADR encompasses many techniques including negotiation, conciliation, mediation, and arbitration and may take a variety of forms including a mini-trial, confidential listening, court-connected mediation, and private judging. A surge of interest in ADR emerged in the United States at least 20 years ago because of serious concerns by litigants, lawyers, and judges about the costs and delays involved in going to court.

In Canada, the use of ADR in specialized tribunals, such as the Workers Compensation Board (est. 1914) and the Ontario Labour Relations Board (est. 1944), is long established. Over the past few years, pressures have mounted to adopt ADR to address delay and cost problems in other areas such as commercial, environmental, family, estates, and employment law. A pilot project for court-mandated mediations was introduced for civil actions in Ottawa and the City of Toronto. Court-mandated mediation has since been formally adopted and incorporated into the *Rules* for the Cities of Ottawa and Toronto and the County of Essex.

Various factors contribute to the interest of both lawyers and clients in alternatives to traditional litigation. Some of the most commonly cited reasons for using ADR processes instead of traditional litigation are the following:

- **Speed:** Overloaded and back-logged court dockets mean that it may take years to get a trial date in metropolitan areas. ADR can result in much faster resolution of disputes.
- **Choice of neutral decision-maker(s):** You cannot choose your judge. However, with ADR, parties or their lawyers can often choose their adjudicator or mediator on the basis of known ability or special expertise.
- **Privacy:** Through the use of ADR, disputes are resolved privately and confidentially allowing parties to avoid the adverse publicity that disputes litigated through the courts are often subjected to.
- **Cost:** More expeditious and less formal ADR procedures can help cut legal costs considerably.
- **Mutually advantageous solutions:** Unlike traditional litigation, which tends to produce winners and losers, the goal of ADR is to have better processes that respond to the unique needs of the participants and produce acceptable solutions for all parties.
- **Preserving relationships:** The adversarial nature of litigation often fosters antagonism, which leads to the severing of business or other relationships. With ADR, relationships may more easily be preserved.

2.2 Techniques of alternative dispute resolution

It is beyond the scope of this chapter to describe all of the various dispute resolution processes in detail. Two of the more significant techniques of ADR, **arbitration** and **mediation**, are discussed below.

2.2.1 Contractual arbitration

In arbitration, the parties agree to submit their dispute to a neutral third party they select to act as decision-maker and whose decision can or, in the case of binding arbitration, must be accepted by the parties. Unlike litigation where you cannot "shop" for or select a judge of your choice, the parties have an opportunity to select an arbitrator or arbitral panel with background and experience with the particular issues in dispute.

Arbitration, like litigation, is an adversarial and adjudicative process; unlike litigation, its structure is fashioned by the parties. Since the parties can customize the proceedings to meet their needs, arbitration can be faster, less formal, and less expensive than the judicial process.

An arbitration may be conducted with respect to anything that is properly the subject of litigation, excluding criminal law and matters governed by any statute that has special rules such as labour law. The parties may select arbitration as a dispute resolution mechanism by specifying in their original agreement that any disputes shall be referred to arbitration, or they may jointly elect to submit a dispute to arbitration after it has arisen.

It is exceptionally important to read all contractual documents between the parties before embarking on any contractual arbitration. Typically, contractual arbitrations have confidentiality clauses that forbid all parties from discussing the matters in arbitration or their result. Legal counsel should make sure that his or her client understands the nature of that confidentiality agreement.

(a) Jurisdiction

Historically, it was against public policy for parties to oust the jurisdiction of the courts by contract. The only way to guarantee that a party would not derail an arbitration by commencing legal proceedings was either to make arbitration an option by election or to include a *Scott v. Avery* clause in any agreement making the final decision of the arbitrator a prerequisite to the commencement of legal proceedings.

The *Arbitration Act, 1991 (Act)* introduced major changes in the enforceability of agreements to submit disputes to arbitration and in the procedures attached to the arbitration process itself. The *Act* sets very clear limits on the right of the Ontario courts to intervene in matters governed by the *Act*. Section 6 directs that no court shall intervene in matters governed by the *Act* except for the following purposes:

- to assist in the conducting of arbitrations;
- to ensure that arbitrations are conducted in accordance with arbitration agreements;
- to prevent unequal or unfair treatment of parties to arbitration agreements; or
- to enforce awards.

(b) Procedural issues

The parties may make whatever arrangements they wish to govern the conduct of the arbitration, except as

expressly limited by the *Act*. Many commercial agreements include standard arbitration clauses. The *Act* mirrors in many ways the *Rules* and the *Courts of Justice Act*. This chapter can only give an overview and discuss the highlights of the legislation, and counsel should refer to the *Act* and the corresponding case law for further details.

Subsection 2(1) of the *Act* provides that the *Act* applies to any arbitration conducted under an arbitration agreement with two exceptions: (1) where the application of the *Act* is excluded by law (for example, s. 43(26) of the *Labour Relations Act, 1995* excludes the *Act*, and s. 43 sets up a special system of arbitration); or (2) where the arbitration is one to which the *International Commercial Arbitration Act* applies.

An arbitration agreement is defined in the *Act* as an agreement between two or more persons to submit to arbitration a dispute that has arisen or may arise between them (s. 1). Subsection 5(3) provides that an arbitration agreement may be oral or in writing. Under the *Act*, parties have the right to create their own process to resolve their dispute. They will, however, be bound by any process that they create.

Section 3 of the *Act* provides that parties may agree, expressly or by implication, to vary or exclude any part of the *Act* with certain exceptions. The provisions of the *Act* that the parties cannot contract out of are as follows:

- **Subsection 5(4):** Any agreement (containing a *Scott v. Avery* clause) requiring or having the effect of requiring that a matter be adjudicated by arbitration before it may be dealt with by a court has the same effect as an arbitration agreement.
- **Section 19:** The parties must be treated equitably and fairly and be given an opportunity to present a case and to respond (principles of natural justice).
- **Section 39:** The court may extend the time within which the arbitrator may make an award even if the time has expired.
- **Subsection 46(1):** On a party's application to set aside an award, the court may only set the award aside on one of the following 10 grounds:
 - (1) A party entered into the arbitration agreement while under a legal incapacity.
 - (2) The arbitration agreement is invalid or has ceased to exist.
 - (3) The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement.
 - (4) The composition of the tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with the *Act*.

- (5) The subject matter of the dispute is not capable of being the subject of arbitration under Ontario law.
 - (6) The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator.
 - (7) The procedures followed in the arbitration did not comply with the *Act*.
 - (8) An arbitrator has committed a corrupt or fraudulent act, or there is a reasonable apprehension of bias.
 - (9) The award was obtained by fraud.
 - (10) The award is a family arbitration award that is not enforceable under the *Family Law Act*.
- **Section 48(1):** The court may also declare the arbitration invalid at the instance of a party who has not participated in the arbitration at any stage during or after the arbitration on the basis of any one of the four grounds set out in s. 48(1):
 - A party entered into the arbitration agreement while under a legal incapacity.
 - The arbitration agreement is invalid or has ceased to exist.
 - The subject matter of the dispute is not capable of being the subject of arbitration under Ontario law.
 - The arbitration agreement does not apply to the dispute.
 - **Section 50:** Any party entitled to enforcement of an award made in Ontario or anywhere else in Canada may make an application to the Ontario courts for this relief. An arbitration award from anywhere in Canada may be enforced in Ontario under the *Act*.
 - **Section 3:** In the case of a family arbitration agreement, all of the above provisions, as well as
 - s. 4(2) — no deemed waiver of right to object;
 - s. 31 — the application of law and equity;
 - ss. 32(3)–(4) — the substantive law of Ontario or other Canadian jurisdiction; and
 - s. 45 — appeals.

The parties may, by agreement, opt out of any other provision of the *Act*, apart from the above. It is important, therefore, to refer to the arbitration agreement—which may actually be several agreements—in order to determine the procedure and the arbitrator's terms of reference. Subsection 17(2) provides that an arbitration clause is treated as a separate agreement so that it may survive even if the main agreement is found to be invalid. A party who participates in an arbitration despite being aware of non-compliance with the

arbitration agreement or with a provision of the *Act*, other than those specified in s. 3, and does not object to the non-compliance within the time limit provided (or within a reasonable time if none is provided) is deemed to have waived the right to object (s. 4(1)).

If a party to an arbitration agreement commences a court proceeding in respect of a matter submitted to arbitration, the court proceeding may be stayed on the motion of any other party to the agreement (ss. 7(1)–(2)). The arbitration of the dispute may commence and continue while the motion for a stay of the court proceeding is being made (s. 7(3)).

Any party to an arbitration agreement may initiate an arbitration by serving on the other parties a notice to appoint one or three arbitrators (depending on the agreement) or by serving a notice demanding arbitration (s. 23). Section 10 of the *Act* provides that where the parties cannot agree on the appointment of the arbitrator(s), the court may appoint the arbitrator(s) on application by a party. The party who commenced the arbitration must provide a statement within the time specified by the arbitral tribunal, or the tribunal may dismiss the claim (s. 27(1)). Unlike in the *Rules*, failure to submit a responding statement does not result in a default judgment. Pursuant to s. 27(2), the arbitral tribunal may continue the arbitration and shall not treat the failure to submit a statement as an admission of another party's allegations. The claimant is still required to prove its claim, and a hearing must still be held before an award is granted.

The arbitrator is effectively the trier of first and last instance. An award may be appealed to the court on a question of law, fact, or mixed fact and law if the arbitration agreement so provides (ss. 45(2)–(3)). A party may appeal an award to the court on a question of law, with leave, if the arbitration agreement does not deal with appeals on questions of law (s. 45(1)). The court's determination of a question of law may be appealed to the Court of Appeal, with leave (s. 8(3)). The arbitrator may make interim awards and rulings (s. 41), including orders for the preservation of property (s. 18(1)), requiring the production of documents (s. 25(6)(b)), or compelling the attendance of witnesses (s. 29(1)). The enforcement of these types of orders requires a party to apply to the court.

An arbitral tribunal shall decide any dispute in accordance with law and equity and may order specific performance, injunctions, and other remedies (s. 31). The award must be in writing, shall state the reasons on which it is based (unless the award is made on consent), and must be dated and signed by all members of the arbitral tribunal (s. 38). An arbitrator may make an

award dealing with the costs of the arbitration (s. 54) and has the same powers in respect of prejudgment and postjudgment interest as the courts (s. 57). Section 54 dealing with costs and offers to settle contains a provision similar to that found in r. 49.10. Subsection 54(5) provides:

If a party makes an offer to another party to settle the dispute or part of the dispute, the offer is not accepted and the arbitral tribunal's award is no more favourable to the second-named party than was the offer, the arbitral tribunal may take the fact into account in awarding costs in respect of the period from the making of the offer to the making of the award.

(c) Substantive issues

While arbitration is intended to be a less formal procedure than litigation through the courts, as well as a faster and less expensive method to reach a decision, this is still a legal result in that an award can be enforced in the same manner as a court's decision. Since the procedure is largely in the control of the parties, it offers them the ability, through their counsel, to fashion the proceeding to include as much or as little court-like procedure as they wish. It is not necessary for the parties to be represented by legal counsel or, for that matter, for an oral hearing to be held. Subsection 26(1) provides that the arbitral tribunal may, in a proper case, decide the issue on the basis of documents alone but must hold a hearing whenever a party requests it. Hearings can be conducted with as much or little formality as may be required provided that the process is fair.

Arbitration also offers the opportunity to have a specialized person or expert serve as the decision-maker. It may prove very useful to be able to appoint a real estate agent or business valuator to determine an arbitration according to a lease, or an engineer to decide an arbitration over a construction matter or other matters involving technical competence. An arbitrator may also appoint experts to assist him or her pursuant to s. 28(1). Subsection 13(1) provides that an arbitrator can be challenged in either of the following cases:

- Circumstances exist that give rise to a reasonable apprehension of bias.
- The arbitrator does not possess qualifications the parties have agreed are necessary.

An arbitrator must ensure that any potential conflicts of interest are revealed to the parties to avoid the appearance of bias. An objecting party must object to the arbitrator within 15 days of becoming aware of the grounds for a challenge, for example, facts that support a reasonable apprehension of bias (s. 13(3)).

The requirements of the formal rules of evidence are lessened by s. 21, which directs that ss. 14–15 and 16 of

the *Statutory Powers Procedure Act* apply to arbitrations with necessary modification and, among other things, makes hearsay evidence admissible.

Arbitration is not conciliation or mediation and shall not be conducted as such. Section 35 of the *Act* requires that no part of the arbitration be conducted as conciliation or mediation that may compromise or appear to compromise the arbitrator's impartiality. The parties may, however, explicitly contract out of this provision.

2.2.2 Statutory arbitration

Several provincial statutes provide for arbitration and prescribe the manner in which the arbitration will take place. In some statutes, there is an express requirement of submission to arbitration; in others, an implied submission to arbitration; and, finally, in other instances, there is nothing more than an opportunity afforded the parties to a dispute to go to arbitration. Some examples of statutes that fall within one or more of these categories are the *Expropriations Act*, *Insurance Act*, *Hospital Labour Disputes Arbitration Act*, *Municipal Arbitrations Act*, *Condominium Act, 1998*, and *Ontario New Home Warranties Plan Act*. One of the best known examples of a statute expressly requiring submission to arbitration is the *Labour Relations Act, 1995*, referred to above.

2.2.3 Mediation

Mediation is an informal process in which a neutral third party helps participants reach their own agreement for resolving a dispute. Parties may voluntarily enter into mediation, but mandatory mediation also exists. Unlike a judge or arbitrator, the mediator has no authority to impose a solution. Mediation is a co-operative, interest-based approach to conflict resolution.

The mediator controls the process by which the parties may reach an agreement but not the actual substance of any agreement that is reached. The mediator's role is to serve as a neutral facilitator or catalyst who advises the parties on procedure and how they might best negotiate. The mediator's intervention in the dispute resolution process is designed to ensure that communication takes place clearly and effectively in an effort to identify and narrow issues in dispute, uncover underlying interests, and generate options as to how the dispute might be resolved.

Mediation is a co-operative rather than a combative process. As a result, it may help to preserve relationships that might be destroyed through litigation. Furthermore, because mediation is a confidential process, concerns over litigation publicity generally do not arise.

Counsel should establish who will be paying the costs of the mediation before it is booked since these expenses can be significant.

Advocacy at mediation is quite different from arbitration/trial practice since a conciliatory approach often bears the most fruit.

Mediation is explored in greater depth later in this chapter.

3. Rule 77 and case management

3.1 Background – before January 1, 2010

In 1997, “Civil Case Management” was introduced by way of a new rule in the *Rules* (R. 77). Case management applied in Ottawa, Windsor, and Toronto.

In Toronto, all eligible cases commenced on or after July 3, 2001, were case managed pursuant to R. 77. Before that date, approximately 25 percent of all cases were randomly assigned to case management by the registrar. A practice direction was introduced that directed that cases in Toronto would no longer be automatically assigned to R. 77. The change was the result of concerns among the bench and bar about delays in the civil justice system in Toronto. The practice direction reiterated the court’s continued commitment to effective case management but noted that some difficulties had arisen in the universal application of R. 77 because of the large number of cases in the Toronto region.

A three-year pilot project was introduced in Toronto commencing on December 31, 2004, that put an end to the automatic assignment of cases to R. 77. The details of the pilot project were set out in a Superior Court of Justice Toronto Region practice direction titled “Backlog Reduction/Best Practices Initiative,” dated November 22, 2004 (“Backlog Practice Direction”). Under the pilot project, there was no automatic assignment of otherwise eligible cases to case management. If the court considered it to be advisable or if all parties sought case management by way of a joint request, R. 77 was applied to a proceeding.

Rule 78 (Toronto Civil Case Management Pilot Project) came into effect on May 6, 2005. This rule applied to actions commenced in the City of Toronto on or after December 31, 2004, and incorporated the key elements of the Backlog Practice Direction. Under the R. 78 Toronto regime, parties had greater responsibility for managing actions and moving them to trial or other resolution. The court continued to provide partial or full case management where the need for the court’s intervention was demonstrated. Case management pursuant to R. 77 was still available in Toronto where all parties consented in writing or on a party’s motion where

another party had taken steps that amounted to chronic and substantial obstruction of the action. Rule 77 cases commenced prior to December 31, 2004, continued to be governed by R. 77, with the exception of trial scheduling procedures. The Backlog Practice Direction and R. 78 did not affect the operation of R. 77 in Ottawa and Windsor.

It became increasingly clear to the profession and parties alike that the case management system was confusing, complex, and costly. At the very least, there were two case management systems operating under RR. 77 and 78. Effective January 1, 2010, the case management regime was changed. The old R. 77 was revoked and replaced with a simpler case management system under a new R. 77. Also, the pilot project ended, and R. 78 and the Backlog Practice Direction were revoked. As a result, Toronto civil case management now follows the regular procedures in the new R. 77.

3.2 Purpose and general principles after January 1, 2010 – r. 77.01

Case management was introduced principally to address issues of excessive expense and delay in the administration of civil lawsuits. Previously, the progress of a civil action was almost entirely up to the parties and their counsel. Rule 77 gives the courts a much more significant supervisory role over the progress of cases moving through its system. Despite the experience in Toronto, which may be related in large part to the sheer number of cases in that region, the courts remain committed to the principle of case management. However, the new R. 77 requires that the parties be responsible for managing the proceeding, and case management is to be used only if there is a demonstrated need and only to the degree necessary.

The purpose of the civil case management rule is set out at r. 77.01(1):

The purpose of this Rule is to establish a case management system that provides case management only for those proceedings for which a need for the court’s intervention is demonstrated and only to the degree that is appropriate, as determined in reliance on the criteria set out in this Rule.

According to r. 77.01(2), certain general principles will govern the interpretation and application of the new case management rule. Rule 77 must be construed in accordance with the principle that the greater share of the responsibility for managing the proceeding and moving it expeditiously to a trial, hearing, or other resolution remains with the parties (r. 77.01(2)1). Further, the nature and extent of case management provided by a judge or case management master under R. 77 in respect of a proceeding will be informed by

relevant practices, traditions, customs, or judicial resource issues that apply locally (r. 77.01(2)2).

3.2.1 Application — r. 77.02

The new R. 77 applies to both actions and applications commenced in or transferred to the Cities of Ottawa or Toronto or to the County of Essex on or after January 1, 2010, and assigned to case management by court order (r. 77.02(1)).

According to r. 77.02(2), case management does not apply to

- actions or applications on the Commercial List in the Toronto Region;
- actions or applications under RR. 74 and 75 (estates);
- applications for the removal or replacement of personal representatives under the *Trustee Act*;
- applications under Part V of the *Succession Law Reform Act*;
- applications for guardianship of property or persons under the *Substitute Decisions Act, 1992*;
- actions under R. 64 (mortgage actions);
- actions under R. 76 (simplified procedure);
- actions or applications under the *Construction Lien Act* (except trust claims);
- actions or applications under the *Bankruptcy and Insolvency Act*; and
- actions and applications certified as class proceedings under the *Class Proceedings Act, 1992*.

3.2.2 Case management powers — r. 77.04

Broad case management powers are conferred on both judges and case management masters under the new R. 77. Pursuant to r. 77.04(1), a judge or case management master may

- extend or abridge a time prescribed by an order or the rules;
- adjourn a case conference;
- set aside an order made by the registrar;
- establish or amend a timetable; and
- make orders, impose terms, give directions, and award costs as necessary to carry out the purpose of R. 77.

A “timetable” is defined in r. 1.03 as a schedule for the completion of one or more steps required to advance the proceeding, including the delivery of affidavits of documents, examinations under oath, where available, or motions. A “timetable” may be established either by written agreement of the parties or by order of the court.

A judge or case management master may, on his or her own initiative, require the parties to appear or participate in a conference call to deal with any matter arising in connection with the case management of the proceeding (r. 77.04(2)). The powers set out in rr. 77.04(1)–(2) are in addition to any other power in R. 77 (r. 77.04(3)).

3.2.3 Assignment for case management — rr. 77.05–77.06

A defendant or respondent who is served with an originating process is required to defend or respond to the proceeding in the ordinary way. A court order is now required for a proceeding to be assigned for case management (r. 77.05). The court order for assignment for case management may be made on consent, on the court’s initiative, or on the request of one of the parties. Where the consent of all the parties has been obtained, a regional senior judge or, subject to the direction of the regional senior judge, any judge or case management master may assign a proceeding to case management under R. 77 (r. 77.05(1)). If the parties do not consent, at any time on or after the filing of the first defence (defined to include a notice of intent to defend, statement of defence, notice of appearance, and a notice of motion in response to a proceeding (r. 77.03)) in a proceeding to which R. 77 may apply, a regional senior judge or, subject to the direction of the regional senior judge, any judge or case management master may assign a proceeding to case management under R. 77 on his or her own initiative or on the request of a party or on motion if the court requires it (r. 77.05(2)). The rule also provides that two or more proceedings may be assigned for case management (r. 77.05(3)).

The new r. 77.05(4) sets out the criteria that the court must review when considering assigning a proceeding for case management. When considering whether to assign a proceeding to case management, the regional senior judge, other judge, or case management master must have regard to all the relevant circumstances, including any or all of the criteria in r. 77.05(4):

- the purpose set out in r. 77.01(1);
- the complexity of the issues of fact or law;
- the importance to the public of the issues of fact or law;
- the number and type of parties or prospective parties and whether they are represented;
- the number of proceedings involving the same or similar parties or causes of action;
- the amount of intervention by the court that the proceeding is likely to require;
- the time required for discovery, if applicable, and for preparation for trial or hearing;

- in the case of an action, the number of expert witnesses and other witnesses;
- the time required for the hearing; and
- whether there has been substantial delay in the conduct of the proceeding.

In certain instances, a proceeding may be assigned to a particular judge. The Chief Justice or Associate Chief Justice of the Superior Court of Justice, a regional senior judge, or a judge designated by any of them may direct that all steps in a proceeding that is assigned for case management be heard and conducted by a particular judge (r. 77.06(1)). The assigned judge may not preside at the trial of the action or the hearing of the application, except with the written consent of all the parties (r. 77.06(2)).

Lawyers with proceedings in the Toronto Region will need to be aware of Part II (requests for assignment to case management: rule 77.05) of the Practice Direction for Civil Applications, Motions and Other Matters in the Toronto Region dated January 1, 2010 (Practice Direction). The Practice Direction prescribes how consent and opposed requests for assignment to case management are to be made. Further, the Practice Direction deals with requests for the appointment of a particular judge pursuant to r. 77.06 (Practice Direction, paras. 27–33).

3.2.4 Motions — r. 77.07

Subrule 77.07(4) provides for a variety of procedures that may be used on a motion. Certain motions can be brought without supporting material, and motions can be brought by attendance, in writing, by fax, or under r. 1.08 by telephone and video conference. Motions may be made only to a judge or case management master (r. 77.07(1)). If a direction has been made for all the steps in a proceeding to be heard by a particular judge pursuant to r. 77.06(1), then the motions in the proceeding must be made to that judge (r. 77.07(2)). Unless directed otherwise, that particular judge may refer to a case management master any motion within the jurisdiction of a master under r. 37.02(2) (r. 77.07(3)).

The issue of costs must be addressed by the judge or case management master at the conclusion of each motion in accordance with r. 57.03 whether or not the motion is contested (r. 77.07(5)). A feature of case management is that a formal order does not have to be taken out after a hearing. Subrule 77.07(6) provides that no formal order need be prepared, signed, or entered if the order has been recorded in writing unless an appeal or motion for leave to appeal is made to a judge or appellate court.

3.2.5 Case conferences — r. 77.08

The conduct of case conferences is governed by r. 77.08. A judge or case management master may at any time convene a case conference on his or her own initiative or at a party's request (r. 77.08(1)). The judge or case management master may direct that the parties, or a representative responsible for making decisions and instructing the lawyer, attend the case conference personally or be available by telephone (r. 77.08(2)). Lawyers attending the case conference must have authority to deal with the matters to be dealt with and be fully acquainted with the facts and legal issues in the proceeding (r. 77.08(4)).

A broad range of matters may be dealt with at the case conference (r. 77.08(3)). The judge or case management master may identify the issues in the case noting those that are contested and those that are not and explore methods to resolve the contested issues (r. 77.08(3)(a)–(b)). The judge or case management master may secure the parties' agreement on a specific schedule of events in the proceeding (r. 77.08(3)(c)). In addition to whatever other order may be made, the master or judge may establish a timetable for the action or modify an existing timetable (r. 77.08(3)(d)–(e)). The judge or case management master has the power at the case conference to, if notice has been given and it is appropriate to do so or on consent of the parties, make procedural orders, convene a pre-trial conference, or give directions, and in the case of a judge, make an order for interlocutory relief or convene a hearing (r. 77.08(5)).

3.2.6 Transition — r. 77.09

Subrule 77.09 governs the transition of existing cases from the former case management system to the new case management regime. Every proceeding to which the former cases management rules (the old RR. 77 and 78) applied immediately before January 1, 2010, on and after that day, are continued under the new R. 77 (r. 77.09(2)). Pursuant to r. 77.09(3), a judge or case management master may make orders or give directions as necessary to deal with any procedural issues that arise as a result of the transition. Unless a judge or case management master orders otherwise, all orders, directions, and timetables in a proceeding under the former case management rules that were in force immediately before January 1, 2010, remain in force on and after that day (r. 77.09(4)).

Notwithstanding the transition rule above, it is important to note that in the case of an action that was governed by R. 78 immediately before January 1, 2010, r. 78.06 (dismissal by registrar of action as abandoned) continues to apply. Subrule 78.06(1) requires that the registrar

dismiss an action as abandoned if all of the following are true:

- More than two years have passed since the date the originating process was issued.
- No statement of defence has been filed.
- The action has not been disposed of by final order or judgment.
- The action has not been set down for trial or summary trial.
- The registrar has given 45 days' notice that the action will be dismissed as abandon.

4. Rule 24.1 and mandatory mediation

4.1 Background

On January 4, 1999, R. 24.1 of the *Rules* came into effect in Toronto and Ottawa/Carleton. Rule 24.1 established as a pilot project a mandatory mediation program for case-managed civil, non-family actions.

On September 1, 1999, R. 75.1 came into effect in Toronto and Ottawa/Carleton, bringing estates, trusts, and substitute decisions matters within the mandatory mediation program. Rule 75.1 is substantially similar to R. 24.1 although there are some differences. This chapter focuses on general mandatory mediation under R. 24.1.

The pilot projects under RR. 24.1 and 75.1 were scheduled to be revoked on July 4, 2001. An independent evaluation was conducted to assess the effectiveness of mandatory mediation, which resulted in a recommendation that R. 24.1 should be made a permanent feature of the *Rules*. As a result, regulations containing amendments to RR. 24.1 and 75.1 were filed, making both rules a permanent part of the *Rules*.

In addition to actions commenced in Toronto or Ottawa, RR. 24.1 and 75.1 were subsequently amended to apply to proceedings commenced in the County of Essex.

The requirements under the mandatory mediation regime were not wholeheartedly embraced by all members of the bar. Some counsel expressed concern that the mediation (which was usually held before examinations for discovery) occurred at such an early stage that the parties did not have sufficient information to be able to engage in meaningful settlement discussions. In addition, some lawyers felt that mediation was simply not appropriate in certain cases and that it should not be forced on their clients. Further, some counsel felt that it added another layer of cost in the already expensive litigation process.

On January 1, 2010, after much discussion with the legal profession, the rules with respect to mandatory

mediation under R. 24.1 were substantially amended to address these concerns.

4.2 Significant changes under R. 24.1

Before mandatory mediation was introduced, parties in civil lawsuits would frequently arrange mediations privately in an effort to resolve their dispute without the necessity of proceeding to trial.

Rule 24.1 introduced two significant changes to the process:

- Mediations are mandatory in specified actions (r. 24.1.01).
- They must take place within 180 days after the first defence has been filed, unless the court orders otherwise (r. 24.1.09(1)).

These changes were intended to help parties resolve disputes outside of court early in the litigation process, thereby saving them both time and money.

4.3 Scope of R. 24.1

The new R. 24.1 applies to actions that were governed by R. 24.1 immediately before January 1, 2010, and actions that are commenced in the Cities of Ottawa and Toronto and the County of Essex on or after January 1, 2010 (r. 24.1.04(1)). According to rr. 24.1.04(2)–(2.1), R. 24.1 does not apply to actions

- to which R. 75.1 (mandatory mediation – estates, trusts, and substitute decisions) applies;
- in relation to a matter that was the subject of a mediation under s. 258.6 of the *Insurance Act* if the mediation was conducted less than a year before the delivery of the first defence in the action;
- on the Commercial List;
- under R. 64 (mortgage actions), the *Construction Lien Act* (except trust claims), and the *Bankruptcy and Insolvency Act*; and
- certified under the *Class Proceedings Act, 1992*.

4.4 Timing of the mediation

The mandatory mediation rule applies only to defended actions. In a defended action, a mediation session must take place within 180 days after the first defence is filed, unless the parties obtain a court order abridging or extending the time for the mediation session (r. 24.1.09(1)). In the case of actions that were governed by R. 24.1 immediately before January 1, 2010, the 180-day period begins to run on January 1, 2010 (r. 24.1.09(2.1)).

The factors the court shall take into account in considering whether to order an extension or abridgement of time are set out in r. 24.1.09(2) and include

- the number of parties, the state of the pleadings, and the complexity of the issues in the action;
- whether a party intends to bring a motion under R. 20 (summary judgment), R. 21 (determination of an issue before trial), or R. 22 (special case);
- whether the mediation will be more likely to succeed if the 180-day period is extended to allow the parties to obtain evidence under
 - Rule 30 (discovery of documents);
 - Rule 31 (examination for discovery);
 - Rule 32 (inspection of property);
 - Rule 33 (medical examination);
 - Rule 35 (examination for discovery by written questions); and
- whether, given the nature of the case or the circumstances of the parties, the mediation will be more likely to succeed if the 180-day period is extended or abridged.

There are also additional provisions that permit parties to avoid the 180-day requirement. Mediations may be postponed to a later date if the parties consent to the date in writing and the consent is filed with the mediation co-ordinator (r. 24.1.09(3)). A party may also bring a motion for an order exempting the action from mandatory mediation (r. 24.1.05).

4.5 Selection of mediator

Parties to an action may agree to select a mediator from a roster of mediators maintained by the local mediation committee, or on consent, they may choose a mediator who is not on the roster (r. 24.1.08). The parties must select a mediator, and before setting the action down for trial, one of the parties shall file with the mediation co-ordinator a notice (Form 24.1A) stating the agreed mediator's name and the date for the mediation or a mediator's report indicating that the mediation has been concluded (r. 24.1.09(5)).

In the case where the parties to an action do not select a mediator, one will be appointed by the mediation co-ordinator. If no notice has been filed within 180 days after the first defence has been filed and the time has not otherwise been extended under r. 24.1.09(1) (court order) or r. 24.1.09(3) (consent of the parties) or the mediation co-ordinator has not received a mediator's report, a notice under r. 24.1.09(5)(a) (name of mediator and date of session), or a notice that the action has been settled, a mediator will be assigned to the parties by the mediation co-ordinator unless the court orders otherwise (r. 24.1.09(6)). If the mediation co-ordinator does not, within the time provided by an order under r. 24.1.09(1) or r. 24.1.09(3), receive a mediator's report, a notice under r. 24.1.09(5)(a), or a notice that the action has

been settled and the action is set down for trial, he or she must immediately assign a mediator from the list, unless the court orders otherwise (r. 24.1.09(6.1)).

The assigned mediator must immediately fix a date for the mediation session and serve on each party, at least 20 days before the date, a notice in Form 24.1B stating the place, date, and time of the session and advising that attendance is obligatory (r. 24.1.09(7)). Unless the court orders otherwise, the mediation session shall be within 90 days of the appointment of the mediator (r. 24.1.09(7.1)). A copy of the notice shall be provided to the mediation co-ordinator by the assigned mediator (r. 24.1.09(8)).

The roster of mediators is made up of both lawyers and non-lawyers. Pursuant to r. 24.1.07, local mediation committees have been established to maintain the list of mediators and monitor the mediators' performance. The names of the mediators who are on the roster at any given time can be found on websites established by the Ministry of the Attorney General.

The fees a roster mediator may charge for the three-hour mandatory mediation session are prescribed by O. Reg. 451/98, which is reproduced at the beginning of R. 24.1 in *Ontario Civil Practice* and at the end of R. 24.1 in *Ontario Annual Practice*. The prescribed fee covers one hour of preparation time and a mediation session of up to three hours. The fees range from \$600 to \$825 plus GST depending on the number of parties involved. This fee is divided equally among the parties. The fees of mediators who are not on the roster are not regulated. Fees of roster mediators after the completion of the three-hour mandatory mediation session are also unregulated. If the mediation session is not concluded within three hours, the mediation may continue with the consent of all parties and the mediator at a rate agreed upon by the parties and the mediator.

4.6 Procedure under R. 24.1

At least seven days before the mediation session, every party to the mediation is required to prepare and deliver to the opposing parties and the mediator a statement of issues in Form 24.1C (r. 24.1.10(1)). The statement of issues must identify the issues in dispute and the parties' positions and interests (r. 24.1.10(2)). The pleadings and any other documents of central importance in the action must be served with the statement of issues (rr. 24.1.10(3)–(4)).

The mediation may be held anywhere that is acceptable to the parties, such as the mediator's office, the office of any party or party's lawyer, or the court facilities. All parties and (if they are represented) their lawyers must attend the mediation unless the court orders otherwise

(r. 24.1.11(1)). If an insurer may be liable to satisfy all or part of a judgment in the action or to indemnify or reimburse an insured party for money paid in satisfaction of all or part of a judgment in the action, a representative of the insurer must attend the mediation session, unless the court orders otherwise (r. 24.1.11(1.1)(a)). In the same circumstances, the insured party is not required to attend the mediation session (r. 24.1.11(1.1)(b)).

The parties attending the mediation must have authority to settle the case or have ready telephone access throughout the mediation to anyone else whose approval is needed to settle (r. 24.1.11(2)). A significant impediment to settlement at mediation is a lack of authority to settle on the part of a party's representative. Where a corporation, partnership, or other organization is a party to an action, it should be represented by an individual who is authorized to make a decision on its behalf.

If it is not practical to conduct the scheduled mediation session because a party fails to attend within the first 30 minutes of a scheduled mediation session or fails to provide a copy of a statement of issues at least seven days prior to the mediation, a mediator shall cancel the session and immediately file a "certificate of non-compliance" in Form 24.1D with the mediation co-ordinator (rr. 24.1.10(5) and 24.1.12).

Under r. 24.1.13, when a certificate of non-compliance is filed, the mediation co-ordinator shall refer the matter to a case management master or judge. According to r. 24.1.13(2), the case management master or judge may convene a case conference under r. 77.08 and may

- establish a timetable for the action;
- strike out any document filed by a party;
- dismiss the action or strike out the statement of defence depending on which party is not in compliance;
- order a party to pay costs; or
- make any other order that is just.

Rule 24.1.14 expressly provides, "All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions."

Agreements reached at the mediation resolving some or all of the issues in dispute must be in writing and signed by the parties or their lawyers (r. 24.1.15(3)). It is best to ensure that the agreement between the parties is properly documented so that the parties cannot resile from the agreement and the terms of the settlement are clear. The agreement can be prepared in the form of minutes of settlement to be signed preferably by the

parties, not their lawyers, since it's the parties that are bound by the agreement's terms. The agreement is legally binding. If a party fails to comply with the terms of a signed agreement, any other party to the agreement may bring a motion for judgment under the terms of the agreement or continue the legal proceeding as if there had been no agreement (r. 24.1.15(5)).

If the parties settle the case, the defendant must file a notice with the court advising of the settlement within 10 days of the agreement being signed or, in the case of a conditional agreement, within 10 days after the condition is satisfied (r. 24.1.15(4)). The mediator is required under r. 24.1.15(1) to give the mediation co-ordinator and the parties a report on the mediation within 10 days after the mediation is concluded.

Lawyers with cases in the Toronto Region need to be aware of Part III (mandatory mediation) of the Practice Direction. Paragraph 36 of the Practice Direction states that court staff will not accept for filing a trial record (ordinary actions) or a notice of readiness for a pre-trial conference (simplified procedure action) unless a certificate is filed indicating proof that certain requirements under R. 24.1 have been met (Practice Direction, paras. 34–37).

5. Mediation examined in more depth

5.1 Introduction

The increased use of mediation has caused counsel to re-examine their role in legal proceedings. Mandatory mediation has meant that lawyers in the jurisdictions where it is applicable will be attending a mediation with their clients long before a trial in the matter (if it ever gets to that stage) in almost every case. Historically, lawyers have been trained to take cases to trial, through courses in trial advocacy and evidence, as well as in substantive law. Currently, counsel have to advise clients how best to approach a negotiated resolution of their cases, often without having had examinations for discovery or even full documentary discovery. This change brings with it a new approach to the role of counsel.

Mediation has already become a prominent part of the civil litigation process in the areas where it has been introduced and is likely to spread to the rest of the province, fundamentally affecting the way lawsuits are conducted in the process. Lawyers who will be representing clients in this system should do their best to become knowledgeable about and skilled in both "mediation advocacy" and "trial advocacy." Although most lawyers have been exposed to the negotiation process while carrying out their traditional functions, the

legal profession has only recently begun to study negotiation in a formal way.

5.2 Voluntary mediation: the mediation agreement

The first stage of voluntary mediation is initiated when the disputing parties agree to mediate and select a mediator. There is considerable flexibility in the process, and the parties can fashion the process according to their interests. It is advisable to prepare a written agreement to mediate that can be signed by all parties before the mediation. The agreement will usually cover matters such as the powers and responsibilities of the various persons involved, organizational and procedural matters, the payment of fees, and confidentiality requirements. The mediation agreement need not provide too much structure or deal with rules of evidence, exchange of documents, or examinations of parties. A mediation may be more successful where the mediator can develop and amend the procedures to be employed as circumstances change. Because any party can withdraw from the mediation process at any time, it is advisable to provide for a minimum time allowance to accord the parties sufficient time to determine whether the process can work for them. Most mediation agreements have confidentiality terms, which means that neither party can divulge (especially in an open court room) what transpired at the mediation.

5.3 Statutory mediation

As is the case with arbitration, several provincial statutes provide for mediation. In some statutes, there is a requirement to mediate. In other legislation, there is an opportunity to mediate. Examples of statutes that provide for mediation include the *Insurance Act* and the *Commercial Mediation Act, 2010*.

5.4 Mediation procedure

While each mediation will be different, the process will generally include several stages, including pre-session preparation; introduction of the process; information exchange; exploration of the issues and interests beneath the positions; and option generation, development, and closure either by creating an agreement or agreeing on the next step(s). The mediator will usually take the initiative at the start of the mediation. He or she will start by explaining both the nature of mediation generally and what will happen in the mediation session specifically.

In the next stage of the mediation (whether voluntary or mandatory), each party will present his or her case via an opening statement. These presentations serve three principal functions:

- It is an opportunity for each party to educate the mediator about the nature of the case and to facilitate preparation of a list of issues that need to be addressed.
- They allow each side to state their concerns while the other party is compelled to listen and hopefully hear the real, rather than the imagined, concerns of the other.
- The presentations give each side an opportunity at the outset to have some uninterrupted time to state their position, be heard by the mediator, and vent some emotion.

From the information provided in the parties presentations and from information the mediator may have gained from reading the statements of issues or position papers filed by the parties, the mediator can now attempt to identify existing areas of agreement between the parties on either substantive or procedural matters. It is useful to remind parties that there is some common ground between them. Mediators will often then work on a list of the issues in dispute in consultation with the parties.

The mediation then moves into a problem-solving phase. The mediator will aim at this stage to identify differences in perceptions and expectations; clarify terms, issues, feelings, and responses; indicate discrepancies and illogical conclusions; recognize and encourage signs of progress; and propose creative solutions tailored to the parties' interests or needs. The mediator will not determine who is right or wrong but will identify strengths and weaknesses and advise the parties as to where he or she perceives there to be room for movement so that the parties can break the impasse that brought them to mediation. The mediator may pose questions to each party or may try to encourage the parties and their counsel to communicate directly with one another.

At some stage in the mediation, the mediator will meet separately with each of the individual parties. These private confidential sessions, called caucuses, may take place between the mediator and each party from time to time during the course of the mediation. The separate meetings can be used, among other things, to

- allow the parties to disclose additional information that they were unable or unwilling to disclose in joint meetings;
- assist mediators in understanding the motivations of the parties and their priorities and in developing empathy and trust with them individually;
- assist in clarifying underlying interests, needs, and expectations and in separating them from positions;
- identify obstacles to constructive negotiation and engage in discussion of same;

- give the parties time and space to vent emotion with the mediator without jeopardizing the progress of the negotiations; and
- provide the parties with the opportunity to disclose options for resolution and have the mediator assess, challenge, or encourage them without any compromise to the parties' negotiating posture.

The end of the mediation, if not established by some pre-determined time limit, is identified by the mediator. Any agreement reached should be reduced to writing and signed by the parties and may form the basis of minutes of settlement. It is wise to ensure the agreement is in writing and signed by all parties so that it can be enforced through application to the court if either party resiles from the agreement or there is some dispute at a later date about the terms of the settlement. If no agreement is reached, the mediator will nonetheless try to terminate the mediation on a positive note with a short statement complimenting the parties on their efforts and reminding the parties that they can return to mediation at a later date if they wish. A good mediator will assist the parties in narrowing the issues that divide them and bring the parties closer together so that they have a chance to work on their own resolution of the dispute, whether during the mediation or at some time thereafter.

5.5 The role of the mediator

Whether mediations are mandatory under R. 24.1 or voluntary, they constitute negotiations that are conducted with the assistance of a mediator whose role is to facilitate the negotiation process. Effective representation of a client at mediation requires an understanding of the role of the mediator, as well as that of counsel. The mediator serves a different purpose than that of an arbitrator or a pre-trial judge. It is not the mediator's role to provide an expert evaluation of the case or to predict the outcome at trial (though some mediators will do so anyway).

Counsel should remember that the mediator's interest is to achieve a consensus. The mediator is not there to ensure that the settlement is on favourable terms for any particular party. It is ultimately up to counsel, not the mediator, to ensure that his or her client's interests are protected in the mediation process.

5.6 Negotiation theory

A great deal has been written about the theoretical underpinnings of negotiation. But only in the last few years, with the increasing popularity of mediation and with the introduction of mandatory mediation, have Ontario lawyers begun to study negotiation in significant numbers. There are regular continuing legal education programs on the subjects of negotiation and "mediation

advocacy," often using the "Harvard Negotiation Project" as a model. Law schools are also beginning to turn their attention to the discipline.

The following comments are intended as an overview of some aspects of negotiation theory of which Ontario lawyers should be aware at a time when the vast majority of their cases will likely be disposed of through negotiation (either at or following mediation) rather than at trial.

5.6.1 Co-operative v. competitive negotiation

The premise of the popular book *Getting to Yes: Negotiation Agreement Without Giving In* (2011) by Fisher, Ury, and Patton is that it is possible to resolve most disputes on a "win-win" basis. This approach is based on the co-operative approach to negotiation, which seeks to meet the underlying needs of all parties to the dispute or transaction and, therefore, tends to produce strategies designed to promote the disclosure and relevance of these underlying needs. The authors of *Getting to Yes* (at xxviii) are proponents of an integrative or "principled" bargaining technique:

The method of *principled negotiation* developed at the Harvard Negotiation Project is to decide issues on their merits rather than through a haggling process focussed on what each side says it will and won't do. It suggests that you look for mutual gains whenever possible, and that where your interests conflict, you should insist that the result be based on some fair standards independent of the will of either side.

A commonly cited example of this approach involves two sisters, both of whom want an orange. Because there is only one orange, the sisters are unable to find a way to resolve their dispute until they realize that one wants the orange for its pulp (to make orange juice), while the other wants the zest for a cake she is making. It is possible for there to be a "win-win" solution to this dispute in which each of the negotiators gets what she wants and neither has to give up anything of value to her. The techniques associated with this approach to negotiation include increasing the number of issues for bargaining or "enlarging the pie" before dividing it.

Co-operative bargaining is especially well suited for certain types of cases, such as employment law, family law, or certain commercial disputes. In these cases, there is typically more than one thing in dispute, not all of which may be valued in the same way by all of the parties. In addition, in all these cases, the parties may have an ongoing relationship that they value and wish to preserve, a situation that can make co-operative bargaining much more likely to succeed.

In other types of cases though, the parties may find themselves in litigation over one issue (typically, an amount of money); often, they may be disputants on a “one time only” basis such that there is no relationship between them. A personal injury action, for example, usually involves a plaintiff and an insurance company as parties litigating liability and damages or, sometimes, damages only.

In these cases, the parties’ interests conflict such that what one gains, the other must lose. A competitive negotiating strategy will be adopted in these cases with the negotiator trying to maximize the benefits for his client by convincing his or her opponent to settle for less than he or she otherwise would have at the outset of the negotiation process. The basic premise underlying the competitive strategy is that all gains for one’s own client are obtained at the expense of the opposing party. Competitive bargaining is also known as “positional,” “distributive,” “win-lose,” or “zero-sum” bargaining.

The reality is that there are some cases in which the pie is not capable of being enlarged and where the gains made by one party in the negotiation process will come at the expense of another party.

As counsel, part of your preparation for mediation should involve identifying your client’s interests and, to the extent possible, those of the opposing parties in order to determine which negotiation approach is most appropriate. Ask yourself and your client: is there anything at stake in the dispute other than money? Non-monetary “interests” may not be immediately apparent but are often present under the surface. In some cases, for example, a party may place a value on a simple apology that a lawyer might find surprising.

Even if money is the only issue, consider whether there are separate heads of damages such that a compromise on one might encourage the opposing party to moderate its position on another.

A co-operative strategy may produce the best results if your analysis of the case indicates that there are several interests involved in the dispute. Discuss with your client what values he or she places on the various interests (including the interests that you have identified on the part of the opposing party or parties). There may be some items of little consequence to your client that you find are much more highly valued by another party. This may allow your client to make a concession without actually giving up much of value.

If, on the other hand, the dispute is really a single issue, “zero-sum” one, then you will likely have to pursue a “competitive” strategy. While aiming to undermine their

opponents’ confidence, competitive negotiators employ a strategy that may include the following tactics:

- a high initial demand;
- a false issue—e.g., a demand that the negotiator and party do not really care about but that can be traded for concessions from the opposing party;
- limited disclosure of information regarding facts and one’s own preferences;
- few and small concessions;
- threats and arguments; and
- apparent commitment to positions during the negotiating process.

As counsel in a true competitive bargaining situation you will have to try to maximize your client’s share of the “pie.” In order to be able to advise your client properly, you must analyze the case as comprehensively as you can (both from your client’s perspective and from that of the opposing parties). There will often be limited information available to you at the mediation stage of the case. You should be careful to recognize situations in which you simply lack adequate information to evaluate the case.

5.6.2 “Litigotiation”

In any court proceeding, if no settlement is achieved through mediation, then the dispute resolution method provided for is trial by judge or jury.

In *Getting to Yes*, Fisher, Ury, and Patton coined the expression “BATNA” (“Best Alternative to a Negotiated Agreement”) and explain it this way at 102:

The reason you negotiate is to produce something better than the results you can obtain without negotiating. What are those results? What is the alternative? What is your BATNA—your Best Alternative to a Negotiated Agreement? *That* is the standard against which any proposed agreement should be measured. That is the standard which can protect you both from accepting terms that are too unfavourable and from rejecting terms it would be in your interest to accept.

In cases that are being mediated through the mandatory mediation process, trial is the parties’ BATNA. Therefore, in evaluating your negotiation position and any settlement proposals, you should always have in mind how the dispute will proceed if you do not reach an agreement.

Commentators have remarked on the nature of negotiation in a litigation context. In *Let’s Make a Deal: Understanding the Negotiation Process in Ordinary Litigation* (at 4), Herbert M. Kritzer quotes Marc Galanter in *Worlds of Deals: Using Negotiation to Teach*

about *Legal Process* and coins the expression “litigotiation”:

Although settlement and adjudication can be cast as contrasting methods of resolving disputes, they are by no means unrelated within the context of actual or potential civil litigation: there is always the option to forego settlement and allow the dispute to be litigated. Marc Galanter goes one step further, arguing that the combination of *litigation* leading to formal adjudication and *negotiation* to achieve an out-of-court settlement should be thought of as “a single process of disputing in the vicinity of official tribunals that might [be] call[ed] *litigotiation*, that is, the strategic pursuit of a settlement through mobilizing the court process.”

Because litigation is the alternative that both you and your opponent have if your settlement discussions are unsuccessful, you are engaging in “litigotiation” as soon as you start bargaining, whether litigation has begun or not.

5.6.3 Risk assessment

In any negotiation, whether it is a co-operative or a competitive bargaining case, you will be required to advise your client of the strengths and weaknesses of the client’s case with respect to a reasonable settlement. Your advice to your client will always be given in the context of the likely outcome at trial; this requires you to evaluate the risk that your client and the opposing party or parties face in having a judge or jury decide the case.

Risk analysis involves the use of the laws of probability. Here is an example of how this works in practice. You decide that your client has a 65 percent chance of obtaining a judgment of \$50,000 and, conversely, a 35 percent chance of losing the case and receiving nothing. In such a situation, you might feel that your client should consider settling for ($\$50,000 \times 65\% = \$32,500$). This risk-discounted amount is what is known in the field of statistics as the “expected monetary value” or “EMV.”

Most cases will require that you perform a much more complex analysis than this one. For instance, it may not be so clear to you that the damages will be assessed at \$50,000. You might think that there is a range of possible awards, from \$50,000 to \$75,000, with the associated probabilities shown below:

Assessment	Probability
\$50,000	0.25 (25%)
\$60,000	0.50 (50%)
\$75,000	0.25 (25%)

The probabilities must add up to 1.0 or 100 percent. Here, the EMV is ($\$50,000 \times 0.25 = \$12,500$) + ($\$60,000 \times 0.50 = \$30,000$) + ($\$75,000 \times 0.25 = \$18,750$) = \$61,250).

In a real case, there will usually be multiple issues, each with its own set of values and associated probabilities. These issues will not always be monetary. In such instances, you will have to come up with a method of valuing and assessing the issue from the standpoint of your client (and that of the other parties).

Whether or not you use a form of probability analysis like the one above, in order to advise your clients properly, you will have to analyze the case thoroughly. It is also common practice to provide a range of damages based on case law that is similar to the facts of your client’s case. This must be done before you can assist them in formulating a settlement position that takes into account the risks that they face in litigating the case.

It is important that you conduct a risk analysis as early in the case as you can and that you repeat the process regularly as you learn more about the case. In either a co-operative or a competitive bargaining environment, each party participating in the mediation must assess his or her case against the likely outcome at trial and then take a settlement position accordingly. Your client will want to have a well-reasoned position on settlement before engaging in negotiation in order to make or respond to settlement offers.

5.7 The lawyer as mediator

Rule 4.07 of the *Rules of Professional Conduct* governs the conduct of a lawyer acting as mediator. The rule requires the lawyer-mediator to ensure at the outset of any mediation that the parties to the mediation process understand fully the role of the mediator and that the lawyer-mediator is not acting as a lawyer for either party. Neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should give legal advice (as opposed to legal information) or render legal representation to either party to the mediation.

The lawyer-mediator should encourage the parties to seek independent legal advice before and during the mediation process and, in particular, in respect of any draft contract prepared by the lawyer-mediator.

Finally, the lawyer-mediator must advise the parties at the outset of the mediation and ensure they understand fully that communications pertaining to and arising out of the mediation process will not be covered by lawyer-client privilege.

Simplified procedure under Rule 76

1. Introduction

Rule 76 of the *Rules of Civil Procedure (Rules)* was introduced to attempt to reduce the cost of litigating claims of modest amounts by reducing the procedures available in such cases. The rule was drafted on the rationale that more modest claims should proceed by a simplified procedure that still provides ample due process but reduces the high costs and delays traditionally associated with civil proceedings.

Initially enacted in 1996 for a four-year trial period, R. 76 is now a permanent part of the *Rules*. The rule was, however, substantially amended effective January 1, 2002, with the introduction of important changes, such as an increase in the monetary amount of claims for which the simplified procedure is mandatory, from \$25,000 to \$50,000.

Another series of significant amendments to R. 76 came into effect on January 1, 2010. Most notably, the monetary limit was increased to \$100,000. Other substantial changes to the simplified procedure include changes to examinations for discovery, summary judgment motions, pre-trial conferences, and authority to settle. As a result, cases decided on the basis of the original rule and the 2002 amendments should be read with caution.

Use of the simplified procedure is mandatory in some cases, but subject to the defendant objecting, a plaintiff may choose to use the simplified procedure in any case. Whether the simplified procedure is mandatory in any particular case will depend on the value of the claim in question.

2. Overview

The simplified procedure has the following major features:

- Rule 76 is mandatory for all actions for money or property worth \$100,000 or less, exclusive of interest and costs (r. 76.02(1)).
- The plaintiff may choose to proceed under the simplified procedure in actions for more than \$100,000 or for relief other than damages or recovery of property (r. 76.02(3)) provided the defendant does not object. Even if the defendant objects, the plaintiff may still proceed under the simplified procedure if claims that are not within the \$100,000 requirement are abandoned (r. 76.02(5)).
- No written examinations for discovery, cross-examination of a deponent on an affidavit filed on a motion, or examination of a witness on a pending motion are permitted in actions under the simplified procedure (r. 76.04(1)). Oral examinations for discovery are now allowed on a limited basis. No party shall exceed a total of two hours of oral examinations for discovery regardless of the number of parties or other persons being examined (r. 76.04(2)).
- Affidavits of documents for actions under the simplified procedure must include a list of names and addresses of persons who might reasonably be expected to have knowledge of the matters in issue in the action, unless the court orders otherwise (r. 76.03).
- Rule 76 permits the parties to choose between an ordinary trial and a summary trial. If the parties cannot agree, the pre-trial conference judge or case management master shall decide which mode of trial is appropriate (r. 76.10(6)). In a summary trial, evidence-in-chief is primarily given by way of affidavit with a limited right to examination, cross-examination is strictly time-limited, and the judge must decide the case at the conclusion of the hearing (r. 76.12).
- Previously the test for a summary judgment motion under the simplified procedure was different from and less demanding than the test under the ordinary procedure. As of January 1, 2010, the test for a summary judgment motion under the simplified procedure is the same as the one under the ordinary procedure, and both are governed by r. 20.04.
- There are costs consequences for a plaintiff who commences and continues an action under the ordinary procedure that should have been brought under the simplified procedure (r. 76.13(3)). Rule 76 also imposes costs consequences on a defendant who inappropriately objects to an action proceeding under the simplified procedure (r. 76.13(7)).

3. Availability

Rule 76 does not apply to actions under the *Class Proceedings Act, 1992*, the *Construction Lien Act* (except trust claims), or civil case management cases governed by R. 77 (r. 76.01(1)). Also, R. 76 does not apply to family law proceedings, which are governed by the *Family Law Rules*.

In all other civil proceedings, the simplified procedure is mandatory in certain circumstances and optional in others, subject to the defendant objecting. In any action

commenced under the simplified procedure, the statement of claim or notice of action must indicate that the action is being brought under R. 76 (r. 76.02(4)).

3.1 Mandatory — r. 76.02

Claims for money or property worth \$100,000 or less must be commenced under the simplified procedure. Rule 76.02 provides:

76.02—(1) The procedure set out in this Rule shall be used in an action if the following conditions are satisfied:

1. The plaintiff's claim is exclusively for one or more of the following:
 - i. Money.
 - ii. Real property.
 - iii. Personal property.
2. The total of the following amounts is \$100,000 or less exclusive of interest and costs:
 - i. The amount of money claimed, if any.
 - ii. The fair market value of any real property and of any personal property, as at the date the action is commenced.

—(2) If there are two or more plaintiffs, the procedure set out in this Rule shall be used if each plaintiff's claim, considered separately, meets the requirements of subrule (1).

—(2.1) If there are two or more defendants, the procedure set out in this Rule shall be used if the plaintiff's claim against each defendant, considered separately, meets the requirements of subrule (1).

...

The defendant cannot object to proceeding under the simplified procedure if the claim is for money only in the amount of \$100,000 or less. In other circumstances, however, a defendant may be able to prevent an action from continuing under the simplified procedure by objecting in the statement of defence to the action proceeding under R. 76 on the grounds that the plaintiff's claim does not fall within r. 76.02(1). The defendant may object that the claim is for more money than \$100,000 or that the fair market value of the property that is at issue in the claim is greater than \$100,000 (r. 76.02(5)). If it is ultimately determined that the property (or money and property) had a fair market value of \$100,000 or less at the time the action was commenced, however, the defendant will be required to pay, on a substantial indemnity basis, the costs incurred by the plaintiff that would not have been incurred had the claim originally complied with the \$100,000 requirement, unless the court orders otherwise (r. 76.13(7)). These costs consequences are intended to encourage defendants to

allow the action to proceed under R. 76 in appropriate cases. The plaintiff has the burden of proving that the fair market value of the real or personal property in question at the date of commencement of the action was \$100,000 or less (r. 76.13(8)).

3.2 Optional — r. 76.02(3)

The plaintiff has the option to commence any other action under the simplified procedure (r. 76.02(3)). If, however, the plaintiff makes a claim other than those referred to in r. 76.02(1) or in excess of the monetary limit set out in that rule, the defendant may object to proceeding under the simplified procedure in the statement of defence (r. 76.02(5)). If the plaintiff does not make its claim compliant in the reply by abandoning the claim or parts of the claim, the action will not proceed under R. 76. The action can only proceed under the simplified procedure if the plaintiff in the reply abandons the claims or parts of the claims that do not comply (r. 76.02(5)). A plaintiff who abandons a claim or part of a claim may not bring the claim or part of the claim in any other proceeding (r. 76.02(9)). If the plaintiff does not abandon the claim in accordance with r. 76.02(5), the action shall proceed under the ordinary procedure rather than the simplified procedure, and the plaintiff must prepare and deliver a notice (Form 76A) confirming this (r. 76.02(6)).

3.3 Multiple plaintiffs

Use of the simplified procedure is required where there are multiple plaintiffs if each plaintiff's claim, considered separately, meets the \$100,000 or less requirement of r. 76.02(1) (r. 76.02(2)).

Where the defendant objects to a case involving multiple plaintiffs proceeding under the simplified procedure on the grounds that one of the plaintiff's claims is for more than \$100,000, the action will proceed by the ordinary procedure unless this plaintiff abandons the claim or part of the claim that does not comply. Strictly speaking, the wording of rr. 76.13(3) and (6) suggests that the costs consequences ordinarily imposed on a plaintiff who continues a proceeding under the ordinary procedure that should have been under the simplified procedure, would apply to a plaintiff who obtained judgment for under \$100,000 but who was forced into the ordinary procedure because one of its co-plaintiffs had a claim in excess of the monetary limit. Nonetheless, it seems likely that the court would exercise its discretion under those rules to "order otherwise" if the claims arose out of the same set of facts and thus should have been tried together.

3.4 Counterclaims, crossclaims, and third party claims under the simplified procedure

Ordinarily, if an action is commenced under the simplified procedure and the defendant makes a counterclaim, crossclaim, or third party claim (any one of which is referred to in this chapter as a subsidiary claim), the proceeding remains under the simplified procedure. Subrule 76.02(5), however, sets out two situations in which the main action commenced under R. 76 and the counterclaim, crossclaim, and third party claim will have to proceed under the ordinary procedure:

- The defendant to the counterclaim, crossclaim, or third party claim objects to proceeding under the simplified procedure because the counterclaim, crossclaim, or third party claim does not comply with r. 76.02(1) and the defendant making the claim does not abandon, in the reply to the subsidiary claim, the claim or parts of claims that do not comply (r. 76.02(5)(b)).
- The defendant makes a counterclaim, crossclaim, or third party claim that does not comply with r. 76.02(1) and states in the defendant's pleading that the subsidiary claim is to proceed under the ordinary procedure (r. 76.02(5)(c)).

Therefore, while the defendant in a simplified procedure action can attempt to remove that action from R. 76 by taking the step of making a subsidiary claim for more than the \$100,000 limit of the simplified procedure or for relief other than what is permitted under r. 76.02(1), the main action will nonetheless proceed under the simplified procedure unless the defendant to the subsidiary claim objects to the main action proceeding under R. 76 or the defendant states in its pleading that the claim is to proceed under the ordinary procedure.

3.5 Amending into or out of the simplified procedure

Subrule 76.02(7) permits parties to move from the ordinary procedure to the simplified procedure by filing the consent of all parties or amending their claims so that they fall within the \$100,000 limit and ensuring all other subsidiary claims comply with R. 76. If this is done, the plaintiff must deliver a notice (Form 76A) stating that the action and any related proceedings are continued under R. 76 (r. 76.02(8)). Lawyers should be aware that Ontario courts have held that actions commenced before March 11, 1996, cannot be continued under the simplified rules, except on consent.

Parties may also move from the simplified procedure to the ordinary procedure by amending their claims to exceed the \$100,000 threshold (r. 76.02(6)). Where an action that was under the simplified procedure comes under the ordinary procedure because of an amendment

to the pleadings or the application of r. 76.02(5), the plaintiff must deliver a notice (Form 76A) stating that the action and any related proceedings are continued under the ordinary procedure (r. 76.02(6)(b)).

There is a cost to the amending party who brings an action from the ordinary to the simplified procedure. Regardless of the outcome of the action, the party whose pleading has been amended to bring the action under the simplified procedure shall pay on a substantial indemnity basis the costs incurred by the opposing party up to the date of the amendment that would not have been incurred if the action had originally been commenced under the simplified procedure, unless the court orders otherwise (r. 76.13(1)). This provision is intended to discourage a party from choosing to proceed under the ordinary procedure to have the benefit of a longer examination for discovery and then amending the pleading to bring the action within the simplified procedure.

4. Affidavit of documents — r. 76.03

In any action under the simplified procedure, every party must serve on every other party an affidavit of documents and copies of the documents referred to in Schedule A within 10 days after the close of pleadings (r. 76.03(1)). In addition, each party must include in its affidavit of documents, a list of the names and addresses of persons who might reasonably be expected to have knowledge of matters in issue in the action, unless the court orders otherwise (r. 76.03(2)). A party to a R. 76 action is required to disclose, in its affidavit of documents, the same information regarding persons with knowledge of the issues in the action that the party would be required to disclose under r. 31.06(2) on examination for discovery in an ordinary action.

A party may not call any person whose name has not been disclosed on the list produced pursuant to r. 76.03(2) as a witness at the trial of the action, unless the court orders otherwise (r. 76.03(3)). Finally, in any action under the simplified procedure, counsel must include in the lawyer's certificate required by r. 30.03(4) a statement that the lawyer has explained to the deponent of the affidavit the necessity of complying with rr. 76.03(1)–(2) (r. 76.03(4)).

5. Limited discovery and no cross-examination — r. 76.04

A major feature of the simplified procedure under R. 76 and a significant means of cutting costs is the limited scope of oral examinations and the absence of written examinations for discovery and cross-examinations. Rule 76.04 provides that the following are not permitted in an action under R. 76:

- examination for discovery by written questions and answers under R. 35;
- cross-examination of a deponent on an affidavit under r. 39.02; and
- examination of a witness on a motion under r. 39.03.

There is no provision for leave of the court or consent of the parties.

As of January 1, 2010, R. 76 allows for a limited oral examination for discovery. In particular, r. 76.04(2) provides that no party shall, in conducting an oral examination for discovery in relation to an action proceeding under R. 76, exceed a total of two hours of examination, regardless of the number of parties or other persons to be examined. For actions in the Toronto Region, motions arising out of examinations for discovery under the simplified procedure will be scheduled for a maximum of 30 minutes subject to leave from a master in exceptional circumstances (Practice Direction for Civil Applications, Motions and Other Matters in the Toronto Region, para. 21).

The limited availability of examination for discovery makes effective pleading particularly important. Motions to strike pleadings under R. 21 and r. 25.11 and demands for particulars under r. 25.10 may become more important. Further, the court may be less reluctant to order particulars of a claim or defence in a simplified procedure action than in any ordinary action.

6. Motions — r. 76.05

Rule 76 motions are initiated by service of a simplified procedure motion form (Form 76B) pursuant to r. 76.05(1). All motions under the simplified procedure shall be heard in the county where the proceeding was commenced unless the parties agree or the court orders otherwise (r. 76.05(2)).

Generally speaking, motions under the simplified procedure can be dealt with less formally and more expeditiously than in ordinary actions. Depending on the nature of the motion, motions under R. 76 can be made without supporting materials (i.e., affidavits or other evidence), motion record, or personal attendance. The motion may be made in writing, by fax, or by telephone or video conference (r. 76.05(3)).

Provided certain conditions are met, r. 76.05(4) permits motions to be dealt with by the registrar. Subrule 76.05(5) lists certain kinds of motions that may be dealt with by a registrar provided the consent of all parties to the motion is filed or no responding material is filed. In either case, the notice of motion or motion form must also state that no party affected by the order is

under disability before a registrar can make an order granting the relief sought.

Once a motion is dealt with, the court or registrar records the disposition of the motion on the motion form, and no formal order is required unless the court or registrar orders otherwise or an appeal is made to a judge or appellate court (rr. 76.05(6)–(7)).

7. Dismissal by registrar — r. 48.15

The former r. 76.06 provided for the dismissal of simplified procedure actions by the registrar on the expiry of certain time periods. Subrule 76.06 was revoked on January 1, 2010. Subrule 48.15 now governs the dismissal of abandoned actions by the registrar if the following conditions are satisfied, unless the court orders otherwise:

- More than 180 days have passed since the date the originating process was issued (r. 48.15(1)1).
- No statement of defence, notice of intent to defend, or notice of motion in response to an action, other than a motion challenging the court's jurisdiction, has been filed (r. 48.15(1)2).
- The action has not been disposed of by final order or judgment (r. 48.15(1)3).
- The action has not been set down for trial (r. 48.15(1)4).
- The registrar has given 45 days' notice in Form 48E that the action will be dismissed as abandoned (r. 48.15(1)5).

8. Summary judgment — R. 20

Prior to January 1, 2010, summary judgment motions were available under r. 76.07. Subrule 76.07 was revoked on January 1, 2010. The new R. 20, also amended on January 1, 2010, now governs summary judgment motions for actions under both the simplified and ordinary procedure.

The summary judgment procedure under R. 76 was similar in many ways to the procedure under the former R. 20, with certain important differences. Two of the most important differences between the R. 20 and the R. 76 procedure for summary judgment were the following:

- Cross-examination of a deponent on an affidavit filed for use on a motion was not permitted under the simplified procedure, and therefore, summary judgment motions were heard and decided on the basis of un-cross-examined affidavit material.
- The test applied by the judge hearing the motion for summary judgment under the simplified procedure was different from and less demanding than the test under the old R. 20, which required the court to

determine whether there was a genuine issue for trial.

These differences, and others, have been eliminated with the revocation of r. 76.07 and amendments to R. 20. Therefore, cases decided on the basis of the former r. 76.07 and R. 20, should be read with care.

9. Settlement discussion and documentary disclosure — r. 76.08

The parties to an action under the simplified procedure are required, within 60 days after the filing of the first defence or notice of intent to defend, to consider whether

- all documents relevant to any matter at issue have been disclosed; and
- settlement of any or all of the issues is possible.

This can be done either in a meeting or a telephone call (r. 76.08). This requirement forces the parties and their lawyers to consider settlement carefully and at an early stage in every case.

10. Setting an action down for trial or summary trial under the simplified procedure — r. 76.09

A party wishing to set down an action for trial under the simplified procedure must do so by serving a notice of readiness for pre-trial conference (Form 76C) on every party to the action and to any subsidiary claim and forthwith filing the notice with proof of service (rr. 76.09(1)–(2)). Rule 76.09 requires that this be done within 180 days of the filing of the first defence or notice of intent to defend and that the party who sets an action down must certify in the notice of readiness for pre-trial conference that there was a settlement discussion (r. 76.09(3)).

The registrar will place the defended action on the ordinary or summary trial list immediately after the pre-trial conference (r. 76.11(1)). The *Rules* also impose requirements with respect to the filing of the trial record. Under r. 76.11, the party who set the matter down for trial must serve, at least 10 days before the date fixed for trial, a trial record on every party to the action and to any subsidiary claim and file the trial record with proof of service (r. 76.11(2)). The contents of the trial record for an ordinary trial are prescribed by r. 48.03, whereas r. 76.11(4) sets out the contents of the trial record for a summary trial.

11. Pre-trial conference — r. 76.10

The registrar must serve notice of the pre-trial conference at least 45 days before the scheduled date (r. 76.10(1)). Two provisions of the new r. 50.05 (pre-trial conferences), applicable to R. 76 actions, emphasize the

importance of pre-trial conferences. These provisions are designed to maximize the possibility of settlement at the pre-trial conference and ensure that the parties take the conference seriously:

- Subrule 50.05(1) requires the lawyers for the parties to appear at the pre-trial conference and, unless the presiding judge or case management master orders otherwise, the parties must also participate in the conference personally, unless personal attendance would require undue amounts of travel time or expense, in which case participation may be by way of telephone or video conference.
- Subrule 50.05(2) directs that if a person's approval is required by a party to the proceeding before agreeing to a settlement, the party shall, before the pre-trial conference, arrange to have ready telephone access to the other person throughout the conference, whether it takes place during or after regular business hours.

Subrule 76.10(4) directs each party, at least five days before the pre-trial conference, to

- file a copy of the party's affidavit of documents and copies of any documents relied on for the party's claim or defence, a copy of any expert report, and any other material necessary for the pre-trial conference; and
- deliver a two-page statement setting out the issues and the party's position with respect to them, and a trial management checklist (Form 76D).

Pursuant to a December 31, 2001, Practice Direction, at every pre-trial conference under R. 76 in the East Region, each party shall file a summary of each witness's evidence in addition to the material required by rr. 76.10(4)(a)–(b).

A date for the trial shall be fixed at the pre-trial conference by the judge or case management master, subject to the direction of the regional senior judge (r. 76.10(5)). If the trial is to be a summary trial, the pre-trial judge or case management master shall fix a date for the delivery of all parties' affidavits and may also vary the order and time of presentation (r. 76.10(7)).

12. Summary trial — r. 76.12

The summary trial procedure encourages very short trials for straightforward cases. By placing strict limits on the length of the trial, the summary trial is intended to provide a low-cost method of trying cases involving modest amounts of money.

The procedure on a summary trial, subject to any direction by the pre-trial conference judge or case management master, is the following (r. 76.12(1)):

- (1) Evidence-in-chief is to be adduced by way of affidavit and limited oral examination. This

“adducing” of evidence is actually begun before the start of trial by the filing of the trial record under r. 76.11(4). The trial judge should have read the trial record, which contains all affidavits filed by any party, before the start of trial. At trial, a party may examine the deponent of any affidavit served by the party for not more than 10 minutes.

- (2) An opposing party may cross-examine the deponent of any affidavit orally, but each party must complete all of its cross-examinations within 50 minutes.
- (3) Each party can orally re-examine any of their own deponents who are cross-examined for not more than 10 minutes.
- (4) When any cross-examinations and re-examinations of the defendant’s deponents are concluded, the plaintiff may, with leave of the trial judge, adduce any proper reply evidence.
- (5) After the presentation of evidence is complete, each party may make oral argument for not more than 45 minutes.

The court has discretion to vary or extend the time limits imposed by r. 76.12. The trial judge may extend any time referred to above (r. 76.12(2)), and the time limits (and the order of presentation) may be varied by the pre-trial conference judge or case management master under r. 76.10(7). Notice of an intention to examine or cross-examine the deponent of any affidavit at the summary trial must be given to the party who filed the affidavit at least 10 days before the date of the trial, who shall arrange for the deponent’s attendance at trial (r. 76.12(3)).

The judge shall grant judgment after the conclusion of the summary trial (r. 76.12(4)).

13. Costs under R. 76

13.1 Costs where judgment does not exceed \$100,000

Rule 76.13 provides special cost consequences if a plaintiff obtains a judgment awarding exclusively or a combination of money, real property, or personal property in the amount of \$100,000 or less, exclusive of interest and costs, and based on the fair market value of any real or personal property awarded, at the date the action was commenced (r. 76.13(2)).

If these conditions are met, the plaintiff shall not recover any costs unless either of the following apply:

- The action was under the simplified procedure at the commencement of trial (r. 76.13(3)(a)).
- The court is satisfied that it was reasonable for the plaintiff to have commenced and continued the action under the ordinary procedure or to have allowed the action to be continued under the ordinary procedure by not abandoning claims that

did not comply with r. 76.02(1), (2), or (2.1) (r. 76.13(3)(b)).

This cost provision applies despite r. 49.10(1) (plaintiff’s offer to settle) (r. 76.13(4)).

Subrule 76.13(3) does not apply if the simplified procedure was unavailable because of a subsidiary claim of another party (i.e., because the amount claimed in the subsidiary claim took the matter out from under R. 76) (r. 76.13(5)).

Where the action should have been under the simplified procedure at the start of the proceeding but was not, in addition to being denied costs, a plaintiff who obtains a judgment for less than \$100,000 may, in the trial judge’s discretion, be ordered to pay all or part of the defendant’s costs, including costs on a substantial indemnity basis. This is in addition to any costs the plaintiff is required to pay under r. 49.10(2) (defendant’s offer to settle) (r. 76.13(6)).

13.2 Costs if defendant unjustifiably objects

If, in an action where the claim is for real or personal property, the defendant unjustifiably objected to proceeding under the simplified rules on the ground that the fair market value of the property exceeded \$100,000 at the date the action was commenced and the court finds that the value did not exceed that amount at that date, the defendant shall pay, on a substantial indemnity basis, the costs that would not have been incurred by the plaintiff if the action had remained under the simplified procedure, unless the court orders otherwise (r. 76.13(7)).

The plaintiff has the burden of proving that the fair market value of the real or personal property at the date of commencement of the action was \$100,000 or less (r. 76.13(8)).

13.3 Counterclaims, crossclaims, and third party claims

The cost consequences of r. 76.13 apply, with necessary modifications, to counterclaims, crossclaims, and third party claims (r. 76.13(9)).

13.4 Transition

Subrule 76.13(11) provides that for actions commenced after January 1, 2002, and before December 31, 2010, rr. 76.13(2) and (7)–(8) apply as if \$100,000 read \$50,000. For those actions commenced before January 1, 2002, rr. 76.13(2) and (7)–(8) apply as if \$50,000 read \$25,000 (r. 76.13(10)).

13.5 Quantum of costs in R. 76 cases

Recent decisions have suggested that R. 76 costs awards should be lower than those under the ordinary procedure to reflect the objectives of the simplified procedure, which is intended to restrict the cost of litigating claims for less than \$100,000.

13.6 Conclusion

Costs are a major sanction for parties who do not use the simplified procedure in appropriate cases. These cost consequences are necessary because absent some penalty, parties might simply ignore the rule and, in the process, defeat the objective of controlling the costs and delays of litigation. These cost consequences mean that lawyers must be very careful to examine closely the real value of the claims they wish to advance. Lawyers may also wish to alert their clients to the fact that although

the simplified procedure may result in lower overall costs, it can increase the costs at the beginning of the action, since lawyers may be required to do substantial initial research and analysis. Finally, lawyers must clearly explain to their clients the risks of proceeding under the ordinary procedure with a claim that may fall below the R. 76 monetary threshold.

14. Special rules for Ottawa, Toronto, and County of Essex

While R. 77 (civil case management) does not apply to R. 76 actions pursuant to r. 77.02(2)(g), all R. 76 actions commenced on or after January 1, 2010, in Ottawa, Toronto, and the County of Essex are assigned to mandatory mediation (r. 24.1.04(1)2). Mandatory mediation under R. 24.1 continues to apply to those R. 76 actions that were governed by R. 24.1 immediately before January 1, 2010 (r. 24.1.04(1)1).

Criminal Law

The classification of offences and trial jurisdiction

1. Jurisdiction

1.1 Constitution – division of powers

Pursuant to s. 91 of the *Constitution Act, 1867*, criminal law falls under federal jurisdiction, granting Parliament exclusive power to make laws in relation to “Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.” Accordingly, federal legislation, such as the *Criminal Code (Code)* and the *Controlled Drugs and Substances Act*, governs criminal law and procedure across Canada.

Under s. 92 of the *Constitution Act, 1867*, provincial legislatures have jurisdiction over the “Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal jurisdiction, and including Procedure in Civil Matters in those Courts.”

Section 482 of the *Code* authorizes that every superior court of criminal jurisdiction may make rules applicable to any prosecution or other type of proceeding within the jurisdiction of that court. Section 484 provides that every judge or provincial court judge has the same power to preserve order in his or her court that may be exercised by a superior court of criminal jurisdiction. Accordingly, in Ontario, both the Superior Court of Justice and the provincial Ontario Court of Justice have each codified rules for their own courts (the Superior Court of Justice *Criminal Proceedings Rules* and the *Rules of the Ontario Court of Justice in Criminal Proceedings*).

The provinces also have jurisdiction to enact and enforce provincial offences legislation within each province. For example, in Ontario the *Provincial Offences Act* governs the procedure for prosecuting offences committed contrary to provincial legislation, such as the *Highway Traffic Act*. While a lawyer may be retained to assist or represent a client in relation to a provincial offence, the focus of this chapter is criminal law trials and procedure.

1.2 Adults

In Ontario, criminal trials for adults (people age 18 or over) are conducted in two trial courts, the Ontario Court of Justice and the Superior Court of Justice. Trials that take place in the Ontario Court of Justice are presided

over by a judge sitting alone. Trials that take place in the Superior Court of Justice are heard by a judge sitting alone or by a judge sitting with a jury.

1.3 Young persons

The *Youth Criminal Justice Act (YCJA)* governs criminal procedure as it relates to “young persons,” who are 12 years of age or older but younger than 18 years of age (*YCJA*, s. 2; *Code*, s. 13), including charges laid under the *Code* and any other Act of Parliament. The *YCJA* gives the “youth court” exclusive jurisdiction in respect of “any offence” alleged to have been committed by a person “while he was a young person” (*YCJA*, s. 14). In other words, the age of the accused at the time of the alleged offence determines whether the accused is tried in youth court.

In Ontario, judges of the Ontario Court of Justice have been designated as judges of the youth court (*Courts of Justice Act*, s. 38(3)).

2. Two types of charging documents

2.1 The information

The information is a sworn document that sets out the charge or charges against the accused. It is used in the Ontario Court of Justice for both adult and youth proceedings. An informant swears before a justice (defined in s. 2 of the *Code* as either a justice of the peace or a provincial court judge) that the accused committed a criminal offence or, if the informant does not have personal knowledge, that the informant believes on reasonable grounds that the accused committed the offence.

The information is in court each time the accused appears, and it is used to record the progress of the case. It is marked with various notes such as whether the accused was released on bail, what sort of release the accused was given, how the accused pleaded, the disposition of the case if it was tried in the Ontario Court of Justice, the outcome of the preliminary inquiry if one was held, and the time and date of every appearance in court. At each appearance, the court clerk records the names of the court reporter, the clerk, the prosecutor, the defence counsel, and the initials of the presiding justice.

2.2 The indictment

The indictment is the charging document used in the superior court of criminal jurisdiction, which in Ontario, is the Superior Court of Justice. The *Code* prescribes a form (Form 4) for the indictment. Essentially, an indictment is a written accusation signed by an agent of the Attorney General (typically Crown counsel). Like the information, the indictment contains the charge or charges against the accused, records all of the court appearances in the Superior Court of Justice, and records the disposition of the case, including any penalty. Not all criminal charges proceed to the Superior Court of Justice, but for those that do, an indictment will be used.

2.3 “Preferring” the indictment

After the indictment has been drafted and signed, it is “preferred.” In this context, the verb “to prefer” is the rough equivalent of “to file.” In Ontario, the indictment is preferred in the Superior Court of Justice.

2.4 Two kinds of indictments

2.4.1 Indictments prepared after the accused has been committed to stand trial

Most indictments are preferred either after the accused has been ordered (or “committed”) to stand trial following a preliminary inquiry in the Ontario Court of Justice (*Code*, s. 574(1)) or after the accused has chosen not to request a preliminary inquiry (s. 574(1.1)).

2.4.2 Direct indictments

In a very small number of cases, the Attorney General or the Deputy Attorney General may prefer an indictment. This may occur before the accused has been given the opportunity to request a preliminary inquiry, or where a preliminary inquiry has commenced but not concluded, or where a preliminary inquiry was held but the accused was not committed for trial. Such an indictment is referred to as a “direct” indictment (s. 577). This power is intended to be exercised in exceptional circumstances and requires the written personal consent of the Attorney General or the Deputy Attorney General. In Ontario, this extraordinary power, which may deprive the accused of a preliminary inquiry, has been used in the situations below:

- The security of witnesses may be jeopardized by lengthy proceedings.
- There is good reason to believe that the accused will abuse the process by causing delay.
- The Crown wishes to try separately charged co-accused together.

- The Crown’s case will be prejudiced by delay, for example, where the witnesses are elderly or are in poor health or from outside the jurisdiction.

3. Three types of offences

3.1 Pure summary conviction offences

Code offences fall into three categories. Offences punishable upon summary conviction only (or “pure” summary conviction offences) are, generally speaking, the least serious offences and attract the lowest penalties. The sections creating pure summary conviction offences in the *Code* are accompanied by no specific penalty provision. For these offences, reference must be made to s. 787(1) of the *Code*, which sets out the general penalty provisions for summary conviction offences:

Unless otherwise provided by law, everyone who is convicted of an offence punishable on summary conviction is liable to a fine of not more than five thousand dollars or to a term of imprisonment not exceeding six months or to both.

3.2 Pure indictable offences

Indictable offences are the most serious offences, and they carry with them the most severe penalties upon conviction. The sections creating “pure” indictable offences are always accompanied by a specific penalty provision. In some cases (e.g., manslaughter), the maximum penalty is as high as life imprisonment (see s. 236 of the *Code*). Other maximum penalties following a conviction for an indictable offence include 2, 5, 7, 10, and 14 years’ imprisonment.

3.3 Hybrid offences

The majority of offences in the *Code* are “Crown elect” offences, or “hybrid” offences. In these cases, the Crown has the choice as to whether to proceed summarily or by way of indictment. All hybrid offences are accompanied by a specific penalty provision that sets out the maximum penalty available should the Crown proceed by way of indictment. For some offences, a minimum penalty may also be specified.

If there is no specific penalty set out where the Crown proceeds summarily, then s. 787(1), the general penalty section for summary offences applies (i.e., maximum six months’ imprisonment or \$5,000 fine or both). For certain hybrid offences, Parliament has provided maximum penalties on summary conviction that exceed the six months provided for in s. 787(1). For example, the maximum penalty on summary conviction for forcible confinement is 18 months (s. 279(2)).

Until the Crown makes its election as to proceeding by way of summary conviction or by indictment, the offence is deemed to be indictable for the purposes of any interim

procedures (*Interpretation Act*, s. 34(1)(a)). If the trial of a hybrid offence proceeds before a summary conviction court and the Crown has not made its election, there is a presumption that the Crown has elected to proceed by way of summary conviction (*R. v. Dudley*).

4. Charge screening

After an accused person is charged with a criminal offence, the Crown will review the Crown brief to determine whether the appropriate charge has been laid. The Crown brief is prepared by the police and typically includes a synopsis of the offence, background information about the accused, witness statements, and police officers' notes. If the Crown determines that there is a reasonable prospect of conviction on the charge(s) laid and that it is in the public interest to proceed with the prosecution, the Crown will complete a charge screening form and prepare disclosure for the defence. The charge screening form will usually list (1) the charges on which the Crown intends to proceed; (2) how the Crown elects to proceed, either summarily or by indictment; and (3) whether the case is appropriate for direct accountability (diversion) or a peace bond.

5. Legal aid

If the accused cannot afford to privately retain counsel, the accused may apply to Legal Aid Ontario (LAO) for assistance. To make an application, the accused must take the charge screening form provided by the Crown to a local LAO office, which is located in every courthouse. LAO will review the charge screening form and the personal circumstances of the accused, including his or her income and family dependants. If LAO determines that the accused is eligible for financial assistance, it will provide the accused with a legal aid certificate that the accused may use to retain his or her counsel of choice.

Duty counsel is also available at each courthouse to provide free legal advice and assist any accused on matters such as bail hearings, guilty pleas, diversion, or peace bonds and to set date appearances.

6. Three ways to proceed "by indictment"

It is important to note that the term "proceeding by way of indictment" refers to the manner of proceeding and does not refer to the charging document known as "the indictment" that was described above. When the Crown chooses to proceed by way of indictment, this affects the procedure and the penalties available, but it does not necessarily mean that there will be "an indictment." All proceedings in the Ontario Court of Justice, which can involve many proceedings that are "by indictment," proceed on a charge or charges that are contained in "an information".

6.1 Absolute jurisdiction or s. 553 offences

The indictable offences listed in s. 553 of the *Code* fall within the "absolute jurisdiction" of the Ontario Court of Justice. With respect to these offences, the accused does not have an election as to mode of trial. The accused will have his or her trial in the Ontario Court of Justice without the right to request a preliminary inquiry. These are less serious indictable offences, for example, theft under \$5,000. In this kind of case, there will be no indictment drafted, and the matter will proceed by way of an information in the provincial court. In a rare case, the Ontario Court of Justice may refuse to try a matter within the court's absolute jurisdiction and decide to continue the proceedings as a preliminary inquiry (s. 555(1)). Similarly, if the evidence establishes that the subject matter of an offence is, in fact, a testamentary instrument or has a value in excess of \$5,000, the judge must give the accused the option of having a preliminary inquiry and a trial in the Superior Court of Justice in accordance with s. 536(2).

6.2 Exclusive jurisdiction or s. 469 offences

The indictable offences listed in s. 469 of the *Code* include some of the most serious offences (including murder). These offences fall within the exclusive jurisdiction of the Superior Court of Justice, and they are presumptively tried, following a preliminary inquiry if requested, by a judge sitting with a jury. The consent of the Attorney General is required to have a s. 469 offence tried by judge alone (s. 473).

6.3 Section 554 offences

All indictable offences that are not listed in either s. 469 or 553 are governed by s. 554 of the *Code*. This section provides that, with the accused's consent, the trial may be held in the provincial court. In other words, the accused may elect to be tried in the Ontario Court of Justice. Otherwise, the accused may elect to be tried either with or without a jury in the Superior Court of Justice. If the accused declines to make an election, he or she is deemed to have elected to have a trial with a jury in the Superior Court. If the accused elects to be tried in the Superior Court, either with or without a jury, both the accused and the prosecution have the option to first request that a preliminary inquiry be held in the Ontario Court of Justice. The options open to the accused are read to him or her in court in the following terms (s. 536(2)):

You have the option to elect to be tried by a judge without a jury or to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and

jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecution requests one. How do you elect to be tried?

7. Proceeding summarily

Where the accused is charged with a pure summary conviction offence or where the Crown elects to “proceed summarily” in respect of a hybrid offence, the *Code*’s summary procedures are followed. These proceedings, both at trial and on appeal, are governed by the provisions of Part XXVII of the *Code*. As noted above, in these cases, the matter will proceed directly to trial in the provincial court without the benefit of a preliminary inquiry.

8. Initiating the criminal process by information

The swearing of an information sets the criminal process in motion. Anyone with reasonable grounds to believe that an offence has been committed by the accused can swear an information (*Code*, s. 504). This is done by attending, *ex parte* and without notice, before a justice of the peace and describing the alleged criminal conduct to the justice. In most cases, the informant is a police officer or a peace officer who has already prepared an information which is presented to the justice of the peace to be sworn. The justice of the peace is required to determine whether the informant has the requisite reasonable grounds. In the case of an information brought before the justice by a police officer, peace officer, the Attorney General, or agent of the Attorney General, the justice must also determine whether to compel the accused to attend court by issuing either a summons or a warrant (s. 507). The justice of the peace must exercise this discretion judicially and is subject to review by the Superior Court of Justice should there be a failure to conduct a proper hearing.

Sometimes a police officer issues process by serving an appearance notice or a promise to appear on the accused. The officer then swears the information before a justice after process has issued (see ss. 505 and 508 of the *Code*). In these cases, the justice performs a screening function by hearing the allegations of the informant and deciding either to confirm the process or cancel it. Where for some reason the process issued to the accused is defective—for example, where the appearance notice requires the accused to appear on a Sunday—the officer can resort to the process of laying an information under s. 504 and asking the justice to issue a summons or warrant under s. 507.

8.1 Private informations and pre-enquetes

Where the informant is a private citizen (as opposed to a police officer or other law enforcement figure) and that “private informant” attends before a justice to lay an information under oath, the provisions of s. 507.1 apply. In such a case, if the information meets the requirements in s. 504, it is then referred either to a provincial court judge or to a designated justice for the purposes of holding an *in camera* “pre-enquete” hearing. The pre-enquete process ensures “that spurious allegations, vexatious claims, and frivolous complaints barren of evidentiary support or legal validity will not carry forward into a prosecution.”

The Attorney General is entitled to receive notice of the hearing and a copy of the information and has the right to attend the hearing. At the pre-enquete, the presiding judge or designated justice must hear and consider the allegations of the informant and the evidence of witnesses. The Crown must be given an opportunity to cross-examine, call witnesses, and present any relevant evidence at the hearing (s. 507.1(3)). After hearing all of the evidence, the court must consider whether to “issue process” (by way of summons or warrant) to compel the appearance of the accused on the information.

If the court refuses to issue process, no new attempts to lay the information may be made unless there is new evidence in support of the allegation (s. 507.1(7)). However, the informant may bring an application in the Superior Court of Justice for a mandamus order to compel the judge or designated justice to issue process. The informant must commence such an application within six months of the pre-enquete decision. If no process is issued, then the information is deemed never to have been laid (s. 507.1(5)–(6)).

If process is issued, the Crown may properly intervene in a private prosecution and decide whether to proceed with the prosecution or to withdraw or stay the charges listed in the information. The Crown may stay the charges any time after the information has been laid (i.e., before the pre-enquete). However, the Crown cannot withdraw the charges until after the pre-enquete hearing is complete and the judge or justice decides to issue process (*R.v. McHale*).

9. Formal requirements of an indictment

9.1 After a preliminary inquiry

As noted above, in most cases an indictment is prepared as a result of an order to stand trial made by a judge of the Ontario Court of Justice pursuant to s. 548 of the *Code*. A judge of that court has jurisdiction to order an accused to stand trial for the offence or offences charged

in the information upon which the preliminary inquiry was conducted, for any included offences, or for any other indictable offence in respect of the same transaction. This order to stand trial is the foundation for the content of the indictment to be drafted by the Crown.

The following rules apply to the charges described within an indictment:

- A single indictment may contain charges that were on separate informations and thus the subject of separate orders to stand trial (s. 574(1.2)).
- The prosecutor may include charges on which the accused was ordered to stand trial or “any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry, in addition to or in substitution for any charge” on which the accused was ordered to stand trial (s. 574(1)(b)).
- With the consent of the accused, the prosecutor may include any other charge whether or not it is founded on an order to stand trial or evidence of it was disclosed at a preliminary inquiry. This provision is often used where the accused has several outstanding charges and wishes to have all of the charges dealt with at one time by one judge, often by way of a guilty plea (s. 574(2)).
- Where the prosecutor is a private prosecutor, an indictment can be preferred only with the written consent of a judge of the Superior Court of Justice (s. 574(3)).

There are no express time limitations in the *Code* governing how soon after the order to stand trial the indictment must be preferred. Once the order to stand trial has been made, the information is spent. The case is then in the hands of the prosecutor until the indictment is preferred. In most jurisdictions, there are administrative procedures that ensure the attendance of the accused following the order to stand trial at a specific time. In the meantime, the Crown will have the indictment preferred.

9.2 Where no preliminary inquiry was requested

Where a preliminary inquiry has not been requested in the provincial court (see s. 536 of the *Code*), the Crown may prefer the indictment in respect of any of the charges that were on the information before the provincial court, or in respect of any included offences, at any time after the accused person has elected his or her mode of trial, re-elected his or her mode of trial, or been deemed to have elected his or her mode of trial (s. 574(1.1)).

9.3 Where the indictment is a direct indictment

Where an accused person has not yet been given an opportunity to request a preliminary inquiry or where the preliminary inquiry has begun but has not finished or where a preliminary inquiry has been held and the accused has been discharged, notwithstanding the provisions of s. 574, the Attorney General may prefer a direct indictment. In the case of public prosecution, the personal consent in writing of the Attorney General or Deputy Attorney General is required to be filed in the court. Where the prosecution is not being conducted by the Attorney General or as a result of intervention by the Attorney General, an order of a judge of the Superior Court of Justice is required for a direct indictment (*Code*, s. 577).

10. Substantive requirements of informations or indictments

Typically, each count on an information or indictment will identify the essential elements of the alleged offence, including the name of the accused or co-accuseds, the date(s) on which the offence occurred, the jurisdiction in which the offence was committed, and the act or omission that constitutes the alleged offence. The following is an example:

The informant says that he or she believes on reasonable grounds that

(1) (*Name of the accused*), on or about the 5th day of October in the year 2011, in the City of X, in the Y Region, did assault (*name of the complainant*) with a weapon, to wit: a knife, contrary to the *Criminal Code*.

The Crown must prove beyond a reasonable doubt each element of the offence as charged in the information or indictment.

There are a number of *Code* provisions governing the content of informations and indictments. Failing to comply with these provisions may result in an order quashing the information or indictment or an order amending the information or indictment. The purpose of these provisions is to ensure that the charging document provides the accused with sufficient information to appreciate the charge and to be able to prepare a full answer and defence to the allegation. The rules are also designed to ensure that cases are tried on their merits and are not lost through pure technicality. The substantive requirements of informations and indictments may be distilled into four basic rules:

- A single transaction: Each count in an indictment must in general relate to a single transaction (s. 581(1)). A single transaction does not necessarily connote a single act. A transaction may include a series of related acts. For example, a bank teller who

illegally and repeatedly takes small amounts of money from his employer might be charged with a single count of theft.

- An offence known to law: Each count must allege an offence known to law, but that offence may be described in either popular language or in the words of the statute as long as the accused has adequate notice of the offence with which he or she is charged (ss. 581(1)–(2)).
- Only one offence per count: Each count must charge only one offence. So for example, one count in the indictment may not charge both theft and fraud. This is often referred to as the duplicity rule.
- The act or omission must be identified: Each count must identify the act or omission that is alleged to have amounted to an offence. Subsection 581(3) of the *Code* requires that sufficient detail of the circumstances of the alleged offence be furnished to the accused to provide reasonable information about the act or omission to be proven against the accused and sufficient detail to identify the transaction. “Reasonable information” about the act or omission to be proved against the accused will vary from case to case and depend on the circumstances. Where considerable detail might be required in some cases, in other circumstances, it may be appropriate to charge the offence using only the words of the section of the *Code* with little more added than the date of the offence.

11. Special provisions for charging certain offences

Some *Code* offences have special rules for pleading. For instance, s. 582 requires that the offence of first degree murder must be specifically charged. Otherwise, an indictment charging simply “murder” without more will be deemed to be a charge of second degree murder. In addition, s. 589 provides that no count for an indictable offence shall be joined with a count alleging murder unless the other offence arises from the same transaction as the count charging murder or the accused consents to joinder of the counts.

Section 584 provides that on a libel or obscenity charge, the allegedly libellous or obscene words need not be set out in the indictment.

Section 585 sets out special rules for charging perjury, and s. 586 provides that on fraud charges the nature of the fraudulent means need not be set out in detail.

The basic requirements within s. 581 must always be met, in addition to any other offence-specific requirements.

12. Motions respecting the form and substance of an indictment or information

12.1 Motion to quash the indictment or information

Where the accused alleges that the information or indictment is deficient on its face, a motion to quash may be brought before the court pursuant to s. 601 of the *Code*. Such a motion must be brought before the accused has entered a plea. Thereafter, the motion can only be brought with leave of the court, although it should be noted that this rule applies only to patent defects; other defects may not become apparent until the trial has begun. In that case, the accused may raise the objection at the time it becomes apparent.

Where the count complained of contains more than one transaction, thereby offending s. 581(1), or is duplicitous at common law, the usual remedy is for the court to divide the count into two separate counts. Alternatively, the Crown may be invited to choose one of the charges and to strike out the remaining offence from the count.

Where the count fails to charge an offence known to law as required by s. 581(1), fails to give reasonable information about the act or omission under s. 581(3), or fails to give sufficient information to identify the transaction as required by s. 581(3), among other potential defects of form and substance, the court may amend the indictment instead of quashing it, pursuant to s. 601(3), which affords the court a broad amending power.

In exercising this power, the court will be guided by s. 601(4) of the *Code*, which directs the judge to consider a number of things in deciding whether an amendment should be made, including “whether the accused has been misled or prejudiced in his defence by a variance, error or omission ... and whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.” The central concern is whether the amendment will cause prejudice to the accused.

12.2 Particulars

Where the information or indictment provides insufficient detail to allow accused persons to know the charge against them, they may move for particulars under s. 587 of the *Code*. Particulars are intended to supplement an information or indictment that is not sufficiently informative to ensure a fair trial. They may be ordered by a judge of the trial court but cannot be ordered by a justice presiding at a preliminary inquiry.

While the Crown can be ordered to provide particulars, the Crown may also provide particulars voluntarily upon receipt of a request from the accused. In either case, however, generally speaking, the Crown is bound to prove beyond a reasonable doubt the particulars provided to the defence.

In the Ontario Court of Justice, R. 29 of the *Rules of the Ontario Court of Justice in Criminal Proceedings* governs the procedure for the service and filing of a motion for particulars.

12.3 Quashing the indictment or information

Where an information or indictment is so deficient that it is quashed, this may, practically speaking, end the prosecution. A limitation period may have intervened to prevent the re-laying of the charge, or a further prosecution may be stayed on an application of s. 11(a) or (b) of the *Canadian Charter of Rights and Freedoms* (*Charter*).

Provided that a limitation period has not intervened and the information or indictment was quashed prior to a plea, the charge may be relaid. Moreover, the Crown has routes of appeal from any decision to quash an information or indictment (see ss. 676(1)(c) and 830 of the *Code*).

Where an accused person's application to quash is dismissed, this may be raised on any subsequent conviction appeal.

12.4 Amendments to conform to the evidence

In addition to amendments that may be requested to cure patent defects on the face of an information or indictment, pursuant to s. 601(2) of the *Code*, amendments may be permitted where the evidence deviates from the allegations within the information or indictment. This section gives the court the discretion to amend defects that emerge only during the course of trial. These amendments must be made "on the trial"—not prior to or following the conclusion of the trial.

Although the power to amend under this subsection is permissive, the court's approach seems to be similar to the approach under s. 601(3) (see "Motion to quash the indictment or information," above). That is, if the amendment can be made without prejudice to the accused, it will usually be made.

When such an amendment is made to an indictment or an information, it is endorsed on the original document and forms part of the charge. In the case of a jury trial, the indictment and any amendments or particulars go with the jury into the jury room for their deliberations.

The accused need not be re-arraigned when an amendment has been made.

13. Trial jurisdiction

13.1 Territorial jurisdiction

As a general rule, an accused is tried in the territorial jurisdiction in which the offence was committed. Further, Canadian courts will usually not exercise jurisdiction over offences committed outside Canada. This rule is contained in s. 6(2) of the *Code*. However, several statutory exceptions to this rule exist, including where the alleged offence was committed on an airplane (s. 7) or where the allegation is treason (s. 46), forging a passport (s. 57), piracy (ss. 74–75), money laundering (s. 462.31), or certain conspiracy offences (s. 465(1)(a) and (4)), among several other offences (in particular, see s. 7). If charges are laid in relation to one of these offences committed outside of Canada, s. 481.2 provides that proceedings may be commenced, whether or not the accused actually is in Canada, and the accused may be charged, tried, and punished within any territorial division in Canada as if the offence had been committed in that territorial division.

Where parts of the alleged offence occurred in Canada and parts in another country or countries, the courts have found the jurisdiction to try those cases in Canada.

"Territorial division" is defined in s. 2 of the *Code* as follows:

"territorial division" includes any province, county, union of counties, township, city, town, parish or other judicial division or place to which the context applies.

On occasion, offences are committed in several territorial divisions or, more rarely, upon the connecting boundary between them. Section 476 of the *Code* sets out rules for the special jurisdiction, such as offences committed on the boundary of two or more territorial divisions or within 500 metres of any such boundary, among others.

Generally speaking, the courts of one province lack jurisdiction to try an offence committed entirely in another province (s. 478(1)). There are statutory exceptions relating to the publication of a defamatory libel (s. 478(2)), failure to comply with a probation order (ss. 739–740), and offences committed on or in respect of aircraft (s. 7).

An accused appearing before an Ontario court who has a number of charges outstanding in respect of offences alleged to have been committed in another province(s) may wish to have all of those charges dealt with at the same time by a single judge in a single location. The accused may request that the Crown consent to and facilitate the transfer of the information or indictment.

The consent of the Crown in both provinces is required. Such transfers are only possible where the accused undertakes to plead guilty to the extra-provincial charges and does in fact plead guilty to them. In that case, the judge shall find the accused guilty and impose the appropriate sentence. Where the accused refuses to plead guilty, the indictment or information will be returned to the province from which it originated, as will the accused, so that the prosecution can take place in the province and the territorial division where the offence is alleged to have occurred (s. 478).

13.2 Time limits on trial jurisdiction

There is no time limit on the institution of indictable proceedings. In summary conviction offences, the information must be laid within six months after the time when the subject matter of the proceedings arose, unless the prosecutor and the accused both agree that the information can be laid outside of the time limit (*Code*, s. 786(2)). This restriction is applicable to both pure summary offences and hybrid offences where the Crown elects to proceed summarily. An information in respect of a continuing offence that commenced more than six months before the information was laid but continued into the six-month period before the information is sworn is valid.

All accused persons (whether charged with indictable or summary offences) have a right to be tried within a reasonable time pursuant to s. 11(b) of the *Charter*. If an accused person establishes that the state failed to bring the case to trial within a reasonable time, the usual remedy is a stay of proceedings.

13.3 Attorney General's consent

Several *Code* offences may be prosecuted only where the Attorney General consents to the laying of the charge. For example, s. 136(3) of the *Code* requires the consent of the Attorney General of the province to institute proceedings for giving contradictory evidence, and s. 54 requires the consent of the Attorney General of Canada to institute summary conviction proceedings against those who assist, aid, harbour, or conceal deserters from the Canadian Forces.

14. Elections and re-elections

Subsection 536(2) sets out the general right of election by an accused person charged with an indictable offence other than those listed in ss. 469 and 553. Sometimes, an accused who has elected a particular mode of trial may later wish to change his or her election to another mode of trial. In determining whether and under what circumstances an accused may change the original election to an alternative mode of trial, counsel must

ensure that proper notice is given and consent obtained (where applicable) so that the trial or plea may proceed in accordance with the accused's instructions.

14.1 Deemed elections

Pursuant to s. 565(1) of the *Code*, the accused will be deemed to have elected to be tried by a court composed of a judge and jury if the provincial court judge declined to record the accused's election pursuant to s. 567, if the accused did not elect when the election was put to him or her under s. 536, or if the accused was ordered to stand trial by a provincial court judge who continued proceedings before him or her as a preliminary inquiry, pursuant to s. 555(1).

If an indictment is preferred against an accused on consent or under s. 577, the accused is deemed to have not requested a preliminary inquiry and to have elected to be tried by a judge and jury (s. 565(3)). If the accused wishes to re-elect, he or she must give written notice to the court (s. 565(4)).

14.2 Electing trial by provincial court judge and re-electing

Where the accused elects to be tried by a provincial court judge without having a preliminary inquiry, the provincial court judge shall call upon the accused to plead to the charge, and if the accused does not plead guilty, the provincial court judge shall proceed with the trial or fix a time for the trial (s. 562(1)). If the election to be tried by a provincial court judge is made before a justice who is not a provincial court judge, the justice must remand the accused to appear and plead to the charge before a provincial court judge having jurisdiction in the territorial division in which the offence is alleged to have been committed.

The accused who elects to be tried by a provincial court judge may, not later than 14 days before the day first appointed for the trial, re-elect as of right to have a preliminary inquiry and be tried by a judge without a jury or by a court composed of a judge and jury. If made less than 14 days before the day first appointed for the trial, such a re-election requires the written consent of the prosecutor (s. 561(2)). Where the accused wishes to re-elect within 14 days of the day first set for his trial and the prosecutor refuses to consent, no re-election is possible.

Procedurally, the accused is required to give notice in writing of a desire to re-elect, together with the written consent of the prosecutor, where required, to the provincial court judge before whom the accused appeared and pleaded or to a clerk of that court (s. 561(4)). The provincial court judge will then appoint a

time and place for the accused to re-elect and will cause the accused to be told of the time and place for the re-election (s. 561(6)). The re-election will be in the following words or words to like effect (s. 561(7)):

You have given notice of your wish to re-elect the mode of your trial. You now have the option to do so. How do you wish to re-elect?

After the accused re-elects, the provincial court judge shall proceed with the preliminary inquiry (s. 562(2)).

14.3 Electing judge alone or judge and jury and re-electing

Where the accused requests to have a preliminary inquiry and elects to be tried by a judge without a jury or by a court composed of a judge and jury, or where the accused is deemed to have elected to be tried by a court composed of a judge and a jury, the provincial court judge before whom the election is made will conduct a preliminary inquiry. An accused who has made or is deemed to have made such an election may re-elect in the following ways.

14.3.1 Re-electing trial by provincial court judge

An accused who originally elected trial by other than a provincial court judge may, at any time before or after the completion of the preliminary inquiry, re-elect to be tried by a provincial court judge with the written consent of the prosecutor (s. 561(1)(a)).

Where the re-election is made before the completion of the preliminary inquiry, notice must be given to the judge presiding at the preliminary inquiry together with the written consent of the prosecutor. On receipt of the notice, the provincial judge shall put the accused to his re-election (ss. 561(3)(b) and (6)). If the accused re-elects, the provincial court judge shall proceed with the trial or fix a date for the trial (s. 562(2)).

If the accused decides to re-elect after the completion of the preliminary inquiry, the accused must give notice in writing of his or her wish to re-elect and provide the written consent of the prosecutor to the judge or clerk of the court of his or her original election. The judge or clerk of the court of original election shall, on receipt of the notice, notify the provincial court judge of the accused's intention to re-elect (s. 561(5)). The provincial court judge shall forthwith appoint a time and place for the accused to re-elect and shall cause notice thereof to be given to the accused and prosecutor (s. 561(6)). The re-election in s. 561(7) shall then be put to the accused at the appropriate time. If the accused re-elects to be tried by a provincial court judge, the provincial court judge shall proceed with the trial or shall set a time and place for the trial (s. 562(1)).

14.3.2 Re-electing mode of trial in the Superior Court before the completion of the preliminary inquiry

When an accused who originally elected (or was deemed to have elected) trial other than by provincial court judge wishes to re-elect another mode of trial but does not wish to re-elect trial by a provincial court judge and the preliminary hearing has not concluded, the accused must give notice in writing to the provincial court judge presiding at the preliminary inquiry. The judge, on receipt of the notice, shall put the accused to his re-election in the words set out in s. 561(7), and if the accused in fact re-elects, the judge shall continue the preliminary inquiry. The Crown's consent is not required.

14.3.3 Re-electing mode of trial in the Superior Court within 14 days after the completion of the preliminary inquiry

When an accused who originally elected (or was deemed to have elected) trial other than by provincial court judge wishes to re-elect another mode of trial "before the 15th day following" (i.e., within 14 days after) the completion of the preliminary inquiry, the accused may elect "as of right" (i.e., without the Crown's consent) to another mode of trial other than trial by a provincial court judge (s. 561(1)(b)). Such re-elections require the accused to give notice in writing of a desire to re-elect to a judge or clerk of the court of his or her original election. The judge or clerk of the court of original election, on receipt of the notice, shall notify the judge or clerk of the court by which the accused wishes to be tried of the accused's intention to re-elect. The judge or clerk of that court shall appoint a time and place for the re-election and shall cause notice thereof to be given to the accused and to the prosecutor. After the re-election, the court shall proceed with the trial or set a date for the trial.

14.3.4 Re-electing mode of trial in the Superior Court 15 days or more after the completion of the preliminary inquiry

Where the accused decides to re-elect another mode of trial in the Superior Court of Justice 15 days or more after the completion of the preliminary inquiry, the written consent of the prosecutor is required (s. 561(1)(c)). In such a situation, the accused must give notice in writing that he or she wishes to re-elect, together with the written consent of the prosecutor, to the judge or clerk of the court of the original election. On receipt of this notice, the judge or clerk of this court shall notify the judge or clerk of the court by which the accused wishes to be tried of the accused's intention to re-elect.

Section 536.2 of the *Code* provides that a re-election by an accused in respect of a mode of trial may be made by submission of a document in writing without the personal appearance of the accused.

14.3.5 Direct indictments and re-elections

Where a direct indictment is preferred, the accused is deemed to have elected to be tried by a court composed of a judge and jury and is deemed not to have requested a preliminary inquiry (s. 565(2)). A re-election to judge alone in such a case is only possible with the written consent of the prosecutor (s. 565(3)).

Procedurally, the accused must give notice in writing of a desire to re-elect, together with the written consent of the prosecutor, to a judge or clerk of the court where the indictment was filed. The judge or clerk, upon receipt of the notice, shall notify a judge or clerk of the court by which the accused wishes to be tried of the intention to re-elect (s. 565(3)). A time and place for the re-election will then be set by the judge or clerk of the court and notice thereof given to the prosecutor and the accused. The re-election given to the accused is the same as set out above (s. 565(4)).

14.4 Multiple accused

Where there are multiple accused charged in one information and they do not elect the same mode of trial, elections for trial by a provincial court judge or a judge without a jury may be refused such that all of the accused will be deemed to have elected to be tried by a court composed of a judge and jury (*Code*, s. 567). To protect the client, defence counsel should consider making an application to sever a joint trial of multiple accused. For example, where one accused is implicated by a co-accused in the commission of the offence, counsel should consider making a pre-trial motion for severance under s. 591(3) of the *Code* to have the client tried separately, depending upon all of the circumstances.

14.5 Attorney General can require a jury trial

Notwithstanding any elections or re-elections by the accused, s. 568 permits the Attorney General to require a jury trial where the offence is punishable by more than five years' imprisonment. If this section is used, a preliminary inquiry must be held if requested under s. 536(4) of the *Code*.

Investigative powers

1. Introduction

The police have a variety of powers they may use to assist in the investigation of crime and in the collection of evidence. This chapter considers search and seizure, production orders, proceeds of crime legislation, the questioning of suspects, and some miscellaneous investigative powers.

2. Search and seizure

The *Criminal Code* (*Code*) contains several provisions that permit the police to search for and seize evidence. The most commonly used statutory search power is s. 487 of the *Code*, which provides for the issuance of a warrant that authorizes the search for and seizure of evidence. Section 487 applies to all federal statutes. Other federal and provincial statutes may also contain search provisions. In addition, the common law authorizes search and seizure in certain situations.

2.1 Search and seizure and the Charter

Search powers are governed by s. 8 of the *Canadian Charter of Rights and Freedoms* (*Charter*), which provides that everyone has the right “to be secure against unreasonable search or seizure.” Section 8 protects a reasonable expectation of privacy. In determining if the accused has a reasonable expectation of privacy, the court will consider whether the accused has a subjective expectation of privacy and whether that expectation of privacy was objectively reasonable. According to *R. v. Tessling*, privacy interests may include

- personal privacy, involving bodily integrity and the right not to have one’s bodies touched or explored;
- territorial privacy, involving varying expectations of privacy in the places one occupies, with privacy in the home attracting heightened protection because of the intimate and private activities taking place there; and
- informational privacy, involving “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others”.

If a reasonable expectation of privacy exists, then the court must consider whether the search and seizure was unreasonable in the circumstances. A reasonable search has been defined in Canada as one that is authorized by law, where the law itself is reasonable and the manner in which the search is carried out is reasonable. Where one

or more of these characteristics is missing, the search will violate s. 8 of the *Charter*.

Even if a violation of s. 8 is established, the evidence discovered during an unreasonable search may still be admissible at trial. Where a violation is proved, the question of the admissibility of the evidence must be determined by reference to s. 24(2) of the *Charter*, which holds that evidence will be excluded where its admission would “bring the administration of justice into disrepute.”

2.2 Search warrants

2.2.1 Prior judicial authorization

The *Charter* jurisprudence surrounding search and seizure law has stressed that “prior judicial authorization” is presumptively required in order to find that a search was reasonable within the meaning of s. 8. In other words, a search without a prior judicial authorization for the search (i.e., a warrantless search) is presumptively unreasonable. Prior judicial authorization will most frequently take the form of a search warrant. In order to qualify as proper prior judicial authorization, the warrant must be issued only where the justice or judge is satisfied on sworn evidence that the statutory prerequisites for issuing the warrant are met.

2.2.2 Information to obtain a warrant

The police officer’s “information to obtain” (i.e., the affidavit sworn in support of the application for a search warrant) must disclose sufficient facts to permit the justice or judge to determine whether the warrant should be issued. Generally, an information to obtain a s.487 warrant must contain details about the alleged offence, the items to be seized, and the location of the search such that reasonable grounds are established that a search at the location will afford evidence of the alleged offence.

(a) The offence

An information to obtain must describe the offence that is the subject of the investigation. While the precision of a charging document is not required in an information to obtain, sufficient facts should be supplied so that the nature of the offence is clear. The informant should include, in a clear and concise manner, as much relevant and reliable information about the alleged offence as is necessary to provide the judge or justice with “full, fair, and frank” disclosure of the investigation. The warrant

must also describe the offence sufficiently so that both the officers executing the warrant and the subject of the search know the nature of the offence for which evidence is being sought.

(b) The evidence to be seized

The evidence to be seized must be described and specified in both the warrant and information to obtain. While more particularity of description is to be desired, it is not always possible to be absolutely precise. It may be that only categories of evidence can be identified. The warrant will be reasonable where the description of the items to be seized is sufficient to permit the officers executing the warrant to identify them and to link them to the offence set out in the warrant. In sections other than s. 487, the *Code* provides for the seizure of bodily substances and the use of other investigative techniques. These provisions will be dealt with below. However, s. 487 now explicitly provides for the seizure of electronic data (ss. 487(2.1)–(2.2)).

(c) The location to be searched

Finally, the location must be described precisely, and an information to obtain must set out reasonable grounds for believing that the evidence sought will be at the location described. For example, a s. 487 warrant must set out the “building, receptacle or place” to be searched, and this must be specified on the warrant. The location may be anywhere in Canada. Where the location of the search is in a jurisdiction other than the one from which the justice issued the warrant, the warrant must also be endorsed by a justice within the jurisdiction in which the search is to take place (*Code*, s. 487(2) and Form 28).

(d) Reasonable grounds

Most search provisions require these three factors (an **offence**, the **evidence** to be seized, and the **location** of the search) to all be established on reasonable grounds. The standard of proof is “credibly based probability” and need not rise to the standard of a balance of probabilities or proof beyond a reasonable doubt. Moreover, an information to obtain may set out and rely on reliable hearsay.

(e) Confidential informers

Where the hearsay in question comes from a confidential informer whose identity cannot be revealed because it is protected by informant privilege, the sufficiency of an information to obtain is assessed on a “totality of circumstances” test. This test requires the court to consider whether the information provided was compelling, whether the source was credible, and whether the information supplied was corroborated.

2.2.3 Sealing orders

Where the disclosure of information contained in a warrant application would tend to identify the confidential informer, compromise the nature and extent of an ongoing investigation, endanger a person engaged in particular intelligence-gathering techniques (which may prejudice future investigations), or prejudice the interest of an innocent person, the informant requesting the search warrant will usually also apply to prohibit access to the information used to obtain a search warrant by means of a sealing order (s. 487.3).

If the accused subsequently wants to challenge the reasonableness of the search and requires access to the warrant application package for that purpose, the accused or the Crown may apply to the court for an order unsealing the package. Usually the court will order that the package be unsealed and given to the Crown to be vetted for disclosure purposes. The accused will then be given an edited version of the information to obtain and warrant that does not divulge the identity of the confidential informer or any other confidential or privileged information.

If no sealing order is requested or granted, a warrant application package including the information to obtain is presumed to be accessible once the search warrant has been executed.

2.2.4 The issuance of search warrants

(a) In writing

Search warrants are most commonly issued pursuant to s. 487(1) of the *Code*. A search warrant under s. 487 is usually issued by a justice of the peace but will, on occasion, be issued by a judge of the Ontario Court of Justice. In most cases, the warrant will be issued only upon the personal attendance of the informant (usually a police officer) before the justice. At that time, the informant will swear to the truth of the information, which is to be in Form 1. The officer will also present to the justice a draft copy of the warrant in Form 5. If the justice is satisfied that the warrant should issue, the justice will sign the warrant and return it to the informant, who will then be charged with executing the warrant according to its terms.

(b) Telewarrants

A warrant under s. 487 may also issue without personal attendance of the informant before the justice of the peace where it is impracticable for the officer to attend before the justice (s. 487.1). In these circumstances, the *Code* provides that the informant may give an information to obtain to a justice “by telephone or other means of telecommunication,” and the justice may issue

the warrant “by telephone or other means of telecommunication.” All of these proceedings are recorded and have specific reporting requirements to ensure an accurate record is created. These warrants are commonly referred to as “telewarrants” and usually are requested and granted by way of written documents transmitted by fax. Similar telewarrant provisions exist for “general warrants” (s. 487.01), DNA warrants (s. 487.05), bodily impression warrants (s. 487.092), and blood sample warrants (s. 256).

2.2.5 The execution of search warrants

The warrant may indicate that it is to be executed by “a peace officer” or “a public officer” (both defined in s. 2 of the *Code*). Where the warrant is to be executed by a person or persons who are public officers, they must be specifically named in the warrant (s. 487(1)). Peace officers may simply be named as a class.

(a) Location to be searched

The warrant can only be executed at the place named on its face. Where there has been a mistake in the written description of the location but the identity of the location is clear, the search may still be found to be lawful and reasonable. Alternatively, a good faith mistake in this respect will be an important consideration in determining whether the admission into evidence of anything seized under the authority of the warrant would bring the administration of justice into disrepute under s. 24(2) of the *Charter*.

(b) Procedural rules

The courts have developed the following procedural rules for the execution of search warrants:

- The peace officer must have the warrant in his or her possession at the time of the search.
- Generally, when the place to be searched is a dwelling house, a demand to open must be made before entry is forced. Where there is a need to ensure that no evidence is destroyed, announcement may not be required.
- The officer executing the warrant must exhibit the warrant for inspection if asked to do so.
- The officer may use no more force than is reasonably necessary to effect any entry or search. Reasonable force may include keeping watch over persons present during the search and preventing a suspect from fleeing. The greater the force used, the heavier the onus on the Crown to justify its use.

When contacted in the course of execution of a search warrant, counsel should ascertain the basis for the warrant and, if possible, obtain a copy of the warrant to confirm that it authorizes the search that is being undertaken. The lawyer must neither obstruct the search

nor advise anyone else to do so. If there is a concern that the search exceeds the authority granted by the warrant and the officer refuses to agree to suspend the search, counsel should simply instruct the owner to make careful notes of what takes place and attempt to obtain an inventory of items seized. This information may then form the basis of an application to quash the warrant or to exclude evidence at trial, if charges are subsequently laid.

(c) Timing for execution

A search warrant issued under s. 487 or 487.1 of the *Code* must be executed during the day (defined in s. 2 of the *Code* as the period from 6:00 a.m. to 9:00 p.m.). The issuing justice may authorize a warrant to be executed at night (the period from 9:00 p.m. to 6:00 a.m. under s. 2) if the issuing justice is satisfied that there are reasonable grounds for executing it at night, those reasonable grounds are set out in the information, and the warrant specifically authorizes the execution of the warrant at night (*Code*, s. 488). There must be some immediate urgency in order to justify the execution of a warrant at night. An unjustified night-time search will amount to a serious *Charter* violation. A warrant authorized under the *Controlled Drugs and Substances Act (CDSA)*, unlike the search provisions in the *Code*, allows the execution of a warrant at any time (*CDSA*, s. 11).

The warrant must specify a period during which it is to be executed, but it may only be executed once during that period. The period may be extended in order to allow the police to choose a time for execution during which they might also be able to apprehend the suspect.

(d) What items may be seized

Where the police seize more evidence than is authorized by the warrant, this may constitute a violation of s. 8 of the *Charter* and lead to the exclusion of the evidence at trial. However, s. 489 of the *Code* authorizes the person conducting the search to seize anything that he or she has reasonable grounds to believe has been obtained by or has been used in the commission of an offence and anything that will afford evidence of an offence. During the execution of a *CDSA* search warrant, a peace officer may seize any controlled substance, anything that the peace officer believes on reasonable grounds to contain or conceal a controlled substance, any offence-related property, and anything that the peace officer believes on reasonable grounds will afford evidence of an offence under the *CDSA* (*CDSA*, ss. 11(6) and (8)).

(e) Return of property seized

Subsection 489.1(1) of the *Code* requires a peace officer who seizes anything under a warrant or otherwise in the

execution of the officer's duties as soon as practicable to return it to its lawful owner, to bring it before a justice, or to report its detention to a justice, following the procedure in s. 490. The justice has the power to order the detention or return of goods seized pursuant to that statutory scheme. Subsection 490(2) provides that nothing shall be detained under the authority of such an order for more than three months after the date of seizure unless, before the expiry of the period, either proceedings are instituted in which the things may be required or an order of further detention is made. Such further order(s) must be made on notice and may not, cumulatively, exceed one year. An order of further detention that exceeds one year may be made by a judge of the Superior Court of Justice.

2.2.6 Searching a lawyer's office

Special rules apply where the location to be searched is a lawyer's office because a lawyer's office will typically house privileged information. A law office may include any location where privileged information is kept, which in certain cases may be a lawyer's home, banking and billing records, or telephone records. Section 488.1 of the *Code* provided a set of procedures to be used for the purposes of a law office search. However, in *Lavallee, et al. v. Canada (Attorney General)* that section was struck down as unconstitutional by the Supreme Court of Canada because it provided insufficient protection to lawyer-client privilege. In *Lavallee*, the court set out the common-law principles that now govern law office searches.

Counsel subject to such a search should immediately contact their senior criminal counsel and client to obtain and provide advice, respectively. Further, the Law Society of Upper Canada has recently developed guidelines for law office searches, which should also be consulted by counsel.

In the absence of specific instructions from the client, the evidence seized by the police will be treated as though privilege has been claimed over it. It is simply not open to the lawyer to waive privilege without instructions from the client. Moreover, counsel is ethically bound to assert the privilege that exists in documents in counsel's possession.

In some law office searches, the lawyer and the client may be in a conflict of interest. Especially where the conduct of counsel may become an issue in the case, the lawyer may not be able to properly advise the client who is the target of the search as to whether privilege should be waived or asserted since the interests of the client and the lawyer in keeping a document confidential may not be the same. In these circumstances, the client must be

advised of the right to retain independent legal advice. Moreover, the lawyer may also want to get legal advice from an independent lawyer.

2.2.7 Other types of search warrants

As noted above, the most commonly used search warrant power is contained in s. 487 of the *Code*. The *Code* contains a number of other search and seizure provisions in order to account for types of evidence or investigative procedures that do not fit neatly under the s. 487 power to search for things at a specified location. The constitutional principles described above with respect to s. 487 search warrants apply to each of these search powers.

(a) Wiretaps

Part VI of the *Code*, "Invasion of Privacy," provides a complete code respecting the interception of private communications in relation to the investigation of specific enumerated offences. Under ss. 185–186 of the *Code*, an application for an authorization to intercept private communications must be signed by the Attorney General, the Solicitor General of Canada, or by a specially designated agent (these are typically senior Crown counsel). The application must be supported by the affidavit of a peace officer, setting out the grounds for requesting the authorization. For an authorization to be granted, the judge must be satisfied that it is in the best interests of the administration of justice. Practically speaking, this requires there to be reasonable grounds to believe that an offence has been or is being committed and that the authorization sought will afford evidence of that offence (s. 186(1)(a)). The judge must further be satisfied that there is "investigative necessity" for the wiretap to be authorized. Accordingly, the application must establish that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed, or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures (s. 186(1)(b)). The investigative necessity precondition does not apply to cases where the wiretap is sought in order to investigate terrorism or criminal-organization offences (s. 186(1.1)).

(b) Blood samples

Section 256 of the *Code* provides for a warrant to obtain a blood sample where there are reasonable grounds to believe that a person has within the preceding four hours committed the offence of impaired driving, or "over 80," and has been involved in an accident that resulted in the death or injury to that person or another person. Such a warrant will only be available, however, where the person

is unable to consent to the taking of his or her blood as a result of any physical or mental condition arising from the accident (s. 256(1)(b)). The sample must be taken only under the supervision of a physician in circumstances where the physician is satisfied that the person's life will not be endangered by the procedure.

(c) DNA samples

The *Code* also contains a comprehensive legislative scheme to allow for the issuance of a warrant to seize bodily substances for the purpose of DNA analysis. The forensic DNA warrant can be issued only in respect of a "designated offence," which is defined in s. 487.04 to include, among other things, various sexual offences, murder, assault, robbery, breaking and entering, and discharging a firearm. The forensic DNA warrant authorizes the plucking of individual hairs, the taking of buccal swabs, and the taking of small blood samples (s. 487.06). Pursuant to s. 487.05, the judge must be satisfied that there are reasonable grounds to believe all of the following:

- A designated offence has been committed.
- A bodily substance connected with the designated offence has been found.
- The subject of the warrant was a party to the designated offence.
- The forensic DNA analysis of a bodily substance from the subject of the warrant will provide evidence that the bodily substance found is from that person.
- The issuance of the warrant is in the best interests of the administration of justice.

In considering whether to issue the warrant, the judge shall have regard to

- the nature of the designated offence;
- the circumstances of its commission; and
- the availability of a trained police officer or other person to collect the DNA sample.

The DNA provisions also set out the purposes for which samples may be used (s. 487.08) and the conditions for their destruction or preservation (s. 487.09). Special provisions apply to young persons, as defined by the *Youth Criminal Justice Act (YCJA)* (*Code*, ss. 487.07(4)–(5)). They are entitled to have either counsel or a parent present when the sample is seized.

Upon conviction for a designated offence, s. 487.051 authorizes a judge to order an accused to provide a sample of his or her DNA to be submitted and stored on a DNA databank.

(d) Bodily impressions

The *Code* also provides for the issuance of a warrant to take "any handprint, fingerprint, footprint, foot impression, teeth impression or other print or impression of the body or any part of the body in respect of a person" (s. 487.092). These warrants are not limited to "designated offences" and may be issued in respect of an investigation into any offence against the *Code* or any Act of Parliament. The issuing justice must be satisfied that there are reasonable grounds to believe that such an offence has been committed and that the impression(s) sought will afford evidence of that offence. The justice must also be satisfied that "it is in the best interests of the administration of justice to issue the warrant." Furthermore, the warrant for such an impression must contain "such terms and conditions as the justice considers advisable to ensure that any search or seizure authorized by the warrant is reasonable in the circumstances."

(e) The general warrant

The *Code* contains in s. 487.01 a broad power to grant warrants authorizing the use of "other investigative techniques." A s. 487.01 warrant is commonly referred to as a "general warrant," and it is typically used to authorize the use of a specified device or investigative technique or procedure, the use of which would otherwise constitute an unreasonable search or seizure. For example, a general warrant might be used to

- authorize the use of high-powered optical equipment;
- conduct a "perimeter search";
- allow for the marking of property;
- enter on premises to make copies;
- take body measurements;
- inspect body markings; or
- take handwashings, among other things.

Section 487.01 also provides a power to issue a warrant for surreptitious video surveillance. The scheme for such surveillance is similar to the wiretap provisions of Part VI of the *Code*.

A judge, not a justice, may authorize a general warrant. There must be information on oath of a peace officer that there are reasonable grounds to believe that an offence has been or will be committed and that information concerning the offence will be obtained through the proposed technique, procedure, or device. The judge must be satisfied it is in the best interests of justice, and there are no other provisions in the *Code* or other Act of Parliament that authorizes the proposed technique, procedure, or device (s. 487.01(1)). This type of warrant

does not permit interference with the bodily integrity of any person (s. 487.01(2)).

(f) Tracking devices

Section 492.1 allows for the issuance of a warrant to authorize the installation of a tracking device. This section permits the use of a tracking device “in or on any thing, including a thing carried, used or worn by any person” where the justice is satisfied that information that is relevant to an offence under investigation “can be obtained through the use of a tracking device.” For this type of warrant, the informant must only have reasonable grounds to suspect that an offence has been or will be committed. The warrant may be granted for a specified period of time, provided it is not a period of more than 60 days. Subsequent warrants may be granted if more time is required (ss. 492.1(2)–(3)).

(g) Dialed number recorder

Section 492.2 allows for a warrant permitting the use of a dialed number recorder, a device that can record the telephone number or the location of the telephone from which a telephone call originated. Similar to tracking device warrants, the informant must only have reasonable grounds to suspect that an offence has been or will be committed and that information could be obtained that would assist the investigation.

2.2.8 Review of search warrants

(a) Application to quash

While there is no appeal from the issuance of a search warrant (or the refusal to issue a warrant), search warrants may be reviewed before trial by way of an application for *certiorari* in the Superior Court of Justice, which has jurisdiction to quash the warrant. Such an application is limited to a consideration of jurisdictional errors allegedly made by the issuing justice. This amounts to a determination as to whether there was evidence upon which the justice, acting judicially, could (not should) have determined that a warrant should issue. Only if the reviewing judge concludes that there was no evidence, can the warrant be quashed. In general, this is the appropriate application to make to obtain return of the items seized. The *Charter* has not altered this scope of review. Where a *Charter* violation is alleged, the reviewing court must determine whether the violation was jurisdictional in nature. If so, *certiorari* is available. If the error was not jurisdictional but violated s. 8, the court must determine whether an appropriate remedy should be granted under s. 24(1) of the *Charter*. If the admissibility of the evidence is the issue, the application should be brought to the trial judge as a pre-trial *Charter* application.

Occasionally, a judge of the Superior Court of Justice issues a search warrant. In such a case, *certiorari* is unavailable to review and quash the warrant since the extraordinary remedies (of which *certiorari* is one) are available only as against the orders of inferior courts. However, it may be that an application may be made to the Superior Court of Justice to set aside the warrant.

Rules 6 (applications) and 43 (extraordinary remedies) of the Superior Court of Justice *Criminal Proceedings Rules* set out the procedure for an application to quash a search warrant. These rules set out the form, content, and time for notice of the application. They also prescribe the contents and the manner and timing of service and filing of the application record and factum for use on the application. In the case of extraordinary remedies, notice must also be given to the court services manager of the inferior court so that a “return” to the clerk of the superior court may be made. In the case of an application to quash a search warrant, the documents “returned” to the superior court will usually be the warrant and the information to obtain the warrant (r. 43.03(2)).

Where the application is supported by an affidavit, it should be prepared in accordance with r. 4.06 and Form 4, and served and filed in accordance with r. 6.04. Note, however, that the rules contemplate there may be cross-examination on the affidavit, either before a special examiner or, with leave, before the judge hearing the application. Accordingly, where there is any possibility that criminal charges may be laid against an individual, it is probably unwise to have that person swear the affidavit, since he or she may be subject to cross-examination pursuant to these rules.

On a motion to quash a search warrant, there is no absolute right to examine or cross-examine the officer who swore the information. Cross-examination will be allowed where the applicant can show a basis for believing that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions for the granting of the warrant described earlier in this chapter. The cross-examination will be limited by the judge to questions that are directed to establish that there was no basis upon which the warrant could have been granted. As noted above, confidential informers are protected by the law. The officer cannot be required to disclose the identity of the confidential informant nor can the confidential informant be produced for cross-examination unless the applicant can bring the case within the exception that permits disclosure of the informer’s identity where the accused person’s innocence is at stake.

(b) Section 8 and s. 24(2) of the Charter

While an application to quash a search warrant may occasionally be successful, there is little point in launching such an application unless there is a strong jurisdictional argument to be made. At trial, an application pursuant to ss. 8 and 24(2) of the *Charter* will provide the defence with much greater scope to attack the warrant, the lawfulness and/or the reasonableness of the search, and the admissibility of the evidence seized. In fact, if the only remedy sought on an application to quash the warrant is the exclusion of evidence, the application will usually be dismissed on the grounds that the trial judge can dispose of the question.

2.3 Warrantless searches

There are several statutory and common-law powers to search without a warrant. These powers are extensive and are exercised far more frequently than the warrant powers contained in the *Code*.

2.3.1 Consent searches

The most common of such searches is the power to search any place or any person on consent. In this area of search and seizure law, the most important issues will always be whether the consent in question was voluntary and informed and whether the right to counsel was respected. The giver of consent must be aware of his or her right to refuse consent and the potential consequences of giving consent (see *R. v. Wills*).

2.3.2 Privacy legislation

In Ontario, the *Freedom of Information and Protection of Privacy Act* restricts disclosure by an “institution” (defined in s. 2 of the *Act*) of personal information in its custody or control except for one of the purposes listed in s. 42. Some of the exceptions include:

- consent by the person to whom the information relates;
- disclosure made to an institution or law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- disclosure made by a law enforcement institution to a law enforcement agency in a foreign country under an arrangement, written agreement, or treaty or legislative authority; and
- disclosure made by a law enforcement agency to another law enforcement agency in Canada.

Despite these provisions permitting disclosure, where police request personal information from an institution as part of their investigation, an institution may still refuse to provide the information and require the police

to obtain judicial authorization for the search and seizure.

2.3.3 Search incident to arrest

Another power frequently exercised is the power to search the person and his or her immediate surroundings incident to arrest. Such a search need not be based on reasonable grounds to believe that the arrestee is in possession of evidence, contraband, or a weapon, but it must have a purpose related to the arrest. Typically, the purpose is the protection of the police and public or the discovery and preservation of evidence. This type of search must be temporally and spatially related to the arrest. Strip searches incident to arrest should be rare and are not justified by virtue of the fact that police have reasonable and probable grounds to arrest. On the contrary, there must be additional grounds for concluding that the strip search is necessary, either to discover weapons or to discover and preserve evidence. In addition, except in rare and exigent circumstances, strip searches must be conducted in police stations and should be conducted with minimal force by an officer of the same gender as the arrestee. Finally, the power to search incident to arrest is not so broad as to permit the taking of bodily samples from the arrestee (*R. v. Golden*).

2.3.4 Search incident to investigative detention

An investigative detention occurs when the police stop and question a person in the absence of reasonable and probable grounds to believe that he or she has committed an offence but with a reasonable justification related, for example, to the safety of the public. The officer must reasonably suspect that there is a connection between the detainee and a recent or on-going crime. The detention must be brief and limited to the extent required for the officer to perform his or her duty. The officer must inform the detainee of the purpose for the investigation. If there is a concern for the safety of the officer or the public, the police may “pat down” or “frisk” the detainee for weapons. Any evidence discovered during such a search may be admissible as long as the purpose of the search was to ensure the safety of the officer or the public (*R. v. Mann*). Upon detention, the detainee must be given his or her rights to counsel without delay (*R. v. Suberu*).

2.3.5 Exigent circumstances

The *Code* also contains a power to conduct a search under ss. 487(1) and 492.1(1) in the absence of a warrant “if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain a warrant” (s. 487.11).

2.3.6 Breath samples

Section 254 of the *Code* gives the police the power to demand breath samples from a motorist in certain limited circumstances (i.e., where the officer has reasonable grounds to believe that the accused has, within the preceding three hours, committed either the offence of “over 80” or the offence of impaired operation). It is a criminal offence to refuse to comply with a valid demand without reasonable excuse. The law of reasonable excuse is complex, but the law is clear that following the advice of counsel is not *per se* a reasonable excuse for refusing to comply with the demand.

2.3.7 Samples of bodily substances

Subsection 254(3.1) permits the police to conduct tests in order to make an “evaluation” as to whether a driver’s ability to drive is impaired by the ingestion of drugs or by a combination of drugs and alcohol. Where the officer, upon completing such an evaluation, has reasonable grounds to believe that the driver’s ability was so impaired, the officer may demand that the driver provide a sample of “oral fluid,” urine, or blood so that the sample may be tested to determine whether the person has a drug in their body (s. 254(3.4)).

2.3.8 Warrantless searches and the right to counsel

Subsection 10(b) of the *Charter* provides that, upon arrest or detention, everyone has the right to counsel. It is clear that as soon as a person is “detained” within the meaning of s. 10(b) or arrested, the person must be informed without delay of his or rights to counsel (*R. v. Suberu*).

In most situations where the police conduct a search of the person, that person will be detained and will have a right to be informed of the right to counsel and to consult with counsel. That said, not all such cases will involve a detention. For example, one series of cases considers whether a person is “detained” when luggage is searched during an airport customs and immigration check. A routine check will likely not amount to a detention. A more intrusive search, such as a strip search or a search of the person in an interview room, will give rise to a detention, and the person being searched will have the right to consult counsel.

Further, the police are not obligated to suspend the physical search until the detainee has had the opportunity to consult with counsel except, for example, where the lawfulness of the search is dependent on the detainee’s consent or where a statute gives a person a right to seek review of the decision to search.

Where the police have executed a search warrant and arrested or detained the occupant of the premises, the police are not required to afford the occupant the opportunity to contact counsel until the situation is clearly under control. Similarly, a search incident to arrest will normally give rise to detention but it is usually impractical for rights to counsel to be exercised until after the search. A further discussion of detention and s. 10(b) rights are outlined below.

3. Production orders

Unlike a search and seizure power, which authorizes the police to take evidence from a person by force if necessary, a production order compels a third party who is not the accused to produce evidence and deliver it to the police.

3.1 The order

The *Code* provides for two types of production orders. In s. 487.012, the *Code* empowers a judge or justice to compel any person, other than the person under investigation, to produce documents or electronic data to the police. In s. 487.013, the *Code* provides for production orders aimed at financial institutions and others in possession of certain “financial or commercial information,” including information about accounts and, in some cases, a person’s date of birth and current and former addresses. The two provisions are virtually identical except for the kind of information the orders are designed to capture and the type of grounds required.

A production order may be signed by either a justice or a judge (s. 487.012(1)). An order under s. 487.012 may be aimed at anyone except a person under investigation for an offence against the *Code* or any other federal statute (ss. 487.012(1) and (3)(a)).

The production order must specify a time within which the evidence sought must be produced (s. 487.012(2)). The order must also indicate to whom the evidence is to be given and mandates that the recipient of the evidence must be either a “peace officer” or “public officer.”

3.2 What kind of evidence can be compelled by a production order?

There are two main categories of evidence that may be compelled. In the first category are documents, copies of documents, and data. If copies are called for, the producer of the copies must, by affidavit, certify that the copies are true copies (s. 487.012(1)(a)). In addition, the legislation provides that such copies are “admissible in evidence” and have “the same probative force as the original document would have if it had been proved in the ordinary way” (s. 487.012(7)). The definitions of both “document” and “data” employed here are very broad

and are clearly intended to capture virtually anything that records information. Section 487.011 provides:

“document” means any medium on which is recorded or marked anything that is capable of being read or understood by a person or a computer system or other device.

With respect to “data,” s. 487.011 adopts the definition of data found in s. 342.1(2) of the *Code*:

“data” means representations of information or of concepts that are being prepared or have been prepared in a form suitable for use in a computer system.

The second category of evidence that may be compelled requires the recipient of a production order “to prepare a document based on documents or data already in existence” (s. 487.012(1)(b)).

3.3 When will a production order be made?

A production order under s. 487.012 may be made only where the judge or justice is satisfied by “information on oath in writing” that the applicant for the production order has reasonable grounds to believe that an offence against the *Code* or other federal Act “has been or is suspected to have been committed,” that the things sought “will afford evidence respecting the commission of the offence,” and that the subject of the order has “possession or control” of the things sought (s. 487.012(3)).

The requirements for a production order for financial or commercial records under s. 487.013 are similar except that the application may be based on “reasonable grounds to *suspect*” as opposed to the more onerous requirement of “reasonable grounds to *believe*” (s. 487.013(4)).

3.4 Exemptions

These provisions allow the subject of a production order to apply to a judge for an “exemption from the requirement to produce any document, data or information referred to in the order.” While the application for an exemption must be made “before the order expires,” the legislation also indicates that the application may only be made if notice is given to the peace or public officer named in the order within 30 days of the making of the order. Upon making the application, the execution of the production order is immediately suspended until the court has disposed of the application. An exemption will be granted if the court is satisfied that at least one of the following three conditions is met:

- The evidence sought “is privileged or otherwise protected from disclosure by law.”

- It would be “unreasonable” to require the applicant to produce the evidence.
- The evidence is not within the “possession or control of the applicant” (s. 487.015(1)).

3.5 Enforcement

Failure to comply with a production order may attract a maximum penalty of \$250,000 or six months in prison or both (s. 487.017).

4. Proceeds of crime

An ordinary search warrant under s. 487 is not available to seize intangibles such as bank accounts. However, Part XII.2 of the *Code* (proceeds of crime) sets out powers for obtaining special warrants and the making of restraint orders. Some aspects of the “proceeds of crime” legislation are reviewed below. Generally, the legislation creates offences for possession or laundering of the proceeds of a “designated offence” (s. 462.31). Designated offences include all federal indictable offences. The *Code* contains a very broad definition of proceeds of crime: “any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly” as a result of the commission of a designated offence (s. 462.3).

4.1 Search, seize, and freeze

Part XII.2 of the *Code* has its own search warrant provision (s. 462.32), which authorizes searches for property that is the proceeds of crime on application by the Attorney General. It also has a provision that permits the Attorney General to apply for a restraint order (s. 462.33) that would prohibit a person from disposing of property reasonably believed to be the proceeds of crime. It is this section that permits the freezing of bank accounts.

Any person who has an interest in property either seized or frozen may make an application to review the search warrant or restraint order (s. 462.34). Upon such a review, the court may order the property returned or revoke or vary the restraint order. The court may also provide relief from the seize and freeze orders for purposes of meeting bail requirements or reasonable living, business, or legal expenses. Specifically, in respect of legal fees, s. 462.34 provides for an application to a judge of the Superior Court of Justice where the accused must demonstrate that there are no other available financial sources. If this initial prerequisite is met, the judge will conduct an *in camera* hearing, in the absence of the Crown, to determine the reasonableness of the legal expenses. This section also permits the Crown, either before or after the *in camera* hearing, to make representations about what would constitute reasonable

legal expenses. In determining what constitutes reasonable legal expenses, the court is to take into account the legal aid tariff of the appropriate province (ss. 462.34(5)–(5.1)).

4.2 Forfeiture

The legislation provides for the forfeiture of proceeds of crime following conviction for a designated offence. In this case, at the time of sentencing, the Attorney General need only show on a balance of probabilities that the property in question is the proceeds of the crime for which the accused was convicted (s. 462.37(1)). Property may also be forfeited even though the court is not satisfied that the property was related to the offence for which the accused was convicted, as long as the court is satisfied beyond a reasonable doubt that the property is proceeds of crime (s. 462.37(2)). The Attorney General may also apply for forfeiture in the absence of a conviction where the accused has died or absconded and the property in question is, beyond a reasonable doubt, the proceeds of crime (s. 462.38). Where a forfeiture order has been made, an innocent person having an interest in the property may apply for relief from that order (s. 462.42).

Where the proceeds of crime are beyond the reach of the court and cannot be forfeited for some reason (e.g., they have been transferred offshore), the court may impose a fine equal to the amount of the property that otherwise would have been forfeited (s. 462.37(3)). In lieu of the payment of such fines, the *Code* provides a schedule of imprisonment depending on the size of the fine imposed (s. 462.37(4)).

Provision is also made in s. 462.4 for orders to set aside any conveyance or transfer of property that occurred after the order was made, unless the conveyance or transfer was for valuable consideration to a person acting in good faith and without notice.

4.3 Lawyers and the proceeds of crime

A lawyer who accepts money or property, whether on account of fees or to be held in trust pending the completion of a transaction, knowing that the funds were the proceeds of crime, may be guilty of the possession or laundering offence. The offences will also be committed where the lawyer, while not having actual knowledge, was wilfully blind to the source of the funds. The doctrine of wilful blindness applies where the person has become aware of the need for some inquiry but declines to make the inquiry because the person does not wish to know the truth.

Even where the lawyer accepted the funds in ignorance of their true nature, the lawyer may become liable to

prosecution as a result of dealing with the funds after learning that they are the proceeds of crime.

5. Investigation and questioning of suspects

5.1 The duty to investigate and the right to silence

The police have a duty to investigate crime, and as part of that duty, they may ask people questions (*R. v. Singh*). Generally speaking, it is inaccurate to describe this right as an investigative “power” given that there is no duty on the person questioned to answer the questions posed. There are exceptions to this rule. For example, the *Highway Traffic Act* requires motorists to respond to some police inquiries. In fact, the *Highway Traffic Act* demands compliance even if the vehicle is not a “motor vehicle,” for example, a bicycle. Therefore, where the investigation involves provincial legislation or federal legislation other than the *Code*, the lawyer must consult that legislation to determine the powers of the authorities and the duties that may be imposed upon the citizen to co-operate. However, it is generally correct advice to say that a citizen who is under investigation for a *Code* offence is not required to answer questions and has the right to remain silent.

Although a police officer may approach a person, for example on the street, to question him or her, if the person refuses to answer, the police officer must allow the person to proceed unless the officer has grounds to detain the person or arrest the person on a specific charge or pursuant to s. 495 of the *Code* (where the officer has reasonable grounds to believe that the person has committed or is about to commit an indictable offence).

The best advice as to when a person should speak to a person in authority depends on the circumstances. Each case is unique, and there is no denying that criminal charges are sometimes avoided because the citizen provided the police with an explanation. The person who chooses to speak to the police, however, must not lie or otherwise mislead the police, since this can constitute the offence of attempting to obstruct justice (*Code*, s. 139), public mischief (s. 140), or obstructing a police officer (s. 129).

5.2 Voluntariness

For a statement made to a person in authority to be admissible in court, the Crown must prove beyond a reasonable doubt that the statement was made voluntarily. Voluntariness requires that the person freely decided to give the statement with an understanding that they have a right to choose whether to speak to the police

or remain silent. In assessing whether a statement was made voluntarily, the court will consider the following factors: (1) whether the statement was given in response to any inducements or threats; (2) whether the accused had an operating mind at the time the statement was made; (3) whether the accused was subjected to any oppressive circumstances; and (4) whether there was any trickery used by the person in authority in eliciting the statement (*R. v. Oickle*).

5.3 Questioning upon arrest or detention

Where a person questioned by the police is under arrest or detention, he or she has the benefit of the rights contained in ss. 10(a)–(b) of the *Charter*:

10.— Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right.

5.3.1 Detention

Whether a person is “detained” within the meaning of this section is a complex question of fact and law. Generally, detention is defined by courts as when the police or a state agent “assumes control over the movement of the person by demand or direction which prevents or impedes access to counsel.” It is clear that the definition of “detention” can include situations that are short of actual physical constraint. In *R. v. Therens*, the court found that a person who is “psychologically detained” will have the benefit of s. 10 of the *Charter*.

The Supreme Court of Canada in the recent decision of *R. v. Grant* (see also *R. v. Suberu*, *R. v. Harrison*, and *R. v. Shepherd*) clarified that a person is not necessarily “detained” when “delayed” briefly by police action. A person is considered to be “detained” for the purposes of ss. 9 and 10(b) of the *Charter* when his or her liberty interest is suspended by “significant physical or psychological restraint.” Detention based on physical restraint is usually fairly clear to identify. In determining whether a person is “psychologically” detained, the courts will consider whether the person was legally compelled to stop and speak to police (e.g., a driver investigated under the *Highway Traffic Act*) or whether other conditions exist where a reasonable person would conclude by reason of the state conduct that he or she has no choice but to comply. Such factors that the court will consider in determining whether someone is psychologically detained are the circumstances of the encounter (e.g., general community policing or focused suspicion of an individual), the nature of the police conduct (e.g., type, duration and location of questioning), and the particular characteristics or circumstances of the

person being questioned (e.g., age, physical stature, minority status, or level of sophistication).

A detention may also arise where a person, who is not under arrest, attends a police station. For these situations, the Court of Appeal has enumerated a set of factors to be considered to determine whether the person who attends “voluntarily” at the police station is nevertheless detained for the purposes of s. 10 of the *Charter*:

- the precise language used by the officer in requesting the person’s attendance and whether the person was given a choice as to where the interview should be held;
- whether the person voluntarily came to the station;
- whether the person left at the end of the interview or was arrested;
- the stage of the investigation and, in particular, whether the questioning was for the purpose of obtaining incriminating statements;
- whether the police had grounds to arrest;
- the nature of the questions; and
- the subjective belief of the person.

5.3.2 Detention based on racial profiling

Racial profiling has been defined by the Ontario Court of Appeal in *R. v. Richards* and *R. v. Brown* as the following:

Racial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.

The attitude underlying racial profiling is one that may be consciously or unconsciously held. This means that the police officer need not be an overt racist and his or her conduct may be based on subconscious racial stereotyping.

In certain cases, the defence may allege that the police detained the accused as a result of racial profiling. The onus is on the defence to prove on a balance of probabilities that racial profiling influenced the actions of the police officer(s) and created or contributed to an arbitrary detention contrary to s. 9 of the *Charter*. In other words, the defence must establish that it is more probable than not that there was no articulable cause for the police officer to stop the accused and that the real reason for the stop was the accused’s race.

5.3.3 Arrest

“Arrest” is more straightforward, being a discrete event. In general, an arrest is constituted by a physical seizure or touching of the arrested person’s body with a view to detention. It is probably fair to observe that actual physical seizing or touching may no longer be absolutely essential, especially if the arrestee acquiesces in the situation by acknowledging, through words or conduct, the deprivation of liberty. An arrest is constituted when any form of words is used that is calculated to bring home to the person and does so that the person is under compulsion and the person thereafter submits to such compulsion.

5.3.4 Implementing rights to counsel

Where the person is arrested or detained and informed of the right to counsel, the person is entitled to exercise that right by contacting counsel except in certain limited circumstances. One such circumstance occurs where a motorist has been detained for a roadside screening device test pursuant to s. 254(2) of the *Code* and there is no reasonable opportunity to consult with counsel before administering the test (*R. v. Thomsen*; *R. v. George*). Similarly, the motorist is not entitled to consult counsel prior to complying with a demand to perform certain roadside sobriety tests or responding to questions about alcohol consumption (*R. v. Orbanski*; *R. v. Elias*). Such test results or answers obtained prior to rights to counsel may only be used as an investigative tool to assist the police officer to confirm or refute the suspicion of impairment and cannot be used as incriminating evidence in court.

In most other circumstances, the detainee has the right to consult counsel. In *R. v. Manninen*, the Supreme Court of Canada has set out guidelines with respect to the right to counsel as guaranteed by s. 10(b) as follows:

- (1) The police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay.
- (2) Where the detainee asserts a right to counsel, the police must facilitate access by, for example, providing access to an immediately available telephone. The detainee need not make an express request to use the telephone.
- (3) There may be circumstances in which it is particularly urgent that the police continue with an investigation before it is possible to facilitate a detainee’s communication with counsel.
- (4) The police must cease questioning or otherwise attempting to elicit evidence from the detainee until the detainee has had a reasonable opportunity to retain and instruct counsel, absent circumstances in which it is particularly urgent that the police proceed with their questioning of the detainee

before providing him or her with a reasonable opportunity to retain and instruct counsel.

- (5) A person may implicitly waive the rights under s. 10(b) but otherwise has the right not to be asked questions until afforded an opportunity to consult counsel and, by answering questions asked in breach of this section, cannot be held to have waived these rights.

In addition, the detainee must be afforded the opportunity to consult counsel in private. In Ontario, detainees are usually informed of their right to consult counsel as a matter of routine. If, for some reason, the detainee cannot be given privacy, absent exigent circumstances, the police have no right to question the detainee until the requisite degree of privacy can be provided. The detainee does not have to specifically ask to speak to counsel in private. Thus, when telephoned by a detainee, counsel should ensure that the conversation is in private.

In *R. v. Brydges*, the Supreme Court of Canada imposed an additional duty upon the police when advising the accused of s. 10(b) rights. In order to give the detainee a full understanding of the right to retain and instruct counsel, the detainee must be informed, as a matter of routine, of the existence and availability of the applicable systems of duty counsel and legal aid in the jurisdiction, which provide immediate, although temporary, legal advice regardless of the detainee’s financial status.

Imposing the *Brydges* requirement may affect what constitutes reasonable diligence in the exercise of the right to counsel. It may well be that a detainee will not be given unlimited opportunity to contact counsel of choice when duty counsel is available. This will likely be the case in circumstances where the investigation is continuing, whether or not there is any special urgency in the matter. In an earlier case, the Supreme Court of Canada had already emphasized the importance of the accused being diligent in the exercise of the s. 10(b) rights. In *R. v. Smith*, the court held that the duties imposed on the police to refrain from attempting to elicit evidence from the detainee are suspended when the detainee is not reasonably diligent in the exercise of those rights. This limit on the rights of the detainee is essential because it would otherwise be possible for the accused to needlessly and with impunity delay an investigation and even, in certain cases, to allow for an essential piece of evidence to be destroyed or rendered impossible to obtain. The Supreme Court of Canada recently affirmed in *R. v. Willier* that “if the chosen lawyer cannot be available within a reasonable period of time, detainees are expected to exercise their right to counsel by calling another lawyer, or the police duty to hold off will be suspended”.

Absent special circumstances indicating that the accused did not understand the right to counsel when informed of it, the onus is on the accused to prove that he or she asked to exercise the right to counsel but that it was denied or that the accused was denied any opportunity to even ask.

In practical terms, if the police inform the detainee about their rights to counsel, including the availability of duty counsel and legal aid, and the detainee waives the right to counsel, police may proceed to take the detainee's statement. Absent special circumstances, the police do not have to give the accused time to consider whether to consult counsel and do not have to specifically obtain from the accused a waiver of his or her rights. In other words, no issue of waiver of the right to counsel arises where the accused does not first assert the right to consult counsel. Special considerations apply to the questioning of young persons. This is dealt with below.

5.3.5 Advising on the right to silence

In most cases, the lawyer's first involvement will be when contacted by a client and asked for advice upon detention or arrest. Again, absent some statutory compulsion, a citizen who has been detained or arrested has the right to remain silent and should be so advised. Otherwise, it is impossible to generalize as to what further advice to give. While some lawyers take the position that there is never a situation where the accused can advance his or her case by answering police questions after the initial arrest, it cannot be said that this is invariably the correct advice. At the least, the lawyer's obligation is to advise the client of his or her rights and, after having been assured that the conversation is private, the lawyer should obtain whatever other information is required to give any further advice. While the lawyer may advise the client of the right to remain silent, there is no obligation on the police to cease questioning even where the accused indicates an intention to take that advice and remain silent (*R v. Singh*). In these circumstances, the best a lawyer can do is to advise the client and, if the client agrees, inform the police that the client chooses to exercise the right. It will then be for a court at some later date to determine the admissibility of anything said after the lawyer departs.

In some cases, the client may wish to have defence counsel present during the interrogation. While the police may agree to permit counsel to attend an interview in some rare cases, s. 10(b) does not include the right to have counsel present during police questioning (*R. v. Sinclair*). However, s. 146 of the *YCJA* does expressly require counsel, when requested, to be present during police interrogations of young persons.

A client who may be quite content to speak to the police about one matter may need further advice as the nature of the investigation changes. The client should also be advised that, generally speaking, the police are not required to again advise the detainee of the right to counsel on each occasion that questioning touches a different offence, unless there is a discrete change in the purpose of the investigation or the offence has become significantly more serious. A detainee should be advised again of the right to contact counsel should the subject matter of the questions change.

The Supreme Court of Canada in *R. v. Sinclair* and *R. v. McCrimmon* recently confirmed that once a person has exercised his or her right to counsel by consulting with a lawyer, the police may proceed with questioning even when the suspect makes additional requests during the interview to consult with counsel again. There is no obligation under s. 10(b) for the police to stop the interview and permit contact with counsel again unless

- there is a change in the jeopardy facing the detainee (e.g., change of charges from attempted murder to murder);
- there are new procedures involving the detainee that require further legal advice (e.g., participation in a polygraph test or line-up, or request for a consent search or DNA sample);
- there is reason to believe that the detainee may not have understood the initial legal advice (e.g., appears confused about choices or the right to remain silence).

However, in the face of repeated requests to consult with counsel, depending on the circumstances, the voluntariness of any subsequent statement made to the police may be challenged and could result in the exclusion of the statement in court.

One further matter that counsel will want to canvass is the possibility that anything the accused says to a fellow inmate may later be adduced in evidence by the Crown. Where the "inmate" is in fact an undercover police officer or a police agent, different considerations may apply. In *R. v. Hébert*, the Supreme Court of Canada held that where the accused consulted with counsel and informed the police that he did not wish to make a statement, it was a violation of s. 7 of the *Charter* for the police to trick the accused into making a statement by placing an undercover officer in the cell. In that case, the court placed a great deal of emphasis on the fact that the officer actively engaged the accused in conversation. The situation is different where the undercover officer merely gave the detainee the opportunity to speak but did not attempt to elicit information concerning the offence. It should be further emphasized to the client that this case law does not apply to "free agents"—inmates who for

their own reasons are anxious to obtain information from their fellow prisoners, perhaps in exchange for lenient treatment, but who are otherwise not under the control of the police nor acting at their behest.

5.4 The questioning of young persons

The *YCJA* includes additional protections for young offenders who are being questioned by the police. Section 146 sets out specific procedures for the questioning of young persons. In particular, the young person must be advised of all of the following:

- There is no obligation to give a statement.
- The statement may be used in evidence in proceedings against him or her.
- The young person has the right to consult counsel and a parent or other appropriate adult.
- The young person has the right to make the statement in the presence of counsel and a parent or other appropriate adult.

While the young person may waive the right to consult with counsel or a parent or an appropriate adult and may waive the right to have that person present, any waiver must be recorded on videotape or audiotape or be in writing.

Before giving a statement, the young person should also be made aware of the possibility, where it exists, that he or she could be subject to an “adult sentence” pursuant to ss. 62–74 of the *YCJA*.

6. Other investigative tests

6.1 Identification line-up

The Supreme Court of Canada has indicated that a detainee has the right to contact counsel prior to being required to participate in a line-up. This includes the right to consult counsel of choice, provided that counsel is available within a reasonable time. Otherwise the detainee may have to be content to rely on the advice of duty counsel. As to the advice counsel can give, the following should be taken into account. There is no legal obligation to participate in a line-up. On the other hand, refusal to do so can have certain prejudicial effects. In particular, where the case turns on identification of the perpetrator, circumstances may arise during the trial that will permit the Crown to explain the absence of line-up evidence by leading evidence that the accused refused to participate in a line-up. In such a case, a jury might well draw an inference adverse to the accused. In *R. v. Ross*, the Supreme Court also suggested that the following advice could be given to the detainee:

They could have been advised, for example, not to participate unless they were given a photograph of the line-up, or not to participate if the others in the line-up

were obviously older than themselves. In short, they could have been told how a well-run line-up is conducted, even though there is no statutory framework governing the line-up process.

In other words, the best advice to the client is to participate only in a fair line-up. To this end, counsel should attempt to speak to the officer in charge to determine that proper procedures have been followed to obtain the other persons who will act as distracters, that everything said to and by the witness will be recorded, that the accused will be permitted to choose a position in the line-up, and that nothing will be done to give any kind of clue to the witness. Ideally, the procedure should be videotaped, but if not, a photograph should be taken of the line-up both before and after it was viewed by the witness. Where the police do not intend to conduct a proper line-up, but rather seek to take the accused to the location of the offence or to some other crowded area to conduct the identification, then the best advice is probably to instruct the client not to participate. Once again, there is no legal requirement to participate, and the conditions are so uncontrolled that the necessary reliability and fairness of the procedure simply cannot be guaranteed. In such a location, the accused, perhaps standing or seated with two large police officers, may unfairly stand out as the obvious suspect.

6.2 Fingerprints

Pursuant to s. 2 of the *Identification of Criminals Act*, the police have the power to obtain fingerprints from anyone who is lawfully in custody and are authorized to use such force as is necessary to obtain those fingerprints. Pursuant to the *Code* (s. 501(3)), a person accused of an indictable offence may be compelled by the police to attend at a specified time and place for the purpose of taking fingerprints under the *Identification of Criminals Act*.

6.3 Sobriety tests

Pursuant to s. 254 of the *Code*, a peace officer may demand the performance of sobriety tests by anyone whom the officer reasonably suspects has alcohol or drugs in his or her body and has operated a motor vehicle within the preceding three hours. In addition, the section allows specially qualified officers to conduct “evaluations” to determine whether a person’s ability to drive has been impaired by drugs or by a combination of drugs and alcohol. Where the “evaluating officer” forms reasonable grounds to believe that the person is so impaired, the officer may demand that the person provide “bodily samples” for analysis.

It should also be noted that s. 48 of the *Highway Traffic Act* provides that a police officer may stop a vehicle for

the purpose of determining whether there is evidence that would justify the making of one of the demands in s. 254 of the *Code*. This section has been interpreted as authorizing the police officer to require the driver to perform sobriety tests at the roadside. While the results of these tests may be used by the officer to form an opinion about whether to make a demand, the results are not otherwise admissible at trial to prove impairment, since the tests are self-incriminatory and taken in breach of the right to counsel. (*R. v. Orbanski*; *R. v. Elias*).

6.4 Polygraph tests

No one can be compelled to take a polygraph (“lie detector”) test. Further, the results of the test, the refusal

to take the test, or even the agreement to do so are inadmissible in evidence. While a polygraph test is sometimes used by the police as a screening device to eliminate suspects, it is rarely productive for a person who is a suspect to take the test. More often than not, the polygraph is used as a device to obtain a confession. By confronting the accused with the results of a failed test, the police may be able to obtain an admission by the client. Most lawyers take the view that nothing is to be gained by participation in polygraph tests and so advise their clients.

1. Introduction

After being arrested and charged with an offence, an individual may be released by a police officer or held for a bail hearing before a judicial officer. This chapter reviews the means by which an adult accused may seek release from custody, along with the applicable procedural requirements.

2. Release by the police

The police have wide discretion to release a person arrested for most offences without any need for an appearance in court.

Where a person has been arrested without a warrant for a summary conviction offence, a Crown elect offence, or any offence within the absolute jurisdiction of the provincial court, a peace officer may release that individual. The officer can compel the accused's appearance in court by a summons or issue an appearance notice prior to releasing the person (*Criminal Code (Code)*, s. 497(1)).

The "officer in charge" of the police station has broader release powers. Not only does the officer in charge play a role in reviewing a peace officer's decision not to release, he or she also has the ability to release a person arrested without a warrant for any offence punishable by imprisonment of five years or less (s. 499). In addition, the officer in charge can release a person arrested with a warrant that has been endorsed by a justice under s. 507(6). Apart from releasing an accused unconditionally and seeking a summons, the officer in charge may grant release on a promise to appear or on a recognizance. Pursuant to s. 499(2), the officer in charge may require the accused to enter into an undertaking to abide by certain conditions considered necessary to monitor the accused and ensure public safety.

Both a peace officer and an officer in charge are required to release an accused unless there are reasonable grounds to believe that the accused will fail to attend court or that detention is necessary in the public interest. In this context, "public interest" refers to the need to establish the identity of the accused, to secure or preserve evidence, to prevent the continuation or commission of an offence, or to secure the safety of a victim or witness (ss. 497(1.1) and 498(1.1)).

In addition, pursuant to s. 503 the officer in charge has discretion to release an accused charged with any offence other than one listed in s. 469 of the *Code* (e.g., murder).

3. Judicial interim release

The ability to seek and obtain bail is a crucial feature of the criminal process. Indeed, the right of a person charged with an offence not to be denied reasonable bail without just cause is enshrined in s. 11(e) of the *Canadian Charter of Rights and Freedoms (Charter)*. The Supreme Court of Canada has interpreted "reasonable bail" to mean that the terms of release, including the amount set for bail and the restrictions placed on the accused's liberty, must be reasonable. "Just cause" requires that bail be denied only in a narrow set of circumstances and only where the denial is necessary to promote the proper functioning of the bail system.

The outcome of a bail hearing can have a substantial impact on the trial itself. In *R. v. Wust* and *R. v. Hall*, the Supreme Court of Canada recognized that accused persons detained in custody are more likely to plead guilty or to be found guilty when they proceed with a trial and are less able to participate in preparing their defence.

For the purposes of the judicial interim release provisions, accused persons are generally divided into two groups—those charged with an offence listed in s. 469 and those charged with any other offence. There are distinct differences in the procedure involved in dealing with these two types of accused.

3.1 Initial appearance of an accused before a justice

The police are under a positive obligation to take before a justice an arrested person whom they cannot or choose not to release. This must occur

- as soon as possible and without unreasonable delay and, in any case, within 24 hours; or
- where a justice is not available within the 24-hour period, as soon thereafter as possible (s. 503(1)).

The fact that the accused has not inquired about bail or that the justice does not have jurisdiction to deal with the offence with which the accused is charged does not affect that responsibility. Depending upon the circumstances, a failure to abide by the duty imposed by s. 503 may amount to a breach of s. 9 of the *Charter*.

When a person charged with an offence not listed in s. 469 is brought before a justice, the accused is entitled

to a bail hearing in accordance with s. 515 of the *Code*, even if he or she is being held in custody for some other reason (e.g., serving a sentence) (s. 519(1)). By contrast, when an accused charged with a s. 469 offence is brought before a justice, the justice must remand the accused in custody (s. 515(11)). The accused is not entitled to an automatic bail hearing but must bring an application for release before a judge of the Superior Court of Justice.

3.2 Bail hearings for offences not listed in s. 469

When a person charged with an offence not listed in s. 469 is taken before a justice, it may not be feasible for either the accused or the prosecutor to immediately proceed with a bail hearing. Section 516 of the *Code* permits a justice to adjourn the proceedings, at the request of the prosecutor or the accused, for a period of not more than three clear days. The adjournment may be for a longer period with the consent of the accused. If an adjournment is granted, the accused is remanded in custody. Section 516 permits a justice to grant an adjournment both prior to and during a release hearing. When acting pursuant to s. 516, the justice may make an order prohibiting the accused from communicating directly or indirectly with a victim, witness, or other named person.

3.2.1 The general situation: onus on the prosecutor

In a bail hearing for an accused charged with an offence that is not listed in s. 469, there is an initial presumption that the justice should order the accused released on an undertaking without conditions unless the prosecutor shows cause why the accused's detention in custody is justified or why a more onerous form of release ought to be ordered (s. 515(1)). In other words, there is an onus on the prosecutor to show, on a balance of probabilities, why the accused should not be granted the least onerous form of release.

3.2.2 The reverse-onus situation

Subsection 515(6) of the *Code* provides that the onus shifts to the accused to show cause why he or she should be released when charged:

515.—(6)(a) with an indictable offence, other than an offence listed in section 469,

(i) that is alleged to have been committed while at large after being released in respect of another indictable offence pursuant to the provisions of this Part or section 679 or 680,

(ii) that is an offence under section 467.11, 467.12 or 467.13, or a serious offence alleged to have been committed for the benefit of, at the direction of, or in association with, a criminal organization,

(iii) that is an offence under any of sections 83.02 to 83.04 and 83.18 to 83.23 or otherwise is alleged to be a terrorism offence,

(iv) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*,

(v) an offence under subsection 21(1) or 22(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in subparagraph (iv),

(vi) that is an offence under section 99, 100 or 103,

(vii) that is an offence under section 244 or 244.2, or that is an offence under section 239, 272 or 273, subsection 279(1) or section 279.1, 344 or 346 that is alleged to have been committed with a firearm, or

(viii) that is alleged to involve, or whose subject-matter is alleged to be, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or prohibited ammunition or an explosive substance, and that is alleged to have been committed while the accused was under a prohibition order within the meaning of subsection 84(1);

(b) with an indictable offence, other than an offence listed in section 469 and is not ordinarily resident in Canada,

(c) with an offence under any of subsections 145(2) to (5) that is alleged to have been committed while he was at large after being released in respect of another offence pursuant to the provisions of this Part or section 679, 680 or 816, or

(d) with having committed an offence punishable by imprisonment for life under subsection 5(3), 6(3) or 7(2) of the *Controlled Drugs and Substances Act* or the offence of conspiring to commit such an offence.

In any one of these situations, the accused must be given a reasonable opportunity to establish on a balance of probabilities that his or her detention in custody is not justified.

In *R. v. Pearson*, the Supreme Court of Canada upheld the constitutional validity of the reverse onus provisions in earlier versions of ss. 515(6)(a) and (d). Although the reverse onus provisions in ss. 515(6)(b)–(c) and 522 were not considered by the court, the reasoning in *Pearson* also tends to support their validity.

Where an accused is successful in showing that his or her detention is not justified, the justice must order the accused's release.

3.2.3 The show cause hearing

The term “show cause hearing” is a colloquial expression for a bail hearing under s. 515 (and s. 522) that refers to the onus that must be discharged by the prosecutor or the accused.

(a) The criteria for detention

The focus of the bail hearing is s. 515(10), which sets out three grounds on which an accused person can be detained:

515.—(10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

(a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law [the “primary” ground];

(b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice [the “secondary” ground]; and

(c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

(i) the apparent strength of the prosecution’s case,

(ii) the gravity of the offence,

(iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and

(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more [the “tertiary” ground].

In *R. v. Hall*, the Supreme Court held that the portion of an earlier version of s. 515(10)(c), with wording akin to the present provision, was constitutionally valid.

(b) Evidence at the hearing

To ensure that a wide range of information relevant to the primary, secondary, and tertiary grounds in s. 515(10) is admissible, the strict rules of evidence employed in a criminal trial are relaxed in a bail hearing. This approach can be seen in s. 518, which deals with a number of the relevance and admissibility issues involved in a bail hearing.

Paragraph 518(1)(a) allows the justice to make any inquiries of and about the accused that he or she considers desirable. These inquiries need not be under oath. Although the section gives broad scope to these inquiries, it also sets out clear restrictions. For example, s. 518(1)(b) limits the extent to which an accused who testifies at a bail hearing may be questioned about the offence with which he or she is charged. Unless defence counsel asks the accused about the offence, neither the prosecutor nor the justice may question the accused on

this topic. This prohibition is designed to provide the accused with some protection against self-incrimination. Defence witnesses, other than the accused, may be asked whether they have any personal knowledge of the circumstances surrounding the alleged offence. Moreover, an accused who testifies at a bail hearing may be questioned about other outstanding charges that are not the subject of the hearing.

In addition to any other relevant evidence, ss. 518(1)(c) and (d.2) specifically permit the prosecutor to lead evidence that

- the accused has a criminal record;
- the accused has been charged with and is awaiting trial for another criminal offence;
- the accused has previously committed an offence under s. 145 of the *Code*;
- shows the circumstances of the alleged offence, particularly with respect to the probability of conviction; and
- there is a need to ensure the safety or security of a victim or witness to the offence.

Further, s. 518(1)(e) permits the justice to base the decision to release or detain on evidence that is found to be “credible or trustworthy” in the circumstances. This provision has been held to permit the introduction of hearsay evidence.

In Ontario, it is usual for the prosecutor to provide the court with a statement outlining the factual foundation for the bail hearing. The statement ordinarily sets out the allegations relating to the offence, as well as information about whether the accused has a criminal record and whether the accused was already on some form of release.

This method of conducting a bail hearing is founded on s. 518(1)(d), which permits the court to consider relevant matters agreed upon by the prosecutor and the accused. This procedure cannot be used without the consent of the accused (or his or her counsel). Where there is no consent, the prosecutor must lead evidence. In general, the prosecutor will call a police officer to give hearsay evidence, such as testimony about the evidence witnesses are expected to give and information about the accused’s background and personal circumstances.

(c) Order restricting publication

As noted above, a significant amount of information about the accused and the offence(s) with which the accused is charged may be adduced at the bail hearing. Some of this information may not be admissible at the accused’s trial, and the publication of this information could compromise the accused’s ability to obtain a fair

trial. Similarly, publicity about information given at a show cause hearing could have a negative impact on the Crown's case by hampering further police investigation and tainting the evidence of potential witnesses.

Section 517 of the *Code* addresses some of these concerns by giving the justice the power to delay any broadcast or publication of the bail proceedings until either the end of the preliminary inquiry if the accused is discharged, the end of the trial, or once an accused pleads guilty. This non-publication order covers "the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice." The media is entitled to broadcast or publish the actual decision to release or detain, without reference to the reasons for the decision.

When the accused requests an order under s. 517, the justice must make it. The court has a discretion to make a non-publication order on its own initiative or at the request of the prosecutor.

The Supreme Court of Canada has held that, while s. 517 violates s. 2(b) of the *Charter*, the violation is justified under s. 1, since the publication ban safeguards the right to a fair trial and fair access to bail (*Toronto Star Newspaper Ltd. v. Canada*).

3.2.4 The form of release

After hearing the evidence and the submissions of counsel, the justice must decide whether cause has been shown. When the onus is on the prosecutor and detention has not been justified, the justice shall release the accused. Although the initial presumption is that the accused should be released on an undertaking without conditions, the prosecutor may show cause why the accused should be given a more onerous form of release. Similarly, where the onus is on the accused and release has been justified, the justice shall grant the accused bail. The forms of release are set out in s. 515(2):

- an undertaking with conditions;
- a recognizance without sureties and with conditions;
- a recognizance with sureties and with conditions;
- with the consent of the prosecutor, a recognizance without sureties, with conditions, and with the deposit of a sum of money or other valuable security; or
- if the accused is not ordinarily resident in the province or does not ordinarily reside within 200 kilometres of the place where he or she is in custody, a recognizance with or without sureties, with conditions, and upon depositing a sum of money or other valuable security.

An undertaking is a solemn acknowledgement signed by the accused in which he or she promises to attend court as required. There is no requirement for money to be deposited or pledged when an undertaking is signed. Failure to comply with an undertaking can lead to a charge under s. 145(2) of the *Code* and the revocation of bail.

A recognizance is an acknowledgment of a debt to the Crown in a specific amount. The debt is cancelled if the accused abides by the conditions set out in the recognizance. In addition to being enforced by a criminal sanction and by the revocation of bail, a recognizance is also enforceable through forfeiture proceedings in which the accused or his or her sureties may be ordered to pay all or part of the debt acknowledged in the recognizance.

A justice has broad discretion as to the amount of the recognizance and, where applicable, the quantum of cash bail or the value of the security that is to be posted. The amount of bail must be within the means of the accused. It cannot be fixed at such a large sum that it becomes tantamount to a detention order.

(a) Sureties

A surety is a person known to the accused (usually a family member or friend) who makes a solemn promise (in the form of a recognizance) that he or she will forfeit a specified sum of money to the Crown if the accused fails to abide by any of the conditions listed in the recognizance. Where the accused cannot produce a surety, he or she may seek the consent of the prosecutor to deposit cash bail (s. 515(2)(d)) or may seek to be released on his or her own recognizance under the supervision of a bail program.

In order to be acceptable to the justice, a surety should be a person of good character who is willing to ensure that the accused attends court when required, complies with the conditions of release, and does not commit any further offences. The surety must have sufficient means to guarantee a specific sum of money in support of this obligation. It is illegal for a person to accept a fee to act as a surety or to agree to indemnify a surety (s. 139(1)). Pursuant to s. 515(2.1) of the *Code*, a justice presiding at a bail hearing may name a particular person as a surety.

Where the surety loses confidence in the accused's willingness to honour his or her release conditions, the surety may apply to the court to be relieved of the obligation (s. 766) or may render the accused into custody (s. 767). In that event, the accused may have another suitable person substituted as his or her surety (s. 767.1) or will go through a new bail hearing (s. 769).

When the accused violates a term of his or her release, the default will be noted on the recognizance and a forfeiture hearing may be held (s. 771). The extent to which the surety is at fault is a relevant factor in determining whether forfeiture should be ordered and the sum to be forfeited. When forfeiture of the recognizance is ordered, the surety becomes a judgment debtor of the Crown.

(b) Conditions that the justice may direct

In determining the form of release, the justice must decide whether to require the accused to comply with certain conditions relevant to the primary, secondary, and tertiary grounds in s. 515(10). Subsection 515(4) provides for the imposition of any of the following conditions:

- report to a peace officer or other designated person;
- remain within a specific territorial jurisdiction;
- notify the peace officer or designated person of any change in address or employment;
- abstain from communicating with named persons (such as victims, co-accused, and Crown witnesses) or refrain from going to any place named in the order;
- deposit a passport;
- comply with any other condition to ensure the safety and security of a victim or witness; and
- comply with any other conditions considered by the justice to be desirable.

When the accused has been charged with any of the following offences, a condition prohibiting the possession of weapons shall be imposed unless the justice believes it is not required in the interests of the safety of the accused or the safety and security of a victim of the offence or any other person (s. 515(4.1)) and provides reasons for that belief (s. 515(4.12)):

- an offence in which violence against a person was attempted, threatened, or used;
- a terrorism offence;
- criminal harassment;
- intimidation of a justice system participant;
- certain drug offences;
- an offence involving certain weapons; and
- certain offences under the *Security of Information Act*.

The *Code* also permits a justice to order an accused to refrain from communication with any named person when the accused is detained in custody (s. 515(12)). A failure to comply with this order is an offence under s. 145(3).

(c) Duration of the release order

A bail order takes effect as soon as the accused complies with the order, unless the accused is subject to some other form of detention (s. 519(1)). For example, if the accused is serving a sentence at the time the release order is made, it will only take effect when the sentence has been served.

Unless altered, a release order continues until the accused is convicted and sentenced or the proceedings are otherwise concluded (s. 523(1)(b)).

(d) The duty to give reasons

In Ontario, the proceedings at a bail hearing are recorded by a court reporter.

In addition, the *Code* places an obligation on justices to provide reasons for their decisions in certain circumstances. When the onus is on the prosecutor to show cause, justices must give a statement of their reasons if the accused is detained (s. 515(5)). Similarly, when the onus is on the accused, justices must record their reasons if the accused is released (s. 515(6.1)). In either case, s. 515(9) states that it is sufficient if a record is made of the reasons in accordance with the provisions of Part XVIII relating to the taking of evidence at a preliminary inquiry.

The *Code* sets out a duty to give reasons as a matter of fairness; an accused person is entitled to know why his or her liberty is being denied, just as the public is entitled to know why an accused person is being released into the community. Further, reasons are necessary to ensure a meaningful review process.

Where a justice orders that an accused be detained in custody primarily because of a previous conviction, this must be noted in writing on the record (s. 515(9.1)). In Ontario, there is a place on the information for a s. 515(9.1) endorsement.

3.3 Review by a judge before trial of an order made by a justice

An order granting or denying bail for an offence not listed in s. 469 may be reviewed pursuant to s. 520 (review by accused) or s. 521 (review by prosecutor). At any time prior to trial, an application for a review of the order or any condition of release may be made to a judge of the Superior Court of Justice.

3.3.1 Application by the accused — s. 520

(a) Application materials

In making an application for a review of a bail order, the accused must comply with the requirements of s. 520 of the *Code* and R. 20 of the Superior Court of Justice

Criminal Proceedings Rules (SCJ Rules). A notice of application and supporting materials must be served on the prosecutor at least two clear days before the application is to be heard in accordance with s. 520(2) and r. 20.04(1). This period of time may be abridged with the consent of the prosecutor.

The notice of application, in Form 1, should set out the time and place of the hearing, the nature of the application, the grounds to be advanced, the materials to be relied upon, and the relief sought (r. 20.03(1)). The notice must also state whether the accused is to be present at the hearing.

The following materials must be filed in support of the application:

- the affidavit of the accused;
- where practicable, an affidavit from the accused's current or prospective employer;
- where practicable, the affidavits of prospective sureties;
- the transcript of proceedings before the justice and the transcript of any earlier bail review; and
- copies of any exhibits capable of reproduction (s. 520(7); r. 20.05(1)).

Subrule 20.05(2) requires that the applicant's affidavit include the following information:

- particulars of the charge on which release is sought and information respecting other outstanding charges;
- the date or dates for a trial or preliminary inquiry with respect to that charge;
- the accused's place of abode in the three years prior to the offence charged and the place where he or she proposes to reside if released;
- the accused's employment over the last three years and information about where he or she proposes to work if released; and
- the form of release the accused seeks, the terms and conditions being sought, and information respecting the proposed sureties.

In addition to these materials, s. 520(7)(c) permits the parties to lead further evidence and file further exhibits. Indeed, *viva voce* evidence from the accused and other witnesses is routinely adduced in bail reviews.

(b) Accused to be present

If the reviewing judge orders or the prosecutor or the accused requests, the accused shall be present for the hearing of the bail review.

Where the accused is in custody, the judge may make an order for the accused's attendance (s. 520(3)). The procedure for obtaining a judge's order is set out in r.

20.03(2). When the notice of application states that a detained accused wishes to be present at the hearing, an affidavit must be filed containing details about the accused's place of incarceration and the review hearing. The material should include a draft order in Form 13A. Once this material is filed, a judge of the Superior Court of Justice may order the accused to be present without any need for an appearance by counsel.

Where an accused who is not in custody has been ordered to attend the hearing but does not appear, a warrant may be issued for his or her arrest (s. 520(5)).

(c) Prosecutor may adduce evidence

In responding to a bail review application, the prosecutor may adduce evidence (s. 520(7)) or file an affidavit to establish that the accused's detention is necessary in the "public interest" (r. 20.05(3)). The affidavit should set out the facts to support this position, including any of the matters referred to in s. 518(1)(c) of the *Code*.

(d) Adjournment of review hearing

The review hearing may be adjourned, either before or at any time during the hearing, at the request of the prosecutor or the accused. If the accused is in custody, the adjournment may not be for longer than three days, unless the accused consents (s. 520(4)).

(e) Powers of judge on review hearing

After considering the materials filed by the parties, any additional evidence, and the submissions of counsel, the judge shall either

- dismiss the application; or
- if the accused shows cause, allow the application, vacate the order made by the justice, and make any other order in s. 515 that he or she considers appropriate (s. 520(7)).

(f) Further application for review

Following an application under s. 520, no further bail review shall be made for 30 days, without permission from a judge (s. 520(8)).

(g) Provisions applicable on review hearing

Sections 517 (publication bans), 518 (evidence), and 519 (release of accused) of the *Code* are applicable, with necessary modifications, to review applications under s. 520 (s. 520(9)).

3.3.2 Review at request of prosecutor — s. 521

The prosecutor's right to have a judge review a bail order made by a justice is set out in s. 521. The requirements for a bail review under s. 521 are virtually identical to

those described for a review by the accused in s. 520. The procedure to be followed is also the same since R. 20 governs both proceedings.

(a) Application materials

The only real difference between an application for a bail review by the prosecutor under s. 521 and a review brought by the accused under s. 520 is in relation to the requirement of notice. Subsection 521(2) requires the prosecutor to serve the accused with written notice of the application and the supporting materials at least two clear days before the hearing. There is no ability for the accused to waive this notice period as the prosecutor is able to do in an application by the accused.

(b) Warrant of committal

Where a judge makes an order that the accused be detained in custody following the review hearing, he or she shall, if the accused is not then in custody, issue a warrant for the committal of the accused (s. 521(6)).

3.3.3 Other rights of review

In addition to the rights of review created in ss. 520–521, s. 523(2) provides for the review of interim release or detention orders. Where cause has been shown, an order for release or detention may be vacated and a new order made by

- the trial judge at any time;
- the preliminary inquiry judge at the completion of the preliminary inquiry, except where the offence is one listed in s. 469;
- any justice at any time, with the consent of the prosecutor and the accused, except where the accused is charged with a s. 469 offence;
- any judge of the Superior Court of Justice, with the consent of the accused and the prosecutor, where the accused is charged with a s. 469 offence; and
- any judge of the court before whom an accused “is being tried,” with the consent of the accused and the prosecutor.

Pursuant to s. 523(3), the procedural provisions of ss. 517–519 also apply to these types of reviews.

3.4 Release for offences listed in s. 469

The *Code* creates a separate procedure for accused persons seeking release after being charged with a s. 469 offence. Only a judge of the Superior Court of Justice has the power to release such a person. This exclusive jurisdiction to grant bail applies throughout the trial process (s. 522(1)) and is not affected by the other rights of review (see ss. 523(2)(b)–(c)). When an accused is charged with an offence listed in s. 469 as well as with another offence, s. 522(6) permits a judge of the Superior

Court of Justice to preside over a single release hearing. This procedure is a safeguard against the possibility of reaching inconsistent results in different hearings.

Bail hearings for accused persons charged with s. 469 offences are governed by s. 522 of the *Code* and R. 20 of the *SCJ Rules*. The accused must apply for release rather than receiving an automatic bail hearing.

In order to make a release application, R. 20 requires that the accused follow the same procedure that is used in seeking a bail review. A notice of application must be served on the prosecutor, along with an affidavit from the accused and, where practicable, affidavits from any current or prospective employers and the proposed sureties (r. 20.05(1)). The affidavit of the accused must comply with r. 20.05(2). Despite the filing of affidavit evidence, it is common for *viva voce* evidence to be called at the bail hearing. For example, the prosecutor will usually lead evidence from the investigating officer about the circumstances of the offence and the accused.

If the accused wishes to be present at the bail hearing, a judge’s order must be sought in accordance with r. 20.03.

As with an ordinary bail hearing under s. 515, the provisions of ss. 517 (publication bans), 518 (evidence) (except s. 518(2)), and 519 (release of accused) are applicable to bail hearings for s. 469 offences (s. 522(5)).

3.4.1 Onus of proof

Subsection 522(2) of the *Code* places the onus on an accused charged with an offence listed in s. 469 to show cause why his or her detention is not justified within the meaning of s. 515(10). The failure to bring an application under s. 522 or to demonstrate that release is warranted will result in the accused being detained in custody.

If an accused is successful in showing cause, the Superior Court of Justice judge may order the accused’s release upon an undertaking or recognizance as described in ss. 515(2)(a)–(e) and subject to such conditions described in ss. 515(4)–(4.1) and (4.2) as the judge considers desirable (s. 522(3)). In addition, s. 522(2.1) allows a judge who detains an accused in custody to make a non-communication order.

3.4.2 Review of order made by judge under s. 522(2)

An order made by a superior court judge under s. 522(2) may be reviewed pursuant to s. 680 of the *Code*. Initially, the applicant must seek a direction from the Chief Justice of the Court of Appeal that the decision of the judge be reviewed by a panel of the Court of Appeal. The application to the Chief Justice must be in writing. Supporting documents, such as the affidavits and

exhibits filed in the original bail hearing, a transcript of the bail proceedings, and any new material, should accompany the notice of application. Once both parties have filed their materials, a hearing before the Chief Justice will be scheduled.

If the Chief Justice directs a review, there will be a hearing before three judges of the Court of Appeal. The review application is conducted as an appeal. Appeal books, containing all of the materials placed before the Chief Justice, and factums must be filed. The court may

- confirm the decision;
- vary the decision; or
- substitute such other decision as, in its opinion, should have been made.

An order under s. 522(2) may also be reviewed by the trial judge under s. 523(2)(a) or before a judge of the Superior Court of Justice with the consent of the prosecutor and the accused pursuant to ss. 523(2)(c)(ii)–(iii).

4. Bail revocation

Section 524 of the *Code* sets out the circumstances in which the accused's bail may be revoked for misconduct on his or her part. The misconduct may involve the commission of further criminal offences or an infringement of the original conditions of release.

4.1 Arresting the accused

The revocation procedure is commenced with the arrest of the accused. An arrest may be made either with or without a warrant.

A justice may issue a warrant for the arrest of an accused under s. 524(1) where there are grounds to believe that the accused

- (1) has contravened or is about to contravene any summons, appearance notice, promise to appear, undertaking, or recognizance; or
- (2) has committed an indictable offence while on a form of release.

Similarly, a peace officer may arrest an accused without a warrant under s. 524(2) when the officer has reasonable grounds to believe that the accused has engaged in the behaviour described above in (1) or (2).

4.2 Initial hearing before a justice

An accused who is arrested pursuant to s. 524 must be taken before a justice. At that time, it must be ascertained whether the accused was on a release for a s. 469 offence. If the accused was released from custody under s. 522(3) for a s. 469 offence, the justice may only order that the accused be taken before a judge of the Superior Court of

Justice (s. 524(3)(a)). Where the accused was on release for an offence not listed in s. 469, the justice will conduct a hearing.

4.3 The cancellation hearing

Regardless of whether the accused is before a justice or a judge of the Superior Court of Justice, the inquiry into the issue of misconduct is the same. The presiding jurist will hear any evidence called by the prosecutor and the accused (s. 524(3)(b)). If the justice or judge finds that the accused did engage in misconduct, either by breaching a release order or committing a further offence, the accused's bail will be cancelled (ss. 524(4) and (8)).

Where bail has been revoked, the onus shifts to the accused to show cause why he or she should not be detained in custody pending trial. If the accused succeeds in showing cause, he or she may be re-released on an undertaking or recognizance as described in ss. 515(2)(a)–(e) with such conditions under ss. 515(4)–(4.1) as the justice or judge considers appropriate (ss. 524(5) and (9)).

Where the justice or judge concludes that misconduct has not been established, he or she shall order the accused person's release from custody (ss. 524(7) and (11)). In these circumstances, the accused's original form of release is revived.

Pursuant to s. 524(12), ss. 517 (publication bans), 518 (evidence) (except s. 518(2)), and 519 (release of the accused) are applicable to proceedings under this section. Although s. 524(10) requires a justice who makes an order for release under s. 524(9) to include a statement of the reasons for making the order, there is no comparable provision for orders made by a Superior Court of Justice judge under this section. Nonetheless, reasons for release in these circumstances are routinely provided.

Both the accused and the prosecutor may apply for a review of an order made under this section. An order made by a superior court judge under s. 524(4) or (5) is reviewed pursuant to s. 680 of the *Code*. Similarly, an order made by a justice under s. 524(8) or (9) may be reviewed in accordance with ss. 520–521.

5. Reviewing detention where the accused's trial is delayed

In order to prevent an accused from languishing in custody for a lengthy period of time, s. 525 of the *Code* provides for the automatic review of a detained person's bail status. Where an accused is in pre-trial custody for an offence not listed in s. 469 and is not being held in custody for any other matter, s. 525(1) requires the

person having custody of the accused to apply to a superior court judge to fix a date for a bail hearing

- in the case of an indictable offence, within 90 days from the accused's first appearance before a justice or from the day on which the accused was ordered to be detained under ss. 520, 521, or 524; or
- in the case of summary conviction proceedings, within 30 days from those dates.

5.1 Notice of hearing

After receiving an application from the person having custody of an accused, the judge must fix a date for a bail hearing. Notice of the hearing may be given to such persons, including the prosecutor and accused, and in such manner as the judge may direct (s. 525(2)).

5.2 Matters to be considered on the hearing

In deciding whether to release the accused, the judge may consider whether the prosecutor or the accused has been responsible for any unreasonable delay in bringing the matter to trial (s. 525(3)).

5.3 Release order

Following the hearing, if the judge is not satisfied that the continued detention of the accused is warranted on the primary, secondary, or tertiary grounds in s. 515(10), the accused must be released on an undertaking or recognizance as described in ss. 515(2)(a)–(e), with such conditions described in ss. 515(4)–(4.1) as the judge considers desirable.

5.4 Re-arrest of accused

Subsection 525(5) of the *Code* establishes its own procedure for dealing with accused persons who are released under this section and subsequently engage in misconduct while on bail. The procedure is a modified version of the cancellation procedure set out in s. 524.

As with s. 524, an accused may be arrested either with or without a warrant under s. 525(5) or (6) if there is reason to believe that the accused has contravened a release order made under s. 525(4) or has committed an indictable offence. Unlike s. 524, the warrant must be obtained from a judge of the Superior Court of Justice. After being arrested, the accused must be taken before a judge of the Superior Court of Justice for a cancellation hearing (ss. 525(5)–(6)).

The cancellation hearing under this section is conducted in the same manner as a hearing under s. 524, and the possible results are the same—the accused may be ordered detained in custody pending his or her trial or re-released pursuant to ss. 515(2)(a)–(e) with appropriate conditions under ss. 515(4)–(4.1) (s. 525(7)).

5.5 Direction to expedite trial

Subsection 525(9) permits the judge to give any directions he or she thinks necessary in order to expedite the accused's trial.

1. Introduction

When an accused is charged with an offence, he or she has a constitutional right to disclosure as part of the right to full answer and defence, guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). The Crown's duty to disclose all relevant evidence to the defence was recognized at common law as a component of the accused's right to a fair trial. The obligation to fulfill that guarantee under the *Charter* rests on the Crown, who is ultimately responsible for ensuring that an accused receives full and timely disclosure of information in the Crown's possession or control. This duty is consistent with the Crown's public guardian and *quasi-judicial* role as an officer of the court to see justice served. As stated in *R. v. Stinchcombe* by the Supreme Court of Canada, "the fruits of the investigation ... are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done." Third parties to the prosecution, however, are generally precluded from accessing disclosure materials by provincial privacy legislation; see s. 14 of the *Freedom of Information and Protection of Privacy Act*.

The general purpose of disclosure is to ensure the accused's ability to make full answer and defence. Accordingly, the defence is entitled to receive and consider initial disclosure at an early stage after the laying of charges before electing a mode of trial or entering a plea. The Crown's disclosure obligation is an ongoing one, and full disclosure should be provided as soon as it is reasonably possible. The Crown bears the onus of justifying any non-disclosure of material in its possession. The disclosure obligation continues, through all stages of the prosecution, including post-conviction, where the evidence might affect the validity or integrity of the trial. In this way, the disclosure obligation ensures both the right to full answer and defence and protects against wrongful convictions.

The additional benefits from timely and full disclosure include early resolution of cases (both pleas of guilty and appropriate withdrawals of charges) and, where the matter will not be resolved, resolution of issues in advance of the preliminary hearing or trial so that court time is used more effectively.

2. Form and content of disclosure

The governing principle of disclosure requires Crown counsel to disclose all information in their possession or control that was created in the course of the investigation to the accused, whether inculpatory or exculpatory, subject to the Crown's exercise of discretion to refuse to disclose information that is privileged, clearly irrelevant, or otherwise subject to another statutory. Put another way, the Crown must disclose all information relevant to the charge(s), whether or not the Crown intends to introduce it in evidence. Relevance is referable to full answer and defence and is met if the defence could reasonably use the information to answer the Crown's case, advance a defence, or make a decision affecting the conduct of the defence. Such a broad threshold requirement for disclosure is quite intentional. It ensures that the defence receives all material, including information that may only have marginal value to its cause.

Information that is irrelevant need not be disclosed. However, the Crown must err on the side of caution, disclosing all information unless it is clearly irrelevant. The Crown will also not disclose information that is privileged or otherwise subject to another statutory regime. The Crown should inform the defence that disclosure is being delayed or limited along with a general description of the information and the reason for withholding the information.

The Crown's disclosure duty is triggered when defence counsel requests disclosure, and it does not require an application to court. This is typically done in writing both to ensure the creation of a record should any disclosure-related issue have to be litigated and to allow for easier processing of the request.

In an ideal situation, the accused receives full disclosure upon request at the first appearance. In some cases, initial disclosure is often incomplete. Full disclosure, based either on the Crown's view of the matter or shaped by defence requests, should ideally be made in advance of the preliminary inquiry, but it may be completed afterwards if done sufficiently in advance of the trial.

Crown and defence counsel are encouraged to discuss any disclosure disagreements with a view to resolving the dispute before the matter reaches the trial stage. While disagreements between defence and Crown counsel on disclosure issues are rare, there will be occasions where

the Crown decides to withhold or delay disclosure. All such decisions by Crown counsel not to disclose—whether on the ground of relevance, privilege, or disclosure being otherwise subject to a statutory regime such as third-party records—are judicially reviewable. A written record that includes a detailed demand for the disclosure at issue is very helpful in arguing a motion for disclosure or any other remedy down the road. If the defence fails to pursue disclosure in a diligent fashion, it may preclude certain remedies for non-disclosure.

The form of disclosure is typically a copy of the investigative materials forming the Crown brief, including copies of any audiotapes or videotapes of evidence. Defence counsel has a positive obligation to ensure proper use and dissemination of disclosed materials. In some cases, this will require defence counsel to make a formal undertaking that includes the return of materials to the Crown upon completion of a case. Where the material raises concerns for a witness's privacy, such as videotaped statements, or is sensitive, such as pornography, defence counsel may be asked to sign an undertaking or be given an opportunity to inspect the disclosure in a private setting. Even more sensitive material such as child pornography may require a court order setting out strict restrictions on the use of the materials.

The defence is not obliged to pay for basic disclosure, i.e., the material supplied to Crown counsel by the police to prosecute the case. Circumstances will arise, however, where the Crown may request payment for additional copies or disclosure in a different form, such as printouts of materials not being relied upon by the prosecution, when they are otherwise available in an electronic form.

Large, complex fraud cases, for example, typically involve disclosure in an electronic media, such as hard drive or CD-ROM or some other format. In paper-intensive cases, indexed and searchable electronic disclosure is easier to access and more cost-effective. Despite these factors, defence counsel may still have their own reasons for requesting production of disclosure in hard copy.

3. What need not be disclosed

While any number of persons may have privacy interests in the material gathered in the course of the criminal investigation, an accused's right to make full answer and defence will typically outweigh any third-party privacy rights. However, the Crown will screen disclosure materials to ensure a witness's private information is redacted, in addition to any irrelevant information. For example, a civilian witness's phone number, address, and personal identifiers such as date of birth and driver's licence number would be redacted.

The Crown will also screen disclosure to ensure that any information that is privileged or otherwise protected by statutory provisions is redacted. When the Crown withholds such information on the basis of such a claim, the defence should be notified of the existence of that material. If the defence challenges the non-disclosure, the onus is on the Crown to justify the non-disclosure.

The Crown may exercise its discretion to refuse disclosure on the basis that the information requested is not within its possession or control. The Crown is not obliged to produce materials that do not arise out of the investigation and are otherwise available to the defence, for example, transcripts of bail hearings. The Crown is also not obliged to direct further investigation at the request of the defence as part of its disclosure obligation. The accused is entitled to the fruits of the investigation, but not entitled to dictate the nature or scope of the investigation. That being said, the Crown should give serious consideration to investigative requests made on behalf of an accused. Different considerations may apply if the defence is alleging misconduct by individuals directly involved in the prosecution of the accused.

3.1 Relevance

The relevance of some information in the Crown's possession may not be readily apparent to Crown counsel, yet be highly relevant to the defence notwithstanding that they do not necessarily wish to advance their position too early.

As noted, the Crown can best discharge its duty under *Stinchcombe* by interpreting relevance generously and ensuring that they “err” on the side of inclusion. For example, any information in the Crown's possession that is relevant to the credibility or reliability of any proposed witness should be disclosed, whether or not the Crown intends to call the witness. This would include any inconsistent statements or recantations in the possession of the Crown and any promises of assistance or immunity given to a witness. Upon defence request, the Crown should provide criminal records of material Crown witnesses that include convictions and any other court-related dispositions. This would include information identifying a witness as a young person dealt with under the *Youth Criminal Justice Act (YCJA)*. The *YCJA* expressly authorizes the Crown to disclose information kept in a youth record to an accused or his counsel provided an affidavit is sworn to the effect that the record is necessary to make full answer and defence.

The Crown's obligation to disclose is a continuing one. Any undisclosed information must be disclosed if and when the relevance of the information later becomes apparent or additional relevant information is received.

This includes additional relevant information from trial preparation interviews of witnesses. The obligation to disclose continues through the appeal process and even after the conclusion of all proceedings if information comes to the attention of Crown counsel that is exculpatory, raises a doubt as to the accused's guilt, or may have assisted the accused in his or her defence

3.2 Privilege

Crown counsel has a limited discretion to withhold disclosure where disclosure would reveal information protected by privilege, such as lawyer-client privilege, police informer privilege, or public-interest privilege, or reveal the confidentiality of investigative techniques. This includes any Crown work product. Standard work product materials such as internal Crown counsel notes, memoranda, correspondence, and legal opinions are protected by privilege and need not be disclosed. Work product would form the basis of a disclosure request only in an exceptional case.

In circumstances other than work product, the Crown is obliged to advise the defence of their decision to withhold or delay disclosure pursuant to a privilege claim. Crown counsel can sometimes waive the claim of privilege depending on the nature of the privilege at issue, but otherwise, a judge must resolve the privilege claim. On review, a judge must balance the public interest asserted by the Crown seeking to withhold disclosure against the *Charter*-guaranteed right to full answer and defence. Each dispute will be resolved on the basis of its own circumstances, but the reader should be aware that even privilege claims are subject to exceptions. An informer-privilege claim can be defeated by the "innocence at stake" exception, and lawyer-client privilege can give way to the "future crime exception" as held in *R. v. Solosky* and *R. v. Leipert*.

Crown counsel may also delay disclosure in order to protect a witness's safety or to allow an investigation to be completed. As always, such instances will be rare, and the Crown's discretion is subject to judicial review.

3.3 In the possession of the Crown

For the purposes of disclosure, any information gathered by the police investigators for the purpose of that prosecution is under the Crown's control. Indeed, the Crown should ensure at the screening stage that the police have provided all such information to the Crown.

What is less clear is the extent to which information in the hands of other government agencies and institutions is under the Crown's control. Where an outside agency is actively involved in an investigation and subsequent prosecution, the Crown may well have a duty to obtain

and disclose relevant information from them. In addition, when the Crown learns of relevant information held by another government department or agency, the Crown may be obliged to try to obtain the documents for the purposes of disclosure. If unsuccessful, the Crown should still disclose the fact of the existence of the records in order that the defence can take any steps they feel necessary.

Although Crown counsel may not have control of the information held by another government agency, it can likely facilitate a defence request since many information custodians will disclose if requested to do so by the Crown. Provided that the request is relevant and reasonable in all the circumstances, Crown counsel may assist with a specific written defence request for disclosure even if not directly under its control, or the Crown may direct the defence to take other steps to obtain the information, such as a request for third party records.

Once the Crown has control of relevant information, it has a corresponding duty to preserve that relevant evidence. The Crown will be required to provide a satisfactory explanation in respect of evidence that should have been disclosed and is subsequently lost or destroyed. The explanation may satisfactorily account for the loss of the information, but the issue of remedy will depend on the conduct of the authorities involved and the impact of the missing information.

3.4 In the possession of the police

The police are bound by law to provide all relevant information concerning a case to the Crown, and the Crown, as previously noted, has a corresponding duty to ensure not only that it has all relevant information from the investigating authorities, but also that it discloses all the relevant information to the defence. While the Crown may rely on the good faith of the police to provide them with all relevant material, lost evidence or a failure to disclose that originates with the police may result in a breach of the accused's rights and can result in the same remedies being awarded.

Defence counsel should be given the opportunity, upon request, to inspect the police agency's file in relation to the offence, regardless of whether the Crown intends to rely on some of that material, subject again to the reviewable discretion of the Crown to withhold materials that are privileged or protected.

The police may also have relevant material even if it is not the product of the investigation at issue. Records pertaining to findings or allegations of police misconduct that relate to the subject matter of the offence are deemed so interrelated to the investigation of the accused

that they must be disclosed as part of the initial disclosure package. The misconduct in this instance need not be considered “serious” in nature to trigger the disclosure obligation. In addition, any police misconduct records that are obviously relevant to the accused’s case—for example, a police officer’s criminal record for perjury or past drug-related misconduct in a drug investigation case—should also be a part of the initial disclosure package.

Occurrence reports, service records, and other such information kept by the police may also have some bearing on a case and can properly be the subject of a specific, written defence request for disclosure. Subject to a demonstration of relevance (if not apparent) and any claim of privilege, the Crown should typically facilitate such requests.

Crown counsel may also choose to facilitate a defence request for further investigation by police. If the request appears reasonable and may produce material arguably relevant to the case, Crown counsel should give serious consideration to an investigative request and convey it to the police. However, an accused does not have a right to direct the conduct of the criminal investigation, and the defence cannot conscript the police to undertake investigatory work on its behalf under the guise of a disclosure demand.

3.5 In the possession of third parties

Materials that are in the possession of the police or another government agency that were not created in the course of, or otherwise related to, the investigation are not in the possession of the Crown. Records in the possession of third parties such as social agencies, rape crisis centres, women’s shelters, doctors’ offices, and such are not deemed to be in the Crown’s possession for the purposes of disclosure either. The defence must bring a “third party records” application in respect of these kinds of records unless the material is already in the physical possession of the Crown.

The process employed depends on the nature of the offence. For cases involving sexual offences, ss. 278.1–278.91 of the *Criminal Code* (*Code*) deal with the production and disclosure of third party records. All other offences continue to be governed by the common-law regime for production of third party records as set out by the Supreme Court of Canada in *R. v. O’Connor*.

Where the offence is an enumerated offence under s. 278.2 of the *Code*, the legislation applies regardless of whether the records are in the possession of a third party or the Crown. The Crown is required to notify the accused that it is in possession of the records but is not allowed to disclose them until there is an application

before the trial judge. Where the defence seeks to obtain production of such records, an application for production, supported by affidavit, must be filed with the court. The defence must also serve the custodian of the records with a subpoena. The Crown and the subject of the records, as well as any other person with an interest in the confidentiality of the records, must also be notified of the application.

Under the *O’Connor* regime, if the witness forwards the material to the prosecution, the material will be disclosed since any privilege or privacy interests have been clearly waived. Consequently, any records in the possession of the Crown must be disclosed by the Crown to the defence irrespective of the confidential nature of the records.

For enumerated offences or non-enumerated offences where the third party retains possession, a trial judge goes through a two-stage procedure to determine whether to grant a third party record application. At the first stage, the accused must establish that the document ought to be produced to the trial judge. At the second stage, the trial judge must examine the records with a view to determining whether to order production to the defence. The complainant or witness and any other interested party are entitled to representation at the hearing to decide whether the records should be disclosed.

3.5.1 Stage one: likely relevance

At this stage, the onus is on the accused to establish “likely relevance.” The threshold of likely relevance, established in *O’Connor*, requires that the trial judge be satisfied that “there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify.”

At this stage, the threshold is not an onerous one and can be met either by counsel’s submissions or by calling evidence on a *voir dire*. A simple assertion that the information may be relevant at large will generally not suffice. Defence counsel must demonstrate that the information is material to an issue in the trial or to the competency of a witness such that non-production could impair the right to full answer and defence.

3.5.2 Stage two: balancing

If the trial judge concludes that the initial threshold of “likely relevance” is satisfied, the inquiry proceeds to the balancing stage, which involves examining the records to determine whether and to what extent the records should be produced. The judge must examine and weigh the probative value of the material and the salutary and deleterious effects of a production order and determine whether non-production would constitute a reasonable

limit on the ability of the accused to make full answer and defence. At this stage, the trial judge is balancing the privacy interests in the records against the right of the accused to make full answer and defence. The trial judge must weigh the potential prejudice to the witness or complainant by production and determine the effect on the integrity of the trial process. If the judge concludes that production is warranted, it should only be ordered to the extent necessary.

In contrast, under the procedure set up under s. 278.2 of the *Code*, for certain enumerated sexual offences, there are additional requirements that bear on this process. For example, at the first stage, defence counsel must additionally show that production of the record is necessary in the interests of justice. The trial judge may also impose conditions on production to protect the interests of justice and the privacy and equality interests of the witness. Such conditions or devices could include the following:

- editing of the records;
- controlling access by, for example, retaining the records in court;
- prohibiting reproduction of materials;
- sealing the materials when they are not in use; and/or
- ordering a publication ban on the evidence.

3.5.3 Serious police misconduct unrelated to the incident

As noted, police misconduct records, however serious, that relate to the subject matter of the offence or that are otherwise obviously relevant must be disclosed as part of the initial disclosure package. The police must also provide Crown counsel with records of any serious police misconduct unrelated to the incident but that could reasonably bear on the case against the accused. These records would previously have been dealt with by way of *O'Connor* applications for third party records. The law now requires, however, that these records be reviewed by the Crown—even absent an application by the defence—to determine if there is any material that could reasonably impact on the case against the accused.

The police are obliged to provide to the Crown records such as current charges or findings of misconduct under the *Police Services Act* or outstanding charges and/or convictions under the *Code*, *Controlled Drugs and Substances Act*, or any other federal or provincial statutes. The Crown will screen these records to determine whether the nature of the misconduct is relevant in light of the role the officer played in the investigation. Any records deemed likely relevant to the defence—in that they could reasonably impact on the

case against the accused—should be disclosed to the defence counsel. Crown counsel should provide sufficient materials so that defence counsel can either raise the issue at trial or make an informed decision on whether to bring an *O'Connor* application to obtain any additional existing records.

4. Testing of exhibits

In the appropriate case, defence counsel may want to have a piece of physical evidence tested or re-examined by an independent expert. The Crown is not obliged to carry out defence-requested testing as part of its disclosure obligation, although consideration should be given to such a request. However, the defence can make its own arrangements for testing.

Defence counsel can make informal arrangements with the police and the Crown to have the evidence examined by a defence expert. A formal application will be required if agreement is not possible or the item has already been entered as an exhibit before the court.

Section 605 of the *Code* allows a judge, upon application, to order the release of physical evidence for the purpose of scientific or other testing or examination, whether it is in the possession of the police or the Crown, or it has been entered as an exhibit in the proceedings. Where there is an “air of reality” to the claim that the proposed testing or examination has the potential to advance an available defence, the exhibit should be ordered released.

5. Ensuring that the disclosure is full and complete

Defence counsel also has obligations under the disclosure regime. The most important of these obligations is one of due diligence. Defence counsel has an active role to play in respect of disclosure and must review received disclosure with his or her clients on a timely basis. Where defence counsel becomes aware or ought to be aware of a failure to disclose relevant material, defence counsel has an obligation to diligently pursue the issue. If the defence receives disclosure that contains information relating to further as-yet undisclosed information and that material subsequently becomes unavailable, the defence failure to have made a timely supplemental request may preclude any remedy.

Defence counsel should make detailed and specific demands for further disclosure. A broadly worded demand for disclosure of all relevant information, whether repeated or not, will not necessarily fulfill the obligation on the part of defence counsel. Defence counsel also has an obligation to make responsible requests for disclosure. Crown counsel are not required to comply with frivolous and/or unreasonable demands

for disclosure that are no more than “fishing expeditions,” and such requests reflect poorly on counsel who make them.

Pre-trial conferences are a good opportunity for Crown counsel and defence counsel to raise issues relating to disclosure and canvass possible solutions. Defence counsel should be prepared to state their position in respect of whether there are any outstanding disclosure issues. Judicial pre-trials also present an opportunity to canvass disclosure disputes with a judge and have his or her views brought to bear on the issue.

Generally speaking, defence counsel is obliged to make reasonable efforts to obtain the evidence, including production requests, on a timely basis. Where a court on review determines that defence counsel made a tactical decision not to pursue disclosure, it can have a serious impact on any remedies requested. A number of appellate decisions have upheld a decision to deny the defence a remedy based on non-disclosure because defence counsel did not raise the issue of production at an earlier opportunity.

6. Consequences of non-disclosure

The remedy or relief that may be granted due to non-disclosure depends on

- the stage of the proceedings;
- the cause for the non-disclosure;
- the conduct of the parties involved; and
- the effect the non-disclosure has had on the conduct and outcome of the proceedings.

The forum for reviewing the disclosure decisions of Crown counsel is typically the trial judge. In exceptional cases, however, a judge of the superior court of criminal jurisdiction may review the disclosure under s. 24(1) of the *Charter*. If production is sought prior to trial, a disclosure order may suffice accompanied by an adjournment, if required, and/or an order for costs. If the trial has already commenced, the potential impact of non-disclosure and consequent remedies are greatly expanded. A disclosure order, an adjournment, and/or granting the right to the defence to re-call or re-examine witnesses may be the appropriate remedies; but these orders may not remedy the consequences of non-disclosure where full answer and defence is impaired. It will be difficult to establish a violation of full answer and defence, however, if the substantive information had already been disclosed but simply in a different form or format. Late disclosure of substantive information previously provided in a different format will not constitute a breach of the Crown’s disclosure obligation.

In cases where the non-disclosure may have affected the accused’s election or conduct of his or her defence, a mistrial may be granted. Alternatively, the evidence may be excluded. The remedy of exclusion of evidence will only be granted in exceptional cases where the late disclosure renders the trial process unfair and that unfairness cannot be remedied through an adjournment and disclosure order, or where the exclusion is necessary to maintain the integrity of the justice system.

In cases of lost or destroyed evidence where the impairment to full answer and defence cannot be remedied, a stay of proceedings may be the only “just and appropriate relief.” In cases of egregious misconduct or unacceptable negligence, a costs award may accompany a stay order.

Where the relevance of the non-disclosed information only becomes apparent as the defence presents its case, the failure to disclose may be viewed as reasonable. An adjournment with disclosure and permitting the defence to re-call witnesses in view of the new information may be the appropriate relief.

If the defence learns of a Crown breach of the duty to disclose after a conviction, the issue is raised through fresh evidence on appeal. The non-disclosed information is assessed in two ways: the impact on the conviction itself and the impact on the integrity of the trial. The accused must demonstrate either that there is a reasonable possibility that the verdict might have been different but for the Crown’s failure to disclose or that there is a reasonable possibility that the failure to disclose affected the overall fairness of the trial process.

7. Reciprocal disclosure

Generally speaking, the defence has no obligation to disclose any part of its case to the Crown. The general rule is subject to exceptions, however, both statutory and practical.

Subsection 657.3(3) of the *Code* requires advance notice of a party’s intention to call an expert witness. Both the Crown and the defence are obliged to give notice to the other side at least 30 days before the start of trial, along with the expert’s name, area of expertise, and a statement of the expert’s qualifications. The defence is further obliged

- to provide the Crown with the expert’s report, if one is prepared, or
- if there is no report, to provide a summary of the expert’s opinion no later than the close of the Crown’s case.

If the defence fails to comply with the notice requirement, defence counsel may be ordered to comply

with disclosure of the report, and the Crown may be granted an adjournment in order to properly prepare and respond.

Defence counsel are also obliged to give notice of their arguments when seeking relief under the *Charter* or in an application under s. 276 of the *Code* for evidence of a complainant's sexual history.

Where the accused's defence is one of alibi, defence counsel must seriously consider making disclosure of that fact in advance. The failure to give the police or Crown notice of the alibi with sufficient detail so that it can be investigated may result in the trial judge drawing an adverse inference against the truth of the alibi or instructing the jury that they may do so.

An alibi need not be disclosed prior to defence counsel having the opportunity to investigate and confirm the alibi to avoid handing the Crown a potential basis to impugn the accused's credibility and/or argue

consciousness of guilt based on a false alibi. Defence disclosure of an alibi triggers an obligation on the Crown to make prompt disclosure of evidence supporting or refuting the defence, including any information compiled in its own investigation.

In an appropriate case, the defence may wish to disclose its case in an effort to have the charge withdrawn. Where an accused discloses a defence in sufficient detail to be investigated, the failure of the prosecution to inquire into that defence may lead to an inference being drawn against the Crown's case.

On a final note, although the defence does not have an obligation to disclose its case, the defence must not conceal physical evidence of a crime. Counsel who comes into possession of physical evidence ought to seek outside legal advice about his or her legal and professional obligation to turn over such evidence to the police, without revealing the identity of the client.

1. The purpose and benefits of the hearing

Part XVIII of the *Criminal Code (Code)* sets out the purpose of and procedural rules applying to preliminary inquiries. The preliminary inquiry (or hearing) ensures the Crown has sufficient evidence to warrant a trial and protects an accused from being subjected to a public trial improperly or unnecessarily. It is first and foremost a charge-screening device. Nonetheless, there are a host of other functions served by the inquiry, with benefits to the defence, the Crown, and the administration of justice.

From the defence perspective, in addition to the possibility of putting an end to the proceedings by having the accused discharged, the primary benefit of the hearing is as a tool for discovery and trial preparation. Witnesses can be questioned and tested; the defence can obtain information helpful in preparing their case or pre-trial motions. Trial issues can be narrowed and focused.

The Crown also may find the preliminary hearing useful as a discovery tool; defence counsel may reveal their defence in the conduct of the hearing. The hearing also provides the Crown with an opportunity to create a helpful record from which to refresh a witness's memory at trial. In addition, the hearing provides an excellent opportunity for the Crown to discover the weaknesses in its own case, so they can be addressed before trial. Alternatively, the Crown may seek to resolve the matter without trial.

Evidence taken at a preliminary hearing may be admissible at trial when a witness has died or is unable or unwilling to testify at trial (s. 715); thus, the hearing may well serve the purpose of preserving evidence that would otherwise be unavailable.

For both the Crown and defence, the preliminary hearing serves to facilitate the resolution of cases or at least the narrowing of issues. It also reduces the likelihood of significant surprises at trial and the delay that these surprises may cause.

2. When a preliminary hearing is available

A preliminary hearing is available in any case that is to be tried in the Superior Court of Justice. Thus, either the Crown or the defence may request a hearing (s. 536(4)) in all of the following circumstances:

- The offence is indictable or is a hybrid offence for which the Crown has elected to proceed by indictment.

- The accused elects a trial in the Superior Court of Justice (judge alone or judge and jury), or the offence is one that must be tried in the Superior Court (s. 469 offences).
- The accused does not elect when put to the election or is deemed to have elected (when the justice or provincial court judge declined to record the election or re-election where there are persons jointly charged).

If neither party requests a hearing, the accused will be remanded directly to the Superior Court of Justice where a trial date will be set (s. 536(4.3)). If any one of multiple accused on a single information request a preliminary hearing, a preliminary hearing will be held in respect of all accused (s. 536(4.2)).

3. The statement of issues and focus hearing

Part XVIII of the *Code* includes provisions that are designed to streamline preliminary inquiries by encouraging both the Crown and the defence to focus the hearing on essential issues. The party who requests the preliminary hearing must identify the witnesses and the issues on which he or she wants to hear evidence (s. 536.3). The requirement for a statement of issues and witnesses has been found not to apply to unrepresented persons (*Gallant, LeBlanc and Steeves v. R.*). Failure to file a statement of issues and witnesses may lead to an order for a focus hearing, the adjournment of the preliminary hearing, and/or a refusal on the part of the Crown to lead the evidence of those witnesses. Even if requested, the Crown is not required to call all witnesses named on the statement of issues.

A focus hearing may be requested by either party or the court with a view to narrowing the issues and the number of witnesses to be heard from at the preliminary hearing, or simply to “encourage the parties to consider any other matters that would promote a fair and expeditious inquiry” (s. 536.4). Even without a focus hearing, the parties may agree to limit the scope of the hearing to specific issues (s. 536.5).

4. The hearing

4.1 Procedural matters that arise at the commencement of the hearing

When not already done, the proceedings before the preliminary inquiry judge will commence with the accused being arraigned and put to his or her election

regarding the mode of trial. The accused does not enter a plea.

Prior to the calling of evidence, defence counsel will usually want to request an order excluding witnesses. While a justice may refuse the order, it is usually granted. An exception is commonly made for the officer in charge of the case who will assist the Crown in court.

Defence counsel will usually want to seek an order under s. 539 of the *Code* prohibiting the publication of any of the evidence from the preliminary hearing to protect their clients' right to a fair trial and untainted jury. As long as the order is requested before any evidence is called, the justice has no jurisdiction to refuse the request. The Crown may also request the ban, and the justice has discretion to grant the request or not. If a publication ban is ordered, it operates until the accused is discharged, the charges are stayed, or until the end of the trial. The presiding justice must inform an unrepresented accused of the right to apply for a publication ban.

A preliminary hearing justice has no power to make an order regarding disclosure (although as a practical matter, disclosure is often largely complete by this stage of the proceedings) and no power to order particulars pursuant to s. 587 of the *Code*.

While the presumption is that the accused will be present at the preliminary hearing whenever evidence is taken, the justice may permit an accused to be absent pursuant to s. 537(1)(j.1) for the whole or part of the inquiry.

An accused should be permitted to sit at counsel table (if permission is sought) absent a proven security risk.

4.2 The conduct of the hearing

Under s. 540 of the *Code*, the evidence commences with the Crown calling its witnesses. The defence is given an opportunity to cross-examine. Keeping in mind the multiple purposes of the hearing beyond simple charge-screening, the Crown may choose to call more witnesses than necessary to obtain an order for the accused to stand trial, and the justice has no power to prevent them from doing so.

While s. 537 of the *Code* appears to give a preliminary hearing judge fairly extensive powers to regulate the process of the hearing, the Supreme Court of Canada has interpreted the powers of a justice restrictively as being only those explicitly granted under the scheme.

Subsection 540(7) provides that otherwise inadmissible evidence that is "credible and trustworthy," including a written or recorded statement (other than that of the accused), is admissible at a preliminary hearing. Before

invoking s. 540(7), the party seeking to tender the evidence must give reasonable notice and a copy of the evidence to the other party. Any party may apply to the court for an order compelling the attendance of the witness for examination or cross-examination. Evidence admitted under s. 540(7) is not admissible to be read in at trial under s. 715.

The right to cross-examine includes the right to a full, detailed, and careful cross-examination (s. 540(1)(a)). Nonetheless, the presiding justice may make evidentiary rulings and curtail a cross-examination that is abusive, too repetitive, or otherwise inappropriate (s. 537(1.1)).

Although the right to cross-examine is that of the "accused or his counsel" (s. 540(1)(a)), an exception is made in the case of a cross-examination of a child witness or a complainant in a criminal harassment case. On application of the witness or the prosecutor, the judge shall appoint counsel to conduct the cross-examination if the accused is unrepresented unless the administration of justice requires the accused to cross-examine personally.

Exceptions are also made in s. 486.3 where the prosecutor or the witness applies and the judge is of the opinion that the court will not obtain a full and candid account if the accused cross-examines personally. In those cases, the court will consider

- the age of the witness;
- whether the witness has a mental or physical disability;
- the nature of the offence;
- the nature of any relationship between the witness and the accused; and
- any other circumstance that the judge considers relevant.

The court must be satisfied on a balance of probabilities that a full and candid account could not be achieved if the witnesses were cross-examined by the accused (*R. v. Tehrankari*).

4.3 Commission evidence

When a witness is unable to come to court to testify due to disability or "some other good and sufficient cause," either party may apply to the justice presiding at the hearing for an order appointing a commissioner to take the evidence of the witness. The application may also be made to a Superior Court of Justice judge. When a witness is outside Canada, the application for the appointment of a commissioner must be made to a Superior Court of Justice judge. The evidence obtained in this fashion is admissible at trial, as well as at the preliminary inquiry (s. 709).

4.4 Confessions

The Crown may lead evidence of an accused person's confession at the preliminary hearing if the statement is proven voluntary beyond a reasonable doubt (s. 542(1)). If the Crown chooses not to lead the statement, the defence may still cross-examine police witnesses about the circumstances of the taking of the statement, an exercise that may prove helpful when the admissibility of the statement arises at trial.

There may be no publication of a confession or the fact that one was tendered at the preliminary hearing—even in the absence of the standard publication ban.

4.5 Charter jurisdiction

A justice conducting a preliminary hearing is not “a court of competent jurisdiction” under s. 24(1) of the *Canadian Charter of Rights and Freedoms* (*Charter*) and has no power to grant remedies for *Charter* breaches. This includes having no power to make evidentiary rulings based on *Charter* violations. Nonetheless, a justice conducting a preliminary hearing ought to exercise statutory powers in a fashion that considers and balances *Charter* values.

4.6 Proceedings following the Crown's case

The accused is given an opportunity to call his or her own evidence at the conclusion of the Crown's case. An accused rarely testifies. There are some specific circumstances when the defence may want to call other witnesses:

- to “discover” the evidence of a Crown witness the Crown has chosen not to call at the hearing;
- to preserve the evidence of a defence witness who might become unavailable; and
- to discover the potential evidence of a witness who is not willing to provide an out-of-court interview to the defence.

Before calling any witnesses, defence counsel must consider the power of the justice to order the accused to stand trial on offences revealed by the evidence that have not been charged on the information.

If the accused is unrepresented at the preliminary hearing, the justice must read the accused the warning set out in s. 541(2) of the *Code*:

Do you wish to say anything in answer to these charges or to any other charges which might have arisen from the evidence led by the prosecution? You are not obliged to say anything, but whatever you do say may be given in evidence against you at your trial. You should not make any confession or admission of guilt because of any promise or threat made to you but if you do make any statement it may be given in evidence against you at your trial in spite of the promise or threat.

Upon the completion of the evidence, the justice must provide the accused or his or her counsel an opportunity to make submissions and may grant this right to the prosecutor or Crown counsel.

5. Other procedural issues

5.1 Bail

The justice presiding at a preliminary inquiry may vary the bail of the accused (other than that of an accused charged with a s. 469 offence) in the following circumstances:

- at any time, with the consent of the parties;
- at the completion of the hearing upon cause being shown.

This provides an opportunity for defence counsel to seek the release of a detained client before a justice familiar with the strength of the case or for the prosecutor to seek the detention of an accused person that is committed on additional offences. The onus is on the party seeking the variation to show cause on balance of probabilities.

5.2 Absconding accused

If an accused absconds during the course of the preliminary inquiry (that is, any time after arraignment and election), the hearing may continue in her or his absence to completion (s. 544(1)).

5.3 Waiver

If the Crown and the accused agree, the hearing can be “waived” at any stage of the proceedings. The presiding justice will take no more evidence and order the accused to stand trial (s. 549(1)).

6. Order to stand trial

6.1 The test on committal

Upon completion of the evidence, the preliminary inquiry justice must commit the accused to trial on any offence for which there was any evidence upon which a reasonable jury properly instructed could return a verdict of guilty or where there is admissible evidence that could, if believed, result in a conviction. When the evidence the Crown relies upon is direct evidence, the justice must simply determine whether the Crown has led evidence going to every element of the offence. This is sufficient for committal. If the Crown's case is circumstantial, the justice must do some limited weighing of the whole of the evidence to determine whether, if believed, it would be reasonable for a properly instructed jury to infer guilt. This limited weighing does not involve drawing inferences from facts or assessing the reliability or credibility of the evidence. Rather, the issue is what inferences the whole of the evidence could support.

6.2 Committal on other offences

During the course of the preliminary hearing, if any “other” indictable offence (i.e., not charged on the information) in respect of the same transaction or connected events is revealed by the evidence, the justice may commit the accused to stand trial on that charge. The “other” offence must be closely interwoven or related to the charged offences (s. 548(1)(a)) but may be a more serious offence than any charged on the information. A preliminary hearing held on a charge of second degree murder can result in a committal to trial on a charge of first degree murder, for instance, if the evidence reveals any admissible evidence that, if believed, could support a finding of planning and deliberation. A justice may commit an accused to stand trial on the *Code* charges revealed by the evidence even though the preliminary hearing is being held in regards to charges under some other Act (such as the *Income Tax Act*).

The justice may commit an accused to stand trial on any indictable or hybrid offence, even if the offence is one within the absolute jurisdiction of the Ontario Court of Justice, but may not commit an accused to stand trial on any purely summary offence.

6.3 Consequences of a discharge

For the most part, a discharge at the preliminary inquiry will mark the end of the proceedings. With the Attorney General’s personal consent, the charge may be the subject of a “preferred” or direct indictment under s. 577. Alternatively, the prosecutor may lay a new information and start the process again. This process does not amount to double jeopardy under s. 11(h) of the *Charter* (or a successful plea of *autrefois acquit*) but may give rise to an abuse of process argument under s. 7 of the *Charter*.

7. Proceedings following the order to stand trial

7.1 The indictment

Following the committal order, the accused will be remanded to the Superior Court of Justice, and prior to the first appearance, the prosecutor will prepare the indictment. The indictment may include not only those offences on which there was a committal, but also any other charge “founded on the facts disclosed by the evidence taken at the preliminary inquiry” (s. 574(1)) without seeking the consent of the Attorney General.

7.2 The transcript

While no rule requires it, defence counsel needs a copy of the transcript of the preliminary hearing in sufficient time to prepare for the trial.

7.3 Re-election

Within 14 days of the completion of the preliminary hearing an accused may re-elect the mode of trial, i.e., revisit the choice to have a trial before a judge and jury or before a judge alone (unless charged with an offence listed under s. 469 of the *Code*). After this short window of opportunity, the accused may re-elect only with the written consent of the Crown.

8. Quashing the order to stand trial or to discharge the accused

A committal order may be challenged only by way of *certiorari*, an application to quash the order on the basis that the preliminary inquiry justice exceeded his or her jurisdiction. The application must be brought to the Superior Court of Justice within 30 days of the order to stand trial.

A justice may exceed his or her jurisdiction at a preliminary hearing in one of three ways:

- by failing to comply with mandatory provisions of the *Code*;
- by breaching the rules of natural justice;
- by ordering committal in the absence of evidence on an element of the offence.

The standard of review on a *certiorari* application when the justice is said to have committed the accused in the absence of any evidence has been extensively litigated. In brief, the reviewing court is not to ask whether there was evidence upon which a properly instructed jury acting judicially could convict, for this would be to simply substitute the reviewing court’s opinion for that of the preliminary inquiry justice. Instead, the reviewing court must conclude there was no evidence upon which the justice could have concluded there was sufficient evidence to put the accused on trial.

The reviewing court may quash the committal order or substitute a committal order for a lesser offence. There is some authority that the reviewing court may also quash the order and send the case back to the Ontario Court of Justice so that the Crown can call further evidence.

Generally, a *certiorari* application will cause the trial to be delayed. The court will, accordingly, expect the application to proceed expeditiously.

The Crown may also apply for *certiorari* to quash an order discharging the accused on the basis that the preliminary hearing justice made a jurisdictional error. A jurisdictional error is committed if the justice fails to consider the “whole of the evidence” before discharging the accused.

1. Who can be a witness in a criminal proceeding?

In order to be a witness at a criminal proceeding, a person must be competent to testify. The Crown or the defence cannot force someone to testify unless the person in question is also compellable.

1.1 Materiality

Subject to the exceptions outlined below, any person with relevant and material evidence to give may be called as a witness in a criminal proceeding.

1.2 The accused

The accused is competent to testify in his or her own defence, but is neither competent nor compellable as a witness for the Crown. This protection is provided to the accused in s. 4(1) of the *Canada Evidence Act (CEA)*, but is also contained in s. 11(c) of the *Canadian Charter of Rights and Freedoms (Charter)*.

1.3 The co-accused

Where co-accuseds are tried separately, one co-accused is a competent and compellable witness at the trial of his co-accused by either the Crown or the defence. This is made possible by the operation of s. 3 of the *CEA*, which provides that a person is not incompetent to give evidence by reason of interest or crime, and s. 5(1) of the *CEA*, which eliminates the right to refuse to answer questions which might incriminate the witness. However, a court has the discretion to exclude the evidence of a co-accused if it is satisfied that it is in the interests of justice to do so or the conduct of the Crown amounts to an abuse of process (for example, where the Crown's real and predominant purpose for calling the co-accused is self-incrimination). Where a co-accused is called as a witness, both s. 5(2) of the *CEA* and s. 13 of the *Charter* prevent the Crown from using any testimony given as evidence against the co-accused at his subsequent criminal trial. Section 7 of the *Charter* also protects against the subsequent use against the co-accused of any "derivative evidence" that is discovered as a result of the co-accused's compelled testimony.

Where co-accuseds are tried together, neither is competent nor compellable for either the prosecution or the other accused. Where either or both of the accused choose to testify, they may be cross-examined both by the other accused and by the Crown. Moreover, in that

situation, the cross-examination by the co-accused is not constrained by all of the same rules that constrain the Crown. For example, one accused may seek to impeach the other by cross-examining him on the fact that he exercised his right to silence.

1.4 Spouse of the accused

The spouse of the accused is a competent witness for the defence (*CEA*, s. 4(1)). For the prosecution, the spouse of the accused is generally neither competent nor compellable unless an exception to the "spousal incompetency rule" applies. These exceptions include

- criminal proceedings against the accused that involve an interference with, or threat to, the "person, liberty or health" of the accused's spouse (e.g., domestic violence offences);
- prosecution of certain listed offences set out in ss. 4(2) (sexual offences for the most part) and 4(4) (certain violent offences where the complainant is under the age of 14); and
- where the spouses are divorced or irreconcilably separated at the time the witness spouse is required to testify (*R. v. Salituro*).

The applicability of the spousal incompetency rule is determined by the marital status of the accused and his or her spouse at the time the witness is required to testify, which is usually at the time of the trial. The purpose of the rule is to protect marital harmony and avoid the "natural repugnance" involved in forcing a person to testify against his or her spouse. Accordingly, the rule applies even in cases where the spouse was not married to, or was separated from, the accused at the time of the alleged offence. However, an application by the prosecution may be made to admit prior statements made by the spouse of the accused as an exception to the hearsay rule (for example, testimony given at the preliminary hearing when the parties were not married (*R. v. Hawkins*) or voluntary statements made to the police (*R. v. Couture*)).

Since s. 4 of the *CEA* limits the application of the spousal incompetency rule to persons who are "husband and wife," most courts have interpreted the section narrowly so as to exclude common-law spouses. However, at least one Superior Court of Justice decision, *R. v. Masterson*, held that this wording violated s. 15 of the *Charter* and read in the words "common-law spouse" into s. 4 wherever it refers to "husband" or "wife."

Even where a spouse is a competent and compellable witness, a spouse cannot be forced to give evidence that would reveal a communication made during the marriage (*CEA*, s. 4(3)). This spousal privilege belongs to the witness (not the accused) and may be waived by the witness without the consent of the accused.

1.5 Mental capacity

Where one of the parties proposes to call the evidence of a person “whose mental capacity is challenged,” the court must first conduct an inquiry to test the ability of the person to testify (*CEA*, s. 16(1)). The inquiry asks the following two questions:

- Does the proposed witness understand the nature of an oath or solemn affirmation?
- Is the proposed witness able to communicate his or her evidence?

The first question involves an inquiry into the witness's understanding of the duty to tell the truth in court over and above the general moral duty to tell the truth. In other words, the witness must understand that telling the truth is important to the court's process and that lying has significant implications for that process. The second question is not simply an inquiry into the ability of the witness to communicate at trial. In addition to this concern, the court must also assess the ability of the witness to observe what happened and to remember what happened. The questions to the witness on the inquiry may be put by the judge or by counsel.

Where these two questions are answered in the affirmative, the witness may then give evidence under oath or affirmation (s. 16(2)). Where only the second question is answered in the affirmative, the witness may still give evidence upon promising to tell the truth where it is shown that the witness has a general understanding of the duty to tell the truth and can make a meaningful commitment to tell the truth (s. 16(3); *R. v. B. (R.J.)*). Where both questions are answered in the negative, the witness is not permitted to testify (s. 16(4)).

1.6 Child witnesses

Where the witness is a child (“a person under 14 years of age”), that witness is presumed to have the capacity to testify (s. 16.1(1)) and does not take an oath or affirmation (s. 16.1(2)). Before testifying, however, the child witness must “promise to tell the truth” (s. 16.1(6)). The child cannot be questioned about his or her understanding of the nature of the “promise to tell the truth” for the purpose of determining whether his or her evidence can be received by the court (s. 16.1(7)). For greater certainty, the *CEA* explicitly states that the

evidence of a child witness shall have the same effect as if it were taken under oath (s. 16.1(8)).

The evidence of a child shall be received where he or she is “able to understand and respond to questions” (s. 16.1(3)). Where a party challenges the capacity of the child to meet this test, that party has the burden of proving that the child cannot understand and respond to questions (s. 16.1(4)). If the trial judge is “satisfied that there is an issue as to the capacity” of a proposed child witness, the trial judge shall conduct an inquiry into the matter (s. 16.1(5)).

1.7 Representatives of corporations

Where the accused is a corporation, any director, officer, or employee of that corporation is both compellable and competent as a witness for the prosecution. Neither s. 4 of the *CEA* nor s. 11(c) of the *Charter* applies to corporations.

1.8 Experts

Expert witnesses may be called on any point to give opinion evidence in order to assist the trier of fact. The evidence must provide information that is not likely within the experience and knowledge of the trier of fact and must be provided by someone who has acquired special skill through study or experience in that area. The *Criminal Code (Code)* now contains a provision (s. 657.3) allowing for the evidence of an expert to be received in writing subject to certain notice requirements. The expert in question may still be required to appear for examination or cross-examination. The *CEA* (s. 7) provides that not more than five experts may be called on either side during a trial without leave of the court.

2. How do you get the witness to court?

There are several methods for getting the witness to court. The most common of these methods is the subpoena.

2.1 Subpoena

A subpoena is an order of the court compelling a person to attend at a specific time and place to give evidence. A subpoena may also require the person to bring to court relevant documents or other things within his or her possession or control (*Code*, s. 700 and Form 16). The subpoena may be issued to anyone who “is likely to give material evidence” (s. 698(1)). If the witness is also required to bring any document, object, or other thing, it is referred to as a *subpoena duces tecum*, and the same form is used with the requested items listed.

2.1.1 Who may subpoena a witness?

A subpoena may be issued at the instance of either the Crown or the defence. Moreover, a judge may on his or her own motion issue a subpoena for a witness.

2.1.2 Which court issues the subpoena?

Where the proceeding requires the witness to give evidence before a superior court of criminal jurisdiction, a court of appeal, an appeal court, or court of criminal jurisdiction other than a trial before a provincial court judge, the subpoena must be issued by the court in which the witness is required to appear (s. 699(1)). Where the proceeding is a summary conviction matter, a trial before a provincial court judge, or a matter over which a justice has jurisdiction, a justice or a provincial court judge may issue the subpoena so long as the witness is within the province in which the proceeding was instituted (s. 699(2)(a)). Where the witness is not within the province, the subpoena must be issued out of the provincial court or the superior court in the province where the proceedings were instituted (s. 699(2)(b)).

2.1.3 Service of the subpoena

Section 701 of the *Code* governs the service of subpoenas. If the witness is inside the province where the court proceedings are taking place, service shall be made by a “peace officer” (defined in s. 2 of the *Code*) or by “any other person who is qualified ... to serve civil process” and shall be effected in the same manner as an accused person is served with a summons as set out in s. 509(2) of the *Code*. That section requires service to be made personally. If the witness “cannot conveniently be found,” the subpoena may be left at the witness’s “last or usual place of abode with an inmate thereof who appears to be at least 16 years of age” (ss. 701(1) and 509(2)).

If the witness resides within Canada but outside the province, a subpoena is issued under s. 699(2)(b) and must be served personally on the witness to whom it is directed (s. 701(2)).

2.1.4 Territorial effectiveness

A subpoena issued by a justice is enforceable only in the province in which it is issued. All other subpoenas issued have effect throughout Canada (*Code*, s. 702).

2.1.5 Enforcement for the failure to answer questions

The subpoena requires the witness to attend at court at a specified time and to remain until the proceedings are concluded or he or she is excused by the court (*Code*, s. 700(2)). Where that witness attends but refuses to be sworn, to answer questions, or to produce documents or other evidence, the witness may be subject to penalties in

the absence of any reasonable excuse for failing to comply with the subpoena. At a preliminary inquiry, such a witness may be imprisoned for up to eight days, following which period he or she may be imprisoned again for up to eight days should he or she again refuse to comply with the subpoena. Indeed, s. 545 of the *Code* provides that the judge may “commit the person to prison from time to time until the person” agrees to comply with the subpoena.

At trial, where the witness refuses to answer questions, the subpoena is enforced by way of the court’s power to sanction for contempt of court, a common-law criminal offence preserved by ss. 9–10 of the *Code*.

2.1.6 Motion to quash a subpoena

A motion to quash a subpoena may be brought by one of the parties or by the witness. Where such a motion is brought, the onus is on the party who subpoenaed the witness to show that the witness is likely to give material evidence.

Before trial, such a motion is brought before the Superior Court of Justice, which has an inherent jurisdiction to supervise the process of the inferior courts. During trial, to achieve the same effect, the presiding judge may hear a motion to excuse the witness from testifying on the basis that the witness has no material evidence to give (see s. 698(1)).

Although these motions are typically concerned with the question of whether the witness has material evidence to give, a subpoena may also be quashed (or the witness may be excused from testifying) on any of the grounds below:

- The subpoena amounts to an abuse of process.
- The witness is not compellable.
- The evidence sought is privileged.
- The proceedings themselves are without jurisdiction because the information is flawed.
- The subpoena gives rise to a *Charter* violation.

2.2 Material witness warrant

Where a subpoena is ineffective in getting the witness to court, resort may be made to what is known as a “material witness warrant,” which authorizes the arrest of a person who has material evidence to give. The *Code* provides for these warrants in three situations.

2.2.1 Three types of material witness warrants

First, the same court that has the authority to issue a subpoena may issue a material witness warrant where it is shown that the witness in question “will not attend in

response to a subpoena” if one were issued or the witness is evading service (s. 698(2) and Form 17). Where such a warrant is issued by a justice or a provincial court judge, it is effective anywhere in the province in which it was issued. Where the warrant is issued by a superior court of criminal jurisdiction or by an appellate court, it is effective throughout Canada (s. 703).

Second, where the witness was required to enter into a recognizance at the end of the accused’s preliminary inquiry in order to ensure that he or she would give evidence at trial (s. 550) and the witness is shown to have absconded or is about to abscond, the court before whom the witness is required to appear may issue a warrant for the arrest of the witness (s. 704 and Form 18). This kind of warrant is effective in the province in which it is issued. However, where the witness is believed to be in another province, a justice of the other province may endorse the warrant to permit the arrest of the witness in that province (ss. 704(2) and 528).

Third, the witness who has already been subpoenaed but who fails to appear or who appears but fails to re-attend may also be the subject of a material witness warrant. This type of warrant is enforceable anywhere in Canada (s. 705 and Form 17).

2.2.2 Execution of the warrant

Where any of these three types of arrest warrants are executed, the witness must be brought before the court and either detained until the witness has given evidence or released on a recognizance that is effective until the witness has given evidence (s. 706). If detained, the witness may be held for no more than 30 days unless the witness’s custody is reviewed by the Superior Court of Justice before 30 days have passed. The judge may order the release of the witness (either outright or on a recognizance) if satisfied that the detention is no longer warranted. If the judge is satisfied that the continued detention of the witness is justified, then the witness will be returned to custody, but the total period of the confinement shall not exceed 90 days (s. 707).

2.2.3 Enforcement for the failure to attend

Finally, the witness who, being required to attend court either by subpoena or recognizance, fails to do so or fails to remain in attendance may be convicted of contempt of court and is liable to a fine not exceeding \$100 or a term of imprisonment not exceeding 90 days or both (s. 708).

2.3 The witness who is in custody

When a witness is in custody, he or she may be brought to court by the making of an order under s. 527 of the *Code*. If the order is made by a Superior Court of Justice

judge, it is effective anywhere in Canada (s. 527(1)). If it is made by a provincial court judge, it is effective in the province in which it was made (s. 527(2)). The party who wants the incarcerated witness to attend must apply with a supporting affidavit that satisfies the court that “the ends of justice require that an order be made” (s. 527(1)).

In Ontario, applications under s. 527 of the *Code* must be made in compliance with R. 23 of the Superior Court of Justice *Criminal Proceedings Rules (SCJ Rules)* or R. 22 of the *Rules of the Ontario Court of Justice in Criminal Proceedings (OCJ Rules)* as the case may be. Both sets of rules call for early notice of the application, “as soon as is reasonably practicable” (*SCJ Rules*, r. 23.03; *OCJ Rules*, r. 22.03) Each lists the required materials for use on the application (*SCJ Rules*, r. 23.04; *OCJ Rules*, 22.04), including the contents of the affidavit to be filed by the applicant. No application record or factum is required unless the court orders otherwise (*SJC Rules*, r. 23.04(4); *OCJ Rules*, r. 22.04(4)). Moreover, the order may be made *ex parte* and without attendance of either party (*SCJ Rules*, r. 23.04(5); *OCJ Rules*, r. 22.04(5)).

If the court is satisfied that the order should be made, it must be made in writing and directed to the person who has custody of the witness (s. 527(3)). The order will indicate the manner in which the witness will be kept in custody while subject to the order and will indicate the manner in which the witness is to be returned to the institution from which the witness was brought (s. 527(4)). The cost of bringing such a witness to court may be imposed on the party that applied for the order (s. 527(3)(b)). An order made under this section is sufficient authority to compel the witness to testify and obviates the need to get a subpoena or warrant.

2.4 The witness who is unavailable for trial

Sometimes, witnesses are unable to attend at trial. They may be ill, residing outside the jurisdiction, or have some other reason for being unable to testify. Moreover, subpoenas and warrants issued under the *Code* are not effective outside Canada. For all these reasons, the *Code* provides for three ways in which trial courts may receive the evidence of those who cannot or will not come to the trial.

2.4.1 Commission evidence

Where a witness is ill, is outside Canada, or for some other “good and sufficient cause” is likely not to be able to attend at the trial, a party to the proceedings may apply for an order appointing a commissioner to take the evidence of that witness (ss. 709–714). Typically, the commissioner is the trial judge, and he or she attends at the place where the witness lives in order to receive the witness’s evidence. The commissioner presides over the

examination and cross-examination of the witness by the parties just as he or she would during the trial.

The *Code* allows for rules of court to govern applications for commission evidence (s. 714), and in Ontario, it is R. 24 of the *SCJ Rules* or R. 23 of the *OCJ Rules* that apply.

2.4.2 Video and audio link

Where a witness is at a location in Canada but removed from the place of trial, the court may permit the witness give his or her evidence by way of video conferencing or video-link technology. The video link must use “technology that permits the witness to testify elsewhere in Canada in the virtual presence of the parties and the court.” The court must be satisfied that such an order is “appropriate” in the circumstances, which include the location and personal circumstances of the witness, the costs of travel to the trial, and the nature of the evidence that it is expected the witness will give (s. 714.1).

The court may also permit an audio link that enables a witness who is in Canada to give evidence by way of technology that permits the witness to be heard and to hear, but not to see or be seen. In this case, the relevant factors are the same as for a video link, except that the court must also consider any prejudice to either of the parties caused by the fact that the witness will be unseen while testifying (s. 714.3).

Where the witness is outside of Canada, the *Code* requires that the court shall permit the use of video-link technology unless the court is satisfied that the reception of such evidence would be “contrary to the principles of fundamental justice” (s. 714.2). Audio-link evidence may be ordered where the witness is outside of Canada, but the court must first consider the nature of the evidence that it expects the witness will give and the potential for prejudice arising from the fact that the witness will be unseen while testifying (s. 714.4).

While in most criminal proceedings there is a face-to-face confrontation between the accused and the prosecution witnesses, there is no independent constitutional right to such a confrontation. In *R. v. N.S.*, the Ontario Court of Appeal recently considered the competing rights and potential prejudicial effect of permitting a witness to testify while wearing a niqab, a religious veil covering her face but not her eyes. The court recognized that the decision to order a witness to remove such a face covering must be determined on a case-by-case basis. If the witness establishes that wearing a niqab is a legitimate exercise of her religious freedoms, the accused must then establish why permitting the witness to testify while wearing a niqab would compromise the accused’s constitutionally protected right to make full answer and

defence. Leave to appeal to the Supreme Court of Canada has been granted.

2.4.3 Reading in evidence

Where a witness refuses to be sworn in or to give evidence, is dead at the time of trial, has become insane, is so ill that he or she is unable to travel to testify, or is absent from Canada and the witness has given evidence at a preliminary inquiry or has testified at a prior trial of the same charge, the witness’s evidence from the preliminary inquiry or prior trial may be read into evidence at trial where it is proven that the evidence was taken in the presence of the accused and that there was a full opportunity to cross-examine the witness (s. 715).

However, if the accused was granted permission to be absent from the preliminary inquiry under s. 537(1)(j.1), the evidence taken during the preliminary inquiry in the absence of the accused may be admissible at the subsequent trial (s. 715(2.1)). Further, if the accused was absent by reason of having absconded from the previous trial or preliminary inquiry, the accused is deemed to have been present during the taking of the evidence and to have had full opportunity to cross-examine the witness (s. 715(4)).

3. Aids for witnesses

The law provides for those witnesses who may have difficulty communicating their evidence in court due to physical disability, mental disability, language, and/or age.

3.1 Interpreters

Section 14 of the *Charter* requires that an interpreter must be provided for the assistance of any witness who does not understand or speak the language in which the proceedings are conducted or who is deaf.

3.2 Communication difficulties — witnesses with disabilities

For those witnesses who have difficulty communicating by reason of a “physical disability,” the court may permit the witness to give evidence by “any means that enables the evidence to be intelligible” (*CEA*, s. 6(1)). Similarly, for those witnesses with a “mental disability” as determined under s. 16 of the *Code* who have the capacity to give evidence but have difficulty communicating by reason of a disability, the court may order the witness to give evidence by any means that will enable the evidence to be intelligible (*CEA*, s. 6(2)). In both cases, the court may conduct an inquiry to determine if the suggested means for giving the evidence is “necessary and reliable” (*CEA*, s. 6(3)).

3.3 Video-recorded evidence

The videotaped statement of a youthful complainant or other witness who was under the age of 18 at the time the offence was alleged to have been committed may be received in court as evidence provided all of the following criteria are met (*Code*, s. 715.1):

- The recording was made “within a reasonable time” after the alleged offence.
- The witness describes the acts complained of.
- The witness, while testifying in court, adopts the contents of the video recording.
- The admission of the evidence would not interfere with the proper administration of justice.

Similarly, if a complainant or witness is able to communicate but may have difficulty testifying by reason of a mental or physical disability, his or her videotaped statement may be admissible, regardless of whether he or she is under the age of 18, provided the same criteria set out above is met (s. 715.2).

3.4 Exclusion of the public

While, presumptively, court proceedings are to be held in open court, the presiding judge or justice may exclude all or any members of the public from the courtroom for all or part of the proceedings in accordance with s. 486(1) of the *Code*. Such an exclusion order may be made if the court finds it is necessary for “the proper administration of justice,” which includes ensuring that “the interests of witnesses under the age of 18 years are safeguarded in all proceedings” (s. 486(2)(a)) and that “justice system participants who are involved in the proceedings are protected” (s. 486(2)(b)).

Where the accused is charged with one of the offences (primarily sexually based offences) listed in s. 486(3) and either the accused or the prosecutor request a public exclusion order, the judge must provide reasons if he or she declines to make the exclusion order (s. 486(3)).

3.5 Support person

Under s. 486.1 of the *Code*, in any criminal proceedings, the prosecution or witness may bring an application for an order permitting a support person of the witness’s choice to be present and to be close to the witness during his or her testimony.

Where a witness is under the age of 18 or has a mental or physical disability, the court shall permit a support person unless the presiding judge or justice finds it would interfere with the proper administration of justice (s. 486.1(1)).

For any other witness, the court may permit a support person if the court finds that it is necessary to obtain a full and candid account from the witness (s. 486.1(2)).

The application for a support person may be made during or before the commencement of the proceedings to the presiding judge or justice (s. 486.1(2.1)). On the application, the court must consider (s. 486.1(3))

- the age of the witness;
- whether the witness has a mental or physical disability;
- the nature of the offence;
- the nature of any relationship between the witness and the accused; and
- any other circumstances that the court considers relevant.

Ordinarily, one witness will not be permitted to be a support person to another witness unless the court finds that it is necessary for the proper administration of justice (s. 486.1(4)). The court may order that the support person and witness not communicate with each other while the witness is testifying (s. 486.1(5)). Subsection 486.1(6) provides that no adverse inference may be drawn from the fact that an order is or is not made in relation to s. 486.1.

3.6 Closed-circuit television, screens, or other devices

Section 486.2 of the *Code* sets out circumstances when, on an application by the prosecution or witness, the court may make an order permitting a witness to testify outside the courtroom (via closed-circuit television) or behind a screen or other device in order to prevent the witness from seeing the accused but still allow the accused and the court to watch the witness testify. There are three types of situations when these provisions will apply.

First, where the witness is under the age of 18 or may have difficulty communicating due to a mental or physical disability, on application, the court shall grant an order permitting the witness to testify outside the courtroom or behind a screen or other device unless it would interfere with the proper administration of justice (s. 486.2(1)).

The second situation applies to all other witnesses. On application, the court may permit the witness to testify outside the courtroom or behind a screen or other device if the court finds that it is necessary to obtain a full and candid account from the witness (s. 486.2(2)). In making its determination, the court must consider the same factors referred to above in relation to a support person (s. 486.2(3)).

An application under s. 486.2(1) or (2) may be made during or prior to the commencement of the proceedings to the presiding judge or justice (s. 486.2(2.1)).

The third situation relates to cases where the proceedings involve a criminal organization or terrorism offences listed in s. 486.2(5). Where it is necessary to protect the safety of the witness, the court may permit the witness to testify outside the courtroom (s. 486.2(4)(a)). Where it is necessary to obtain a full and candid account from the witness, the court may permit the witness to testify outside the courtroom or behind a screen or other device (s. 486.2(4)(b)).

If the witness is permitted to testify outside the courtroom, the accused, the judge or justice, and the jury must be able to watch the witness give evidence by closed-circuit television or otherwise. Moreover, the accused must be able to communicate with counsel while he or she is watching the testimony (s. 486.2(7)).

If testimony is required from the witness on the s. 486.2 application itself, the court shall permit the witness to testify either outside the courtroom or from behind a screen or device (s. 486.2(6)).

Subsection 486.2(8) provides that no adverse inference may be drawn from the fact that an order is, or is not, made in relation to s. 486.2.

3.7 Limits on cross-examination by accused

Section 486.3 permits the prosecution or witness to bring an application to prohibit a self-represented accused from cross-examining the witness and to appoint counsel to conduct the cross-examination.

Where the witness is under the age of 18 (s. 486.3(1)) or where the accused is being prosecuted for the offence of criminal harassment (s. 486.3(3)), on application, the accused shall not personally cross-examine the witness who is under 18 or the complainant of the criminal harassment. The court shall appoint counsel to conduct the cross-examination, unless the proper administration of justice requires the accused to conduct the cross-examination.

For any other witness, on application, the accused shall not personally cross-examine the witness and the court

shall appoint counsel to conduct the cross-examination if the court is of the opinion that in order to obtain a full and candid account from the witness, the accused should not personally cross-examine the witness (s. 486.3(2)).

The application may be made during or before the proceedings begin to the judge or justice presiding over the proceedings (s. 486.3(4.1)).

Subsection 486.3(5) provides that no adverse inference may be drawn from the fact that an order is, or is not, made in relation to s. 486.3.

4. Non-publication orders

In appropriate cases, the court may grant a non-publication order restricting the publication in any document, broadcast, or transmission of any information that could identify the witness or complainant in a criminal proceeding (s. 486.4).

Paragraph 486.4(2)(b) requires that the court shall grant an application for a non-publication order made by the prosecution, the complainant, or a witness in proceedings that involve any offence listed in s. 486.4(1) (primarily sexually based but also including human trafficking and extortion offences). In court proceedings that relate to any of the s. 486.4(1) listed offences, the presiding judge or justice must, “at the first reasonable opportunity,” inform any witness under the age of 18 or the complainant of their right to make an application for a non-publication order (s. 486.4(2)(a)). Special provisions are also included for cases involving child pornography (under s. 163.1) to protect the identity of any witness under the age of 18 or any person who is the subject of a representation, written material, or recording of child pornography (s. 486.4(3)). For cases that do not fit within the listed offences in s. 486.4, the prosecution, complainant, or witness may still apply for a non-publication order under s. 486.5. This section sets out the requirements for a written application and the criteria that the court will consider in deciding whether to grant the non-publication order.

It is a criminal offence under s. 486.6 to fail to comply with a non-publication order.

Pre-trial applications in criminal proceedings

1. Introduction

Pre-trial applications are assuming an increasingly important role in the trial process. Today, it is not unusual for these motions to last far longer than the trial itself. This is not surprising, since in pre-trial applications counsel are attempting to set the parameters of the trial and, in doing so, are dealing with some of the most hotly contested issues in the case. These motions will determine matters ranging from when and if the trial will proceed, to the nature of the evidence to be heard.

As pre-trial applications form a key part of any trial strategy, Crown and defence counsel must turn their minds to the motions they intend to bring at an early stage in the case. Knowledge of the procedural requirements for bringing the various motions is essential in order to secure a successful outcome.

Timing can be a crucial consideration in dealing with pre-trial motions. Criminal procedure is designed to move a case steadily forward to its conclusion in order to comply with the constitutional requirement of a trial occurring within a reasonable time. Where counsel wants a particular issue to be determined in advance of the trial, he or she must take the initiative by bringing a motion. Rule 6 of both the Superior Court of Justice's *Criminal Proceedings Rules (SCJ Rules)* and the *Rules of the Ontario Court of Justice in Criminal Proceedings (OCJ Rules)* requires that a notice of application be served at least 30 days before the hearing in the Superior Court of Justice and 15 days before the hearing in the Ontario Court of Justice. Counsel may seek relief from a missed deadline either with the consent of the opposing party or by asking the court for an abridgement of the time requirements.

In general, the applicant bears the onus of establishing that the motion should be granted on a balance of probabilities.

Whether the motion is heard by the trial judge or another judge of the same court will depend on the nature and timing of the application. Pursuant to s. 551.1 of the *Criminal Code (Code)*, an application may be made before the chief justice of the court in which the trial is to be held for an order appointing a case management judge. The application may be made by the prosecutor, by the accused, or on the court's own motion. The motion will be granted where it is "necessary for the proper

administration of justice." Once appointed, the case management judge may exercise the power of the trial judge and make binding rulings relating to the disclosure of evidence, the admissibility of evidence, and motions under the *Canadian Charter of Rights and Freedoms (Charter)* prior to the selection of a jury or the presentation of any evidence on the merits. Alternatively, where there is a need for continuity between the jurist hearing the pre-trial applications and the judge conducting the trial, counsel may ask that a trial judge be assigned to deal with these preliminary matters at the earliest opportunity. In jury trials, s. 645(5) of the *Code* permits a trial judge to deal with pre-trial applications before the jury is selected.

2. Preparatory motions

Certain types of pre-trial motions are brought in order to ensure that counsel has all of the material necessary to properly prepare for trial. These applications focus on gathering and preserving evidence. Important examples of preparatory motions are applications for disclosure and for taking evidence by way of a commission.

2.1 Release of exhibits for testing

Pursuant to s. 605 of the *Code*, counsel may apply to a judge of the Superior Court of Justice or Ontario Court of Justice for an order for the release of any exhibit for the purpose of examination or testing. Although these applications can be made by Crown counsel, they are most frequently used by defence counsel to secure independent testing of physical evidence in order to challenge, modify, or go beyond the testing done by experts for the prosecution.

Section 605 is founded on the court's supervisory jurisdiction over its own records, including exhibits. Before an item has been made an exhibit, either at the preliminary inquiry or trial, counsel can make an informal arrangement with the Crown to have it tested by a defence expert, as an adjunct to the disclosure process. Where an agreement cannot be negotiated, a motion should be made once the item has become an exhibit. Alternatively, a trial judge has the inherent jurisdiction to order the police or Crown to produce a piece of physical evidence for examination by the defence even where it has not been made an exhibit.

A s. 605 order will be granted where there is an air of reality to the contention that examination of the exhibit is likely to support a defence available to the accused. Rule 21 of the *SCJ Rules* and R. 20 of the *OCJ Rules* set out the requirements for this application in virtually identical terms. The motion must be made before a judge of the court in which the accused is going to be tried on at least two days' notice. An affidavit by or on behalf of the applicant must be filed, setting out information that includes the status of the proceedings, the nature and relevance of the exhibit, the significance of the testing, and whether testing will delay the trial. A second affidavit, from the person or agency being proposed to conduct the testing, must also be produced, detailing the nature of the testing, the time needed to complete the testing, when the applicant will be in a position to decide whether to adduce the test results at trial, and any safeguards that will be used to preserve the exhibit for use at trial.

3. Non-constitutional pre-trial applications

3.1 Challenges to the wording of the charge

This type of pre-trial motion involves attacks on the way in which the charge was framed in the information or indictment. Included in this category are challenges to the validity of the information, requests for particulars, and applications for severance of counts or accused.

3.2 Procedural applications

3.2.1 Adjournments

Adjournments are a common feature of the day-to-day business in the criminal courts. A request for an adjournment may be made for many different reasons, including the unavailability of a key witness or to permit the accused to retain counsel. Where a date has been set for a preliminary hearing or trial, the procedure to be employed in seeking an adjournment is described in R. 26 of the *SCJ Rules* and R. 25 of the *OCJ Rules*. The application is made before a judge of the court in which the proceeding is to be heard. Both courts require that a notice of application be filed at least 15 days before the date on which the motion will be heard and that the motion occur at least 10 days before the date fixed for the proceeding.

This 25-day deadline means that counsel must act quickly when the need for an adjournment arises. Where an adjournment must be sought on the eve of a trial, such as where a witness has suddenly become ill, counsel should immediately notify the court and the opposing party and seek either an abridgement of the time requirements or relief from compliance with the rules of the applicable court. In addition, counsel should be

prepared to provide the court with as much information as possible about the witness's illness, such as the diagnosis, the treatment being received, and the anticipated time for recovery.

The affidavit that accompanies the application provides the evidentiary foundation for the order being sought. At a minimum, the affidavit must describe the nature of the charges, provide details of any prior adjournment requests, explain the reasons for the application, and propose a new date for the proceeding. It is important that the affidavit provide a thorough basis for the adjournment request. For example, where a witness is unavailable, the affidavit should establish the significance of the witness's testimony, show that the applicant has not been negligent in seeking the attendance of the witness, and include an assurance that the witness will be able to attend court on the new date being proposed for the trial.

When seeking an adjournment or responding to an adjournment request, both Crown and defence counsel should be mindful of the position they are taking on the record and the implications it may have for any future application pursuant to s. 11(b) of the *Charter*.

A court has a broad discretion in determining whether to grant an adjournment. The discretion must be exercised judicially, based on an objective consideration of all of the circumstances. In general, an accused person should be granted an adjournment where it is necessary in order to make full answer and defence, unless it is apparent that the accused is deliberately attempting to manipulate the system.

3.2.2 Change of venue

The general rule in criminal cases is that trials should take place in the community in which the offence allegedly occurred. Section 599 of the *Code* permits a judge of the court in which the accused is going to be tried to order that the trial be held in a different location within the province. The applicant (whether the Crown or defence) must establish on a balance of probabilities that an order for a change of venue is "expedient to the ends of justice." The purpose of a change of venue is to safeguard the accused's and society's interests in a fair trial. Mere inconvenience to one of the parties is insufficient.

In jury trials, the defence brings most applications for a change of venue, where it is alleged that the accused cannot receive a fair and impartial trial in the community because of prejudicial pre-trial publicity.

Pursuant to R. 22 of the *SCJ Rules* and R. 21 of the *OCJ Rules*, a notice of application, together with an affidavit

by or on behalf of the applicant, must be served on the opposing party at least 15 days before the date set for the motion, which must be no less than 10 days before the trial is scheduled to begin. The notice of application must set out the location in which it is proposed that the trial be held. A factum is necessary where the motion is to be heard in the Superior Court of Justice and may be required in the Ontario Court of Justice.

The affidavit supporting the application must detail the nature and circumstances of the offence charged, the date set for the trial, the reasons why a particular place is being proposed as the new venue, and any potential prejudice that would ensue if the trial location is not changed. The likelihood of prejudice must be such that it cannot be addressed by the safeguards in existence in the trial process. Prejudice that arises from the nature of the offence alleged or the evidence the jury will eventually hear does not justify a change of venue.

Where the basis for the application is prejudicial reporting by the media, the affidavit must provide details of each report and the extent of its circulation in the area from which the prospective jurors would be drawn. Copies or transcripts of each media account must be attached as exhibits. Since most adverse publicity occurs early in the proceedings, such as at the time of the offence or the time of arrest, it is advisable for the application to be brought on promptly; where the motion is delayed and media attention has died down, a change of venue is unlikely to be granted.

3.2.3 Removal of counsel

When a lawyer has undertaken to act for a client and has appeared in court to set a date for a preliminary hearing or trial, the lawyer has become the “solicitor of record.” Thereafter, counsel has an obligation to appear in court on the accused’s behalf. If counsel wishes to withdraw from representing the accused, permission to do so must be obtained from the court.

Withdrawal by defence counsel may occur in a variety of circumstances, including non-payment of fees, being discharged by the client, and the existence of a serious loss of confidence between the lawyer and the client. This matter raises both legal and ethical issues. In criminal proceedings, the timing of an application to withdraw can be significant. For example, as an ethical matter, a lawyer may not withdraw for non-payment of fees where the trial date is not far enough in the future to permit the accused to retain a new counsel who is properly prepared to defend the case (r. 2.09(5) of the *Rules of Professional Conduct*). Where counsel seeks leave to withdraw for non-payment of fees, the court may exercise its discretion to refuse that request and require the lawyer to

continue to represent the accused where it is necessary to prevent serious harm to the administration of justice.

The Crown may seek to have defence counsel removed from the record on the basis of a conflict of interest. A conflict that warrants disqualification may arise where defence counsel previously represented a Crown witness or where defence counsel proposes to represent persons who are jointly charged.

Rule 25 of the *SCJ Rules* and R. 24 of the *OCJ Rules* set out the procedure for both withdrawal and removal of defence counsel as the solicitor of record. The application must be made as soon as practicable and within sufficient time to avoid an adjournment of the proceedings. The notice of application and supporting materials must be served on the opposing party at least 15 days before the hearing date, which must be no less than 10 days before the preliminary inquiry or trial. The accused must also be served by mailing a copy of the materials to his or her last known address.

An affidavit by or on behalf of the applicant must accompany the notice. This document must contain the particulars of the charge, details of any prior applications to have the accused’s solicitor of record removed, whether an adjournment will be required to permit the accused to retain a new counsel, and a “full statement of all the facts material to a determination of the application,” including the reasons why the order should be granted.

In drafting the affidavit and in appearing in court to seek the order, defence counsel must not reveal any lawyer-client communications or other confidential information. Disclosure of non-payment of fees where it is unrelated to the merits of the case and will not prejudice the accused is not protected by solicitor-client privilege. However, where the reason for seeking to withdraw is because of conflict with the client, the cause of the conflict must not be disclosed. Accordingly, the explanation offered in the affidavit may be limited to an indication that “withdrawal is being sought for an ethical reason.” In these circumstances, the judge ought to trust in the lawyer’s integrity and defer to counsel’s judgment in seeking to withdraw.

3.2.4 Applications for recusal

A lawyer will bring an application for recusal where there is a reasonable apprehension of bias on the part of the trial judge. The test for assessing a reasonable apprehension of bias claim is whether an informed person, viewing the manner realistically and practically and having thought the matter through, would believe that the judge would not decide the matter fairly. The test contains a two-part objective element: the person

considering the alleged bias must be reasonable and invested with knowledge of all of the relevant circumstances, including judicial traditions of integrity and impartiality, and the apprehension of bias itself must be reasonable based on what has been observed.

The fact that the judge has made a finding of credibility against an accused, either in an earlier case or in a *voir dire* in the present trial, is not sufficient to give rise to a reasonable apprehension of bias. Judges are routinely required to disabuse their minds of evidence that is not admissible before them. The applicant bears the onus of providing evidence tending to show either a prejudgment of the outcome of the trial itself or that the judge has placed the weight of his or her authority on the side of one of the parties to the litigation.

These applications tend to arise during the course of a trial, rather than prior to its commencement. Therefore, written materials are not commonly filed. Nonetheless, the applicant must be able to point to something in the record that would justify the allegation of bias.

On occasion, where another judge is available to conduct the trial, a judge who has heard a bail application, bail review, or a judicial pre-trial involving the same allegations against the accused will choose to excuse himself or herself from hearing the trial, even where the test for bias is not made out.

3.3 Evidence voir dire

Where the need for a ruling with respect to the admissibility of evidence can be foreseen before the commencement of the trial, the issue ought to be addressed in a pre-trial motion. By this means the trial can be more focussed, witnesses will not be needlessly inconvenienced by an interruption of their testimony to deal with the issue, and in a jury trial, the jurors need not wait outside the courtroom for the legal argument to be completed.

A *voir dire* (trial within a trial) is necessary where evidence must be called to resolve a preliminary question of fact before the judge can make a ruling. Examples of some common types of *voir dire*s include the following:

- confession *voir dire*s, where the Crown must establish beyond a reasonable doubt that the accused's statement was made voluntarily as a precondition to its admission into evidence;
- a *voir dire* as to the admissibility of a hearsay statement, where it must be shown that the statement meets the criteria of necessity and reliability; and
- applications for the production of sensitive records under s. 278.1 of the *Code*, where an initial showing

that the records are "likely relevant" is necessary before the issue of production can be considered.

The evidence adduced in a *voir dire* cannot be applied to the trial itself unless both counsel agree to it. Clearly, in a jury trial any relevant portions of the evidence will have to be repeated for the jurors' consideration.

In the Superior Court of Justice, RR. 30–31 apply to applications to admit evidence and applications to exclude evidence, and they make specific requirements for written notice in areas such as applications to admit evidence of prior disreputable conduct of an accused or applications to exclude evidence under s. 24(2) of the *Charter*.

4. Constitutional applications

The advent of the *Charter* has had a dramatic impact on the nature and effectiveness of pre-trial motions in criminal proceedings. By means of a constitutional application, an accused person can challenge

- a legislative enactment, in whole or in part, on the basis that it is inconsistent with the *Charter* in either its purpose or its effects;
- a procedural or evidentiary rule, whether created by statute or common law, on the basis that it infringes a right guaranteed by the *Charter*; and
- the conduct of individuals who are agents of the state for violating the accused's *Charter* rights.

This section will examine the procedural requirements and some of the tactical considerations involved in bringing a constitutional application.

4.1 Jurisdiction

A constitutional remedy can only be granted by a court of competent jurisdiction, that is, a court that has jurisdiction over the person, the subject matter, and the remedy being sought. In criminal proceedings, a judge presiding at a preliminary inquiry is restricted to the powers set out in Part XVIII of the *Code* and has no ability to grant relief under the *Charter*. In general, the trial court (whether the Ontario Court of Justice or the Superior Court of Justice) is the proper forum in which to address *Charter* issues, since it is best situated to take into account the entire factual context in making a constitutional determination. In exceptional circumstances, an application may be made to the Superior Court of Justice, which has inherent jurisdiction to grant pre-trial relief. Examples of exceptional circumstances include situations where there is no court of competent jurisdiction since the proceedings have not yet reached a trial stage, and where the trial judge is allegedly involved in the *Charter* violation.

4.2 Burden

The applicant bears the onus of establishing a breach of the *Charter* on a balance of probabilities. This is the case whether the accused is seeking to have legislation declared invalid under s. 52(1) of the *Constitution Act, 1982* for being inconsistent with the *Charter* or the accused is alleging an infringement of a right guaranteed by the *Charter*.

The applicant must also provide an evidentiary foundation in order to support the allegation of a constitutional violation.

Although the applicant bears the ultimate burden of establishing a breach of the *Charter*, in some circumstances the onus of proving a particular issue will shift to the Crown.

4.3 Challenging legislation – Constitution Act, 1982, s. 52(1)

No one can be convicted of an offence under an unconstitutional law. If counsel intends to defend a case by arguing that the legislation is constitutionally invalid, the vehicle for such an application is s. 52(1) of the *Constitution Act, 1982*. This subsection states: “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

The procedural requirements for such a constitutional application are set out in R. 27 of the *SCJ Rules* and R. 26 of the *OCJ Rules*. A notice of application and constitutional issue must be prepared. The document must contain the grounds to be argued, the constitutional issues to be raised, the constitutional principles to be relied upon, and a list of the evidence to be tendered at the hearing. In the Superior Court of Justice, an application record must be served as well.

The notice must be served no less than 30 days in the Superior Court of Justice and no less than 15 days in the Ontario Court of Justice before the application is to be heard. Because a successful application to have legislation declared unconstitutional would have significant ramifications for the accused’s case, as well as many other prosecutions, the rules of both courts expand the usual service requirements. The notice and all supporting materials must be served on the Constitutional Law Division of the Ministry of the Attorney General for Ontario and the Ontario regional office of the Attorney General for Canada (Public Prosecution Service of Canada), in addition to the prosecutor with carriage of the proceedings.

A factum and an application record must be filed. The application record must include

- a copy of the information or indictment;
- a transcript of any relevant earlier proceedings;
- an affidavit by or on behalf of the applicant; and
- any other supporting materials.

The applicant’s affidavit must contain the particulars of the charge and “a statement of all facts material to a just determination of the constitutional issue that are not disclosed in any other materials filed in support of the application.”

Counsel must ensure that the presiding judge has a proper factual foundation on which to measure the impugned legislation against the requirements of the *Charter*. A court will not entertain a constitutional application in a factual vacuum. The documentation set out in both courts’ rules is the bare minimum needed to advance a constitutional challenge; a successful application will generally require far more supporting material. In constitutional litigation, the judge should be provided with evidence of both adjudicative facts and legislative facts. Adjudicative facts are about the immediate parties to the litigation. They provide the factual context for the decision. Legislative facts establish the background and history of the legislation and are directed toward the validity or purpose of the provision. They provide the social, economic, and cultural context.

Where the basis for the challenge is that the legislation is unconstitutional in its purpose, the record should include material such as the history of the legislation, Parliamentary debates, academic articles, and law reform reports.

Where the basis for the challenge is that the legislation is unconstitutional in its effects, counsel must prepare a record that establishes the improper impact of the provision. This material could include affidavits from persons who claim to have been unconstitutionally affected by the legislation; opinion evidence from experts who are able to describe the adverse effects of the legislation on a particular group; and social science data, such as studies, reports, or statistics.

In dealing with a constitutional application, a trial judge has the discretion to rule on the motion or to reserve the decision until the end of the case. In general, the latter course is preferable, since it ensures that there is a complete evidentiary context for determining the constitutional issue. However, where the application is clearly meritorious and is not dependent on the facts to be adduced at trial, the motion may be decided at the outset of the proceedings.

If the applicant is successful in establishing that the legislation contravenes the *Charter*, the onus will shift to

the Crown to prove that the violation constitutes a reasonable limitation on the applicant's right or freedom, pursuant to s. 1 of the *Charter*.

4.4 Charter remedies – s. 24(1)

Most constitutional litigation is directed at complaints about an accused person's treatment within the justice system, rather than efforts to strike down legislation. In criminal cases, *Charter* breaches can take innumerable forms, ranging from an arbitrary detention by the police, to a failure by the prosecutor to disclose relevant evidence, and to a denial of the right to be tried within a reasonable time. When a violation of a *Charter* right is established, the accused must demonstrate that a particular remedy is warranted. In circumstances where no evidence was obtained as a result of the constitutional violation, s. 24(1) of the *Charter* entitles the accused to seek a remedy that is "appropriate and just in the circumstances."

A judge is entitled to use s. 24(1) to provide imaginative and innovative redress for a *Charter* breach so long as the remedy is one that is available in the criminal process. A civil remedy, such as damages, is inappropriate. Examples of some "just and appropriate" remedies under this provision include a sentence reduction where there was an arbitrary detention; a disclosure order, an adjournment, and the payment of costs where the prosecutor failed to disclose evidence; and a stay of proceedings where the accused was not tried within a reasonable time. In general, a stay is a remedy of last resort—it is only available in the clearest of cases where no lesser remedy is suitable. Similarly, evidence may only be excluded under s. 24(1) where a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system.

The requirements of R. 26 of the *OCJ Rules* and R. 27 of the *SCJ Rules* are applied in this type of constitutional application, just as they are to applications to strike down legislation. As described above in relation to s. 52(1) of the *Constitution Act, 1982*, the applicant must file a notice of application and constitutional issue, a factum, and an application record. Under the *OCJ Rules*, these documents need only be served on the prosecutor assigned to deal with the case, whereas the *SCJ Rules* require service on the additional parties described above in relation to an application to strike down legislation.

In addition to the materials specifically required by the Rules of both courts, the contents of the application record must focus on the relevant issues in the case and the substantive law pertaining to the constitutional issue being raised.

4.5 The Charter remedy of exclusion of evidence – s. 24(2)

The remedy most frequently sought in constitutional litigation is the exclusion of evidence. Subsection 24(2) of the *Charter* provides that unconstitutionally obtained evidence will be excluded if its admission would bring the "administration of justice into disrepute." The evidence that counsel may seek to have excluded can take many forms, including an incriminating statement or bodily samples taken from the accused or physical evidence seized by the police.

In the Superior Court of Justice, R. 31 governs *Charter* applications to exclude evidence under s. 24(2). Different provisions exist in the two levels of court; the applicable rule should be carefully consulted well in advance of trial. In the Ontario Court of Justice, R. 30 governs *Charter* applications to exclude evidence under s. 24(2). The notice of application must set out the evidence sought to be excluded, the grounds to be argued, the evidence to be used to support the application, and the relief being requested. The application record must contain a copy of the information and any transcripts of earlier proceedings relevant to the issue. An affidavit by or on behalf of the applicant is required in the Ontario Court of Justice, but only where it is necessary to complete the factual record.

4.5.1 Tactical considerations and the notice of application

The requirement that the notice set out "the grounds to be argued" gives rise to strategic considerations. This is particularly true where the accused's trial will be taking place in the Ontario Court of Justice. Where an accused elects to have a trial in the Superior Court of Justice, the preliminary inquiry provides counsel with an opportunity to lay a foundation for *Charter* applications at trial and to commit police witnesses to a version of events under oath. By contrast, a trial in the Ontario Court of Justice means that there has been no preliminary inquiry and no incidental opportunity to build a record prior to the *Charter* motion. Accordingly, counsel should bear this in mind when drafting the "grounds to be argued" portion of the notice of application. Rule 30 of the *OCJ Rules* requires that the grounds be stated, along with "a concise statement of the exclusionary issue ... to be raised," but does not demand a detailed outline of the argument on the *Charter* application. It may not be possible without the benefit of evidence under oath at a preliminary hearing to provide the identical level of detail in advance of a motion in the Ontario Court of Justice. In these circumstances, reliance will need to be placed on

information contained in the disclosure materials and, to some extent, on the evidence defence counsel expects to adduce.

An example of these considerations arises where a claim of racial profiling is being advanced, in conjunction with an allegation of either an arbitrary detention contrary to s. 9 or an unreasonable search contrary to s. 8 of the *Charter*. Racial profiling is defined as a “phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group.” The courts have accepted that racism and racial profiling exist in Canada and that racial profiling can, consciously or unconsciously, affect police actions and decision-making. However, in most cases, racial profiling can only be established by circumstantial evidence, and the accused will bear the onus of demonstrating its existence on a balance of probabilities along with the *Charter* breach alleged. Astute cross-examination at a preliminary inquiry may provide an evidentiary foundation for the precise case-specific grounds for exclusion of evidence on the basis of racial profiling required by R. 31 of the *SCJ Rules*. However, in the Ontario Court of Justice, where it is unlikely that the disclosure would support a claim of racial profiling, counsel may decide to merely allege the breach itself in the grounds for the application under R. 30 and seek a blended *Charter voir dire* and trial as a means of eliciting evidence of racial profiling to demonstrate the existence of the *Charter* breach.

4.5.2 Tactical considerations flowing from the burden of proof

In many cases, a *Charter* application cannot be decided solely on the basis of the records filed by defence and Crown counsel. This is especially true in motions for the exclusion of evidence under s. 24(2), since the factual basis for the *Charter* argument is rarely settled before the application is heard. Usually a *voir dire* will be held in which *viva voce* evidence will be called.

Even where defence counsel is able to bring a *Charter* violation to light during cross-examination of police witnesses at the preliminary inquiry and can discharge the evidentiary burden by including the relevant transcripts in the application record filed, a *voir dire* may be needed to permit the Crown to cross-examine on any affidavits in the motion record and to call evidence to explain or qualify the testimony at the preliminary inquiry. A *voir dire* will be of particular importance where there was no preliminary inquiry or where the outcome of the application will depend on findings of credibility.

There are no fixed rules as to the way in which a *Charter voir dire* will be conducted—a flexible approach is employed. As the applicant, the accused bears the evidentiary and legal burden of proof. Defence counsel should give careful consideration regarding how to meet this onus.

Since the accused is the person most likely to have direct knowledge of the circumstances giving rise to the *Charter* violation being alleged, it may be necessary to have him or her testify in the *voir dire*. The Crown will usually conduct a vigorous cross-examination of the accused and call the police officers involved. This situation generally leads to a credibility contest, in which the accused gives a version of events involving a constitutional violation, while the police describe carrying out their duties in accordance with the *Charter*. From a defence perspective, this is not an ideal scenario, even with a client who is a good witness. The situation may improve where other witnesses can confirm all or part of the accused’s evidence.

The challenge becomes greater when counsel does not want to call the accused. Often the only other witnesses to the relevant events are the police. The likelihood of eliciting evidence of a *Charter* violation from a police officer during examination-in-chief is not great—obtaining such an admission is difficult enough during cross-examination. Yet, in some circumstances, a tactical approach can alleviate some of the difficulties that arise from bearing the burden of proof. The following examples illustrate this point:

- (1) When the accused has made a statement to the police, the Crown must establish that it was voluntarily made in order for it to be admissible. At the same time, defence counsel may seek to exclude the statement on the basis that it was obtained in breach of the *Charter*. A straightforward way of dealing with these matters would be to hold two *voir dire*s. In one, the Crown would call evidence to prove voluntariness beyond a reasonable doubt; in the other, the defence would lead evidence to establish a *Charter* breach on a balance of probabilities. This would involve some or all of the witnesses giving the same evidence in each *voir dire*. To avoid such unnecessary duplication, most counsel and judges prefer to hold a blended *voir dire* in which both issues are addressed at one time. Often the problem of differing burdens of proof is addressed by loosening the rules governing examination-in-chief and cross-examination of witnesses.
- (2) Where the police have searched the accused’s home and seized an item of physical evidence, defence counsel may want to challenge its admissibility by arguing that the search was unreasonable, pursuant to s. 8 of the *Charter*. The courts have held that

where a search occurs in the absence of a warrant, it is presumptively unreasonable. Once counsel establishes that a search was warrantless, the burden of proof shifts to the Crown to demonstrate on a balance of probabilities that it was nevertheless reasonable. This will require the Crown to call evidence, which will give defence counsel an opportunity to cross-examine the police officers who seized the evidence.

- (3) When counsel wants to challenge a search conducted pursuant to a warrant, he or she may seek to cross-examine the affiant who swore the information to obtain the search warrant. Before the trial judge can grant leave to cross-examine the affiant, defence counsel must show that there is some basis to believe that cross-examination will tend to discredit the existence of one of the pre-conditions for granting the warrant. If defence counsel succeeds in doing this, he or she can cross-examine the affiant in order to gather additional evidence for the *Charter* application.

Where these approaches are inapplicable and the defence has no choice but to call police witnesses to substantiate a *Charter* breach, other methods to establish the claim exist. There is authority to suggest that where fairness requires it, a judge should give an accused some leeway in exploring potential *Charter* issues. In addition, some cases suggest that if an accused is required to call police witnesses to support a *Charter* claim, the presiding judge can relax the evidentiary rules that normally prevent a party from cross-examining his or her own witness. Some counsel are of the view that in reversing the normal manner of questioning (from cross-examination to examination-in-chief), there are better opportunities to achieve a more accurate record on which to make the final argument.

4.6 Applications to stay proceedings for unreasonable delay

Subsection 11(b) of the *Charter*, which guarantees the right to be tried within a reasonable time, plays a significant role in criminal cases. In essence, this provision places a constitutional time limitation on the jurisdiction of the court to deal with a charge where it has taken too long to bring the matter to trial.

The time frame to be considered in analyzing a claim of unreasonable delay runs from the date the information was sworn to the estimated date for completion of the trial. When deciding whether s. 11(b) has been infringed, the trial judge is required to balance the following factors:

- the length of the delay;
- waiver of time periods;
- the reasons for the delay, including the inherent time requirements of the case, the actions of the

accused and the Crown, the destruction or loss of evidence, and limits on institutional resources; and

- prejudice to the accused.

Where a breach of the subsection is found, a stay of proceedings must be ordered.

The procedure to be followed in making this *Charter* application is that already described in seeking a remedy under s. 24(1). The affidavit must also include “a full history of the proceedings against the applicant prior to the date scheduled for trial.”

An application to stay proceedings under s. 11(b) provides an excellent illustration of the importance of a well-prepared factual record. Under the *Rules*, an affidavit will suffice for setting out the procedural history. Yet, an important issue on such applications is the parties’ approach to delay during the course of the proceedings. Filing the transcripts from each court appearance is the best way to document matters such as the actions of the accused and the Crown and whether they contributed in any way to delaying the proceedings and whether the accused, at any point, waived the right to a trial within a reasonable time. A transcript will be particularly helpful to the defence if counsel emphasized the client’s desire for an “early” or the “earliest available” trial date at each appearance in court.

As noted above, prejudice to the accused is another factor that is relevant to a successful application. Although prejudice to an accused can be inferred from a prolonged delay, it is more effective for the record to demonstrate actual prejudice. To do this, counsel will have to consider submitting an affidavit from the accused, detailing the effect of the delay from a personal, familial, and financial standpoint. Where the client’s liberty interests have been curtailed through strict bail conditions, a copy of the recognizance should be appended as an exhibit to the affidavit. On a contested factual matter such as prejudice, counsel cannot file an affidavit that is based on information and belief or which contains hearsay. Therefore, if the client will be a poor witness, counsel should obtain additional affidavits from those who know the accused well, such as a spouse, a family member, or an employer, in order to supplement the accused’s evidence.

5. Motions at the start of trial

5.1 Exclusion of witnesses

At the outset of the proceedings, it is common practice for counsel to seek an order excluding all of the prospective witnesses (except the accused) from the courtroom. The purpose of this motion is to ensure that the testimony of a witness is not tainted by having heard

the evidence of others. No formal written application or advance notice is needed for such a motion. Although the judge has a discretion as to whether to grant or deny the order, it is rare for such requests to be refused. The judge may grant an exception to the order, such as permitting the investigating officer to remain in court, but may require that witness to testify first.

5.2 Non-publication orders

Non-publication orders are available through legislation and the common law. Although publication bans are designed to protect privacy interests and to advance the proper administration of justice, the nature, scope, and duration of these orders can vary significantly. It is important to be aware of two types of non-publication orders that are essential features of criminal trial practice.

Subsection 486.4 of the *Code* permits a justice or judge to prohibit the publication, broadcasting, or transmission of “any information that could identify the complainant or a witness” when an accused has been charged with certain enumerated offences, including current and historical sexual offences, prostitution-related offences, child pornography, trafficking in persons, and extortion. The

judge has an obligation to inform a witness under 18 years of age and the complainant of the right to apply for this order. Where requested by the prosecutor, the witness, or the complainant, the order shall be made. In general, Crown counsel will seek an order of this nature at the earliest court appearance (usually at the bail hearing). No formal application or prior notice is needed to obtain this type of publication ban. The order will remain in effect until the completion of the criminal proceedings (including any appeals).

Subsection 648(1) of the *Code* prohibits the publication of any information about a portion of the trial for which the jury was not present until after the jurors retire to begin their deliberations. This provision is applicable to pre-trial motions and other proceedings that occur during the jury’s absence (such as the pre-charge conference or submissions following an objection to a line of questioning). An order of this type is both mandatory and automatic. While no application is necessary, prudent counsel will remind the judge and, through him or her, the public and the media of the existence of this order to ensure that it not be inadvertently breached and information that would prejudice the trial not be revealed.

1. Introduction

The criminal law has always grappled with the unique challenges posed by individuals who, by virtue of their mental disorders, are either unable to conform to the dictates of the criminal law or to participate in the criminal proceedings brought against them. Canada's response to that conundrum was to enact Part XX.1 of the *Criminal Code (Code)* in 1992, codifying a system for such individuals.

1.1 Mental disorder

Mental disorder is defined in s. 2 of the *Code* as “disease of the mind.” The term is a legal concept although it is informed by medical considerations. Its legal meaning has been interpreted as (*R. v. Cooper*):

any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding ... self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.

From a criminal law perspective, the term “mental disorder” is quite broad and can encompass a variety of conditions: some transient, such as somnambulism (sleepwalking), and some permanent, such as a developmental disability or an organic, acquired brain injury.

1.1.1 Fitness

Fitness relates to the accused's current mental state when he or she is before the court. As a principle of fundamental justice, we recognize that it is unjust to try an accused who cannot understand or meaningfully participate in criminal proceedings because of his or her mental condition. When a mental disorder compromises an accused's functioning to the point that he or she is unable to participate in the trial process, we say that the accused is “unfit to stand trial.”

“Unfit to stand trial” is defined in s. 2 of the *Code* as

unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to

- (a) understand the nature or object of the proceedings,
- (b) understand the possible consequences of the proceedings, or
- (c) communicate with counsel.

When an individual is found unfit, they are put under the jurisdiction of the provincial Review Board system until they return to a fit state. Review Boards are expert tribunals, composed of medical and legal experts with specialized knowledge and experience in psychiatry and mental health, that supervise the conditions of an accused's liberty and treatment.

1.1.2 Not criminally responsible by reason of mental disorder

Accused persons may lack the capacity to commit a criminal offence because of their mental state at the time they committed the offence. If individuals are found to lack such capacity, we refer to them as not criminally responsible by reason of mental disorder. As a principle of fundamental justice, we do not label individuals as criminals and punish them if they were, by virtue of their mental disorder, not criminally responsible when they committed the offence. Accordingly, a verdict of not criminally responsible results in the accused being diverted from the sentencing stream into a system of rehabilitation and treatment managed by provincial Review Boards.

The defence of mental disorder is set out in s. 16 of the *Code* as:

No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Where it is proved that the accused committed the crime while rendered incapable of appreciating that act or omission or knowing that it was wrong by virtue of their mental disorder, the accused is found not criminally responsible by reason of mental disorder.

2. Stages of the criminal justice system

Mental health issues, whether they relate to a mental illness or a developmental disorder, may become important at any of the following stages:

- at the time of initial police contact, in determining whether charges will be laid;
- on the initial appearance of the accused in the provincial court for a bail hearing or a first appearance in a trial court;
- at any stage of the proceedings when the issue of fitness to stand trial is raised; and

- at any time where there is evidence that the accused was a person with a mental disorder at the time of the offence.

Depending on what stage one is at in the criminal justice system, different procedural aspects need to be considered.

3. Alternatives to prosecution

3.1 Pre-arrest or pre-charge

The first entry of a mentally disordered or developmentally disordered person into the criminal process is often because their conduct is the subject of a complaint or a “911” call to the police. It is important to recognize that at this early juncture of the criminal process, the individual’s behaviour does not have to become a criminal matter. At this initial stage of police involvement, the police have the discretion not to lay charges. As the criminal justice system is not always well suited to deal with the mentally disordered, this may well be a better outcome for both the offender and the protection of the public.

The police may remove the individual to a psychiatric facility where the individual can consent to admission or be committed at the facility by a physician under the provisions of the *Mental Health Act* for a period of up to 72 hours for the purposes of observation. The *Mental Health Act* also provides that a family member may apply to a justice of the peace for a psychiatric examination. The order may direct the police to take the individual to an appropriate place where he or she may be examined for a period not to exceed seven days. If certain criteria are met, a designated physician may issue a community treatment order that will supervise the individual in community-based care and treatment for up to six months.

Depending on the outcome of the stay at the psychiatric facility, the police officer may choose not to lay criminal charges even though the conduct would constitute a criminal offence. A community treatment order may, for example, provide both needed treatment and adequate supervision to protect the public. However, extreme conduct warranting potentially serious charges is more likely to result in charges being laid.

3.2 Post-arrest or pre-trial

After charges have been laid, Crown attorneys have the discretion not to prosecute an individual who is nonetheless fit to stand trial and not exempt from criminal liability. Mentally disordered and developmentally disordered offenders may warrant special consideration, depending on the nature and circumstances of the offence and the background of the

offender. Where the offence is minor and there is no risk to public safety, it may be in the public interest to simply withdraw the charge. More commonly, the Crown employs a process known as diversion.

Diversion refers to a system where an accused’s criminal charges are conditionally stayed by the Crown Attorney’s Office. Just as at the pre-charge stage, diversion recognizes that the criminal justice system is a particularly blunt instrument not always well suited to deal with the mentally disordered accused.

As an alternative to prosecution, diversion places an emphasis on restorative and remedial measures, such as treatment options, supervisory programs, or community justice programs. The Ontario Ministry of the Attorney General has a formal protocol to be employed in instances of diversion, the “Ontario, Ministry of the Attorney General, Criminal Law Division, Practice Memorandum [2005] No. 22 — Mentally Disordered/ Developmentally Disabled Offenders: Diversion.” The key requirements of the formal protocol are as follows:

- There is a reasonable prospect of conviction of the offence charged.
- The offence charged falls within a category of offences eligible for diversion: diversion is only available for certain categories of offences, typically minor and non-violent offences.
- The accused is voluntarily participating.
- The Crown has consented to the diversion process.

Diversion can take place at any stage of the proceedings, but it is in everyone’s interests that the issue be raised as early as possible. Sometimes the accused’s behaviour or the circumstances of the alleged offence indicate that the person may have a mental disorder, and the police will inform the Crown, or Crown counsel will flag the matter when screening the charges. However, the Crown brief may not contain these details. Defence counsel is more often better equipped with relevant background information as to the accused’s suitability for diversion and can propose a diversion plan at the first appearance or shortly afterwards. In jurisdictions where specialized court services exist, a mental health court worker may canvass the issue of diversion with the accused.

Accused persons should be advised, through counsel, as to the circumstances of the alleged offence, their right to counsel, and their various trial options. The accused should also be informed that the Crown may rely on the matter of the diverted charges in any future sentencing proceedings.

Assuming the accused chooses to participate, Crown counsel must decide whether to approve a proposed treatment plan or supervisory program. Practices vary

from jurisdiction to jurisdiction, but the critical element is that diversion will result in a stay of proceedings pursuant to s. 579 of the *Code*. Typically, this will be done prior to the completion of a program. The charges may not be stayed until the offender is accepted into the recommended program or institution. In some situations, it may be in the public interest to continue the prosecution until the offender is stabilized. In the event the program is not completed, the Crown may recommence the prosecution in accordance with s. 579(2) of the *Code*.

4. Fitness to stand trial

The issue of fitness generally arises at the first stages of the criminal process, such as the bail hearing or first appearance. As noted, s. 2 of the *Code* provides that the issue of fitness can be raised at any stage of the proceedings prior to verdict. There is some authority in Ontario for the proposition that fitness can be raised even post-verdict, that is, at the sentencing stage. Indeed, fitness may arise repeatedly throughout the proceedings. Depending on when the issue arises, different procedural mechanisms come into play.

Under s. 672.22 of the *Code*, an accused is presumed to be fit to stand trial unless the court is satisfied to the contrary on a balance of probabilities. Subsection 672.23(1) allows the issue of fitness to stand trial to be raised by the court's own motion or on the application of the accused or Crown counsel. The burden to displace the presumption of fitness rests on the party raising the issue (ss. 672.22 and 672.23(2)).

Regardless of when the issue arises or who raises it, the court will typically require a psychiatric assessment to assist in determining whether the accused is fit. The court can make an assessment order in relation to fitness on its own motion or on application of the accused or Crown counsel if the court has reasonable grounds to believe the assessment is necessary to determine the fitness issue. In a summary conviction matter, however, the prosecutor must satisfy the court that there are reasonable grounds to doubt that the accused is fit to stand trial, or the accused must raise the fitness issue. Once the accused has had the assessment, the court may then hold a fitness hearing.

At the fitness hearing, the accused must be represented by counsel. The critical issue at the fitness hearing is the accused's understanding of the criminal justice process. The fitness standard used by the court is a "limited cognitive ability" test, also commonly referred to as the *Taylor* test, after the principles established in the Ontario Court of Appeal's decision in *R. v. Taylor*. Under the *Taylor* test, an accused is considered to be fit to stand

trial where he or she has the capacity to understand the nature and object of the proceedings and its consequences and to instruct counsel. The accused need have only sufficient mental fitness to conduct his or her own defence or instruct counsel to do so, notwithstanding that the accused's decision-making is not in his or her best interests.

If the accused is found fit, the proceedings continue as if the issue of fitness had never arisen. If the court determines that an accused who is otherwise detained in custody needs to be kept in a hospital in order to remain fit, s. 672.29 gives the court this power.

If the accused is found unfit, the proceedings are halted and any plea taken is set aside. It is only at this juncture that a prosecutor can apply for a treatment order to return the unfit accused to a fit state. Only a prosecutor can apply for the order, and the court can only make the order in accordance with the strict statutory criteria set out in s. 672.59. This is an exceptional power and requires, among other things, that a qualified medical practitioner testify that a proposed course of treatment will likely make the accused fit to stand trial within 60 days.

Assuming the court does not order treatment, the court can hold an initial disposition hearing under s. 672.45 of the *Code* or defer the disposition to the Review Board, in which case the Review Board must make a disposition within 45 days (s. 672.47(1)). In either event, the unfit accused remains under the jurisdiction of the Review Board until he or she becomes fit again.

In addition to annual review hearings, the Review Board monitors the issue of fitness, and where the Review Board is of the opinion that the accused has returned to a fit state, the accused is returned to court. The court will again hold a fitness hearing and determine fitness. Once found unfit, the accused is presumed unfit unless the court is satisfied to the contrary by proof on a balance of probabilities. The burden of proof is on the party who asserts it, whether the Crown or the accused. If the verdict is fit to stand trial, the criminal proceedings will recommence.

A verdict of unfitness has significant implications for an accused. The accused can remain unfit and hence detained for an indeterminate period before returning to a fit state and then returning to the courts to be tried for the charged offence. Accordingly, under s. 672.33 of the *Code*, the Crown has a continuing obligation to present a *prima facie* case every two years in order that no accused is held where the Crown is unable to prove the charges against them.

A court has the power to stay proceedings for a permanently unfit accused. Either the Review Board or a court can initiate the process when it concludes in a particular case that a person is unlikely to ever become fit and that the person does not pose a significant threat to the safety of the public. The Review Board can recommend that the court hold an inquiry to determine whether the proceedings should be stayed, or the court can hold an inquiry of its own motion.

In an inquiry, the court must be satisfied of the following three things prior to an order that the proceedings be stayed:

- The accused remains unfit to stand trial and is not likely ever to become fit.
- The accused does not pose a significant threat to the safety of the public.
- A stay would be in the interests of the proper administration of justice.

The factors that the court must take into account are as follows:

- the nature and seriousness of the offence alleged;
- the salutary and deleterious effects of an order to stay the proceedings, including any effect on public confidence;
- the time elapsed since the commission of the alleged offence; and
- any other factors considered relevant by the court.

If the court orders a stay, the criminal proceedings are halted, and a trial of the charges on the merits will not be held. If the court does not order a stay, any disposition remains in effect, and the accused continues under the jurisdiction of the Review Board.

5. The defence of mental disorder

It may be apparent from the conduct of the offender or other circumstances surrounding the criminal act that the accused's capacity for criminal responsibility will be in issue. Under s.16(2) of the *Code*, every person is presumed not to suffer from a mental disorder, unless the court is satisfied to the contrary on a balance of probabilities. Either party can raise the issue of whether the accused was suffering from a mental disorder at the time of the offence so as to be exempt from criminal liability, subject to the limitations outlined below. The burden to displace the presumption of criminal responsibility rests on the party who raises the issue.

Section 16 of the *Code* provides for a two-prong test. An accused will be found not criminally responsible (also NCR) where the accused has a disease of the mind that renders him or her

- incapable of appreciating the nature and quality of the criminal act or omission; or
- incapable of knowing the act is wrong.

Simply having a mental disorder at the time of committing an offence will not result in a NCR verdict. It must also be demonstrated that the mental disorder “rendered the person incapable” of appreciating the act or knowing that it was wrong.

“Appreciating the act” involves more than mere knowledge that an act is being committed. To “appreciate” requires both knowledge and an ability to measure and foresee the consequences of the conduct. The “nature and quality of an act” refers to the physical character and consequences of the act but not its penal consequences nor its psychological impact on the victim. Accused persons who engage in violent conduct while under a delusion such that they cannot foresee the appreciable consequences of that conduct may qualify for the defence of mental disorder, but those who simply lack empathy for what they have done to the victim do not.

“Wrong” in the second prong of the test focuses on the ability to know that a particular act is right or wrong and, hence, to make a rational choice about whether to do the act. The standard to be applied is whether the accused knew it was “morally wrong” and not just legally wrong. The onus is on the party raising the issue to demonstrate that the accused was incapable of knowing that the act or omission would be condemned by reasonable members of society.

As with the issue of fitness, the parties typically require an assessment to assist in determining whether the accused is criminally responsible. Even if the Crown and the defence agree that the accused was not criminally responsible at the time the offence was committed, the trier of fact will still hear expert evidence in order to reach a verdict on this issue. Although the evidence of psychiatrists is critical to this issue, it is not determinative with respect to whether the accused was suffering from a “disease of the mind.”

The accused is entitled to raise the issue of mental disorder at any stage of the trial. Where the accused puts his or her own capacity for criminal responsibility in issue, the Crown may lead or counter with evidence on the issue. Even if the accused does not put his or her mental capacity into issue, the Crown can still raise the issue, over defence objections, but only after the Crown has first proved the *actus reus* and the *mens rea* of the charge beyond a reasonable doubt. Essentially, the accused must first be found guilty, and prior to the conviction being registered, the Crown may lead evidence of a mental disorder. It would be contrary to the

principles of fundamental justice to allow an accused to be convicted in circumstances where he or she was not criminally responsible for his or her acts. Allowing the Crown to raise a “defence” over the accused’s objections reflects the fundamental principle that we do not punish such individuals.

After the initial verdict of not criminally responsible on account of mental disorder is rendered in court and after the initial disposition is made (if the court chooses to make it), Review Boards take full jurisdiction over the accused. Section 672.54 of the *Code* requires the court, if making an initial disposition, or the Review Board to determine first whether the accused continues to represent a significant threat to the safety of the public. If not, the accused is discharged absolutely. Once absolutely discharged, the criminal process no longer has any jurisdiction over the accused.

As long as the threshold test of significant threat is met, the accused found not criminally responsible is subject to an indeterminate form of liberty restriction (either a discharge with conditions or a hospital detention order). The accused has annual hearings where the disposition is reviewed until he or she is discharged absolutely.

6. Assessments

The only assessments dealt with in this chapter are court-ordered assessments under the *Code*. However, if an accused is in a position to obtain a psychiatric assessment privately, then he or she should do so. The most significant advantage is that the accused can ensure confidentiality and control over what, if any, use is made of the contents of the assessment. Court-ordered assessments are, by their very nature, non-confidential and, in certain circumstances, can operate against the accused.

An assessment is defined in s. 672.1 of the *Code* as “an assessment by a medical practitioner ... of the mental condition of the accused under an assessment order.” An assessment order may be made by a court under s. 672.11 to determine, among other things, whether the accused is unfit to stand trial, whether the accused is not criminally responsible on account of mental disorder, and what the appropriate disposition in either case should be.

In all cases, the court simply requires “reasonable grounds to believe” that the order is required. In some cases, the evidentiary foundation for the order will come from a physician or another mental health expert. In other cases, an arresting officer or witness to the offender’s conduct may be able to provide the evidence. In extreme cases, the accused’s own behaviour in court will provide the reasonable grounds.

Since fitness assessments can be completed in a very short period of time, a fitness assessment is only for five days, excluding holidays and travel time, unless the accused and prosecutor agree to a longer period that does not exceed 30 days. The court may extend that period up to a total of 60 days in “compelling circumstances.” Assessment for other purposes may be ordered to last up to 30 days subject to the same exception for compelling circumstances.

Parties should ensure that assessment orders are in strict compliance with these *Code* provisions because the assessment orders may have significant implications for the liberty of the accused. Section 672.17 provides that assessment orders take precedence over bail hearings and that no interim release order can be made for an accused during the life of the assessment order. Although s. 672.17 directs that a bail order cannot be made during the life of an assessment order, to ensure that accused are not unnecessarily detained, if a hospital bed is not immediately available for purposes of an assessment, then an interim release order may be made prior to the making of an assessment order (*Ontario v. Phaneuf*).

7. Protected statements

Section 672.21 is a statutory bar to the Crown using statements made by the accused during the assessment process, with some broad exceptions. Obviously, the statements may be used for the purpose for which the assessment was ordered:

- to assess fitness at a fitness hearing;
- to make a disposition; or
- to determine criminal responsibility.

However, if the accused takes the stand and testifies, the Crown may cross-examine him or her on statements made during the assessment process that are inconsistent with previously given testimony. Although the statements cannot be used to prove the accused’s guilt, inconsistent statements can be used to undermine an accused’s credibility. The statements are also admissible in sentencing proceedings.

8. The uniform standard for assessing claims of mental incompetence

Short of a fitness claim, an accused may rely on his or her mental disorder to argue that he or she was incompetent or incapable of making effective or voluntary choices at some stage of the criminal proceedings. An accused may argue, for example, that his or her mental disorder affected his or her ability to make an informed choice to exercise rights to counsel and to silence and, accordingly, that the accused’s statements should be excluded. An accused may also argue that his or her mental disorder

affected his or her ability to choose effective representation.

Consistency in the standard for mental competency and respect for the accused's autonomy in the adversarial process have resulted in the *Taylor* standard for all claims of incompetence by reason of mental disorder in relation to all aspects of the criminal proceedings. Courts have consistently affirmed the "limited cognitive capacity" test as the uniform standard by which to assess these claims. The courts will not apply a different standard of competency for different aspects of the criminal proceedings.

9. Mental disorder resulting in other verdicts

Mental disorder at the time of the criminal act may affect the verdict in ways other than those set out in s. 16 of the *Code*. Automatism is a state of impaired consciousness where individuals have no voluntary control over their actions. The requirement for voluntary action is a key element of establishing the *actus reus* of the offence. It follows that acts committed in an automatistic state are involuntary and do not give rise to criminal responsibility.

Automatism caused by mental disorder is referred to as mental disorder automatism as opposed to non-mental disorder automatism caused by, for example, a blow to the head or psychological shock. Mental disorder automatism must be the result of a disease of the mind and may trigger the defence of mental disorder. Non-mental disorder automatism is an involuntary act that does not arise from a disease of the mind and entitles the accused to an outright acquittal.

The Supreme Court of Canada has established a legal presumption of voluntariness that casts the burden on the accused to prove involuntariness on a balance of probabilities. If the accused establishes the necessary

foundation for automatism, the rebuttable presumption is that the claim is one of mental disorder automatism. At this stage, the concern is focussed on the risk posed by the potential recurrence of the conduct in issue. Where that risk exists, a mental disorder finding is justified so as to allow for further inquiry into the accused's dangerousness and ensure proper protection of the public.

Mental disorder may also be an issue, along with all other evidence, in determining whether the accused possesses the requisite mental element. For example, mental disorder may reduce first-degree murder to second degree murder where it negates planning and/or deliberation. Similarly, mental disorder may reduce murder to manslaughter where it negates the requisite specific intent to kill.

10. Post-verdict – sentencing

Mental illness can also be an important factor in sentencing an accused. Generally speaking, mental illness is relevant to the sentencing process where it played a role in the commission of the criminal act or affects the offender's rehabilitative potential.

While sentencing is not a statutory purpose for which a court can order an assessment under the *Code*, the Ontario Court of Appeal has approved the use of the provisions under the *Mental Health Act* to obtain a psychiatric report for use at a sentencing hearing.

For individuals with mental health issues but who are sentenced to a custodial term, it is left to the correctional authorities to determine what, if any, treatment will be provided to the accused. However, if the accused is given a conditional sentence, the sentencing judge can order that the accused serve that sentence in a psychiatric facility. In addition, a sentencing judge can order treatment for the accused under a probation order if the accused consents.

1. Three types of trial

There are three types of trials available to an adult accused. First, there are trials before a judge of the Ontario Court of Justice. Second, the trial may be before a judge of the Superior Court of Justice, sitting without a jury. Third, the trial may be before a judge of the Superior Court of Justice sitting with a jury.

2. Pre-trial discussions

Before setting a date for a trial (or preliminary inquiry), it is important for defence counsel to meet with Crown counsel to discuss issues relating to the case, including whether the case can be resolved without the need for a trial. If both counsel agree that the case cannot be resolved but it is ready to proceed, then a trial or preliminary inquiry date will usually be scheduled in the set date court if the case is a simple one and is estimated to take less than a day of court time. However, if the case is complex, anticipated to take a day or more of court time, or there are outstanding issues that counsel cannot resolve (such as disclosure issues), most jurisdictions will require that counsel for both the defence and Crown attend a pre-trial conference with a judge before setting a trial or preliminary inquiry date.

2.1 Crown pre-trials

“Crown pre-trials” or “pre-trial meetings” between Crown counsel and defence counsel or an unrepresented accused are typically held after disclosure has been provided to the accused and in advance of scheduling a pre-hearing conference with a judge. These discussions usually address issues such as outstanding disclosure, trial length estimates, admissions, anticipated motions, and possible disposition or resolution of the charges. Since these meetings normally occur shortly after the court process has begun, they provide an early opportunity for counsel to discuss possible alternatives to proceeding to trial, such as the availability of alternative measures (diversion) or a peace bond, a joint position on sentence, a guilty plea to a lesser offence, or the withdrawal of charges. Defence counsel may choose to provide to the prosecution evidence of potential defences or background information about the accused that may impact on the assessment by the Crown of the reasonable prospect of conviction or whether it is in the public interest to proceed with the prosecution.

During pre-trial meetings, counsel for the Crown will normally provide the sentencing position that the prosecution would take either on a guilty plea before trial or on conviction after trial. During these plea negotiations, the defence may wish to canvass whether the prosecution would agree to alternative measures (diversion) or a “peace bond resolution” as an alternative to a guilty plea. There are two types of “peace bonds” that may be available: (1) a common-law peace bond, or (2) a recognizance under s. 810 of the *Criminal Code* (*Code*). If both parties agree to this type of resolution, the accused must appear before a judge and accept the terms imposed by the peace bond. Typically, the peace bond is a recognizance for one year in length with conditions such as to keep the peace and be of good behaviour, to have no contact with a named person, to not attend at a named location, and/or to not possess weapons or firearms. After the accused signs the recognizance and agrees to comply with its conditions, counsel for the Crown will usually withdraw the criminal charge(s) and thus end the prosecution. However, the accused must understand that if he or she breaches any of the terms of the recognizance, the accused may be further charged under the *Code* with breach of a recognizance (s. 811) or disobeying a court order (s. 127).

2.2 The pre-hearing conference

Section 625.1 of the *Code* provides for pre-hearing conferences to be held in order to “promote a fair and expeditious hearing.” The hearings are to be attended by counsel for the Crown and for the defence and are presided over by a judge of the court in which the trial is to take place. These conferences are, by the terms of the *Code*, mandatory in any case to be tried by a judge and jury and optional in any other case. Practically speaking, however, pre-hearing conferences (or “judicial pre-trials,” as they are often called) are required in many non-jury cases by virtue of the local practice in the various jurisdictions around the province. For example, a pre-hearing conference is now required in all cases in the Superior Court of Justice. In cases before the Ontario Court of Justice, under the *Rules of the Ontario Court of Justice in Criminal Proceedings* (*OCJ Rules*), a judge may order that a pre-hearing conference is not required. Practice differs from jurisdiction to jurisdiction around the province.

Where a pre-hearing conference is held, it is governed by either R. 27 of the *OCJ Rules* or by R. 28 of the Superior

Court of Justice *Criminal Proceedings Rules (SCJ Rules)*. The *OCJ Rules* require that “fully briefed” counsel for the Crown and the accused appear at the conference. Both parties must prepare and file with the court in advance a “draft pre-hearing conference report” (*OCJ Rules*, r. 27.02 and Form 14) setting out the issues for trial.

The *OCJ Rules* provide that the conference is to be “an informal meeting conducted in chambers at which a full and free discussion of the issues raised may occur without prejudice to the rights of the parties in any proceedings thereafter taking place.” While informal, the *OCJ Rules* require the judge to inquire into specific issues. Broadly speaking, these issues may be described as

- the status of disclosure;
- the likelihood that there will be pre-trial motions;
- the possibility of resolution or admissions; and
- the simplification of issues (r. 27.03).

Typically (absent the consent of the parties), the judge who conducts a pre-trial conference will not be the trial judge, and r. 27.04 prevents that judge from communicating anything about the pre-trial to the judge who conducts the trial.

The *SCJ Rules* (R. 28) have recently been amended so that the pre-hearing conference process is more formalized to ensure that these conferences are more effective at promoting a fair and efficient process. Counsel for both the Crown and the defence are required to fill out and file a “pre-trial conference report” (Form 17). The form is detailed and lengthy and requires counsel to state positions on a wide array of issues. The *SCJ Rules* expressly prohibit counsel from deferring the taking of a position on each issue (r. 28.04(5)). Moreover, if any of the positions stated on the form change prior to the trial, counsel must provide notice of the change to the opposite party, and a new pre-trial conference will be arranged (r. 28.04(11)). Failure to provide this notice may lead to the trial judge refusing to hear the application resulting from the change in position (r. 28.04(12)).

The intention continues to be to have an informal and frank discussion of the case, but the *SCJ Rules* now require each party to be represented by someone with the authority to take a binding position on issues reasonably expected to arise at the conference (r. 28.05(6)). The rule provides that the presiding judge should make inquiries into any issue in order to promote a fair and efficient proceeding (rr. 28.05(9)–(10)) and to engage in resolution discussions with the parties (rr. 28.05(11)–(12)). Finally, the presiding judge may make

recommendations on a variety of issues affecting the conduct of the trial (r. 28.05(13)).

2.3 Case management judge

In 2011, Part XVIII.1 was added to the *Code*, authorizing the appointment of a case management judge in proceedings before either the Ontario Court of Justice or the Superior Court of Justice where the Chief Justice or Chief Judge (or his or her designate) determines that it is necessary for the proper administration of justice. It is anticipated that these provisions will be used primarily in cases involving lengthy and complex proceedings and/or in “mega-trial” cases.

Sections 551.1–551.7 set out the procedure for appointing and the powers of the case management judge. A case management judge may be appointed on application made by one of parties or on the court’s own motion, provided it is before jury selection or the presentation of evidence.

The case management judge can also be the trial judge (s. 551.1(4)). However, even if the case management judge is not the ultimate trial judge, under s. 551.3(1)(a)–(f), he or she may exercise the powers of a trial judge, including

- assisting the parties to identify witnesses to be heard;
- assisting the parties to make admissions and reach agreements;
- encouraging the parties to consider any matters that would promote a fair and efficient trial;
- establishing schedules and imposing deadlines;
- hearing guilty pleas and imposing sentence; and
- assisting parties to identify the issues at trial.

Paragraph 551.3(1)(g) further authorizes the case management judge to hold a hearing to adjudicate any issue that can be decided by a trial judge, including those related to

- disclosure;
- admissibility of evidence;
- the *Charter*;
- expert witnesses;
- severance of counts; and
- separation of trials on one or more counts when there is more than one accused.

A decision made by the case management judge is binding for the remainder of the trial, unless the court is satisfied that it would not be in the interests of justice (e.g., because fresh evidence has been adduced).

Section 551.7 authorizes joint hearings to be held in order to adjudicate issues relating to disclosure, admissibility of evidence, or the *Charter* in related trials that are being held in the same province before a court of the same jurisdiction. If the Chief Justice or Chief Judge (or his or her designate) determines that it is in the best interests of justice to hold a joint hearing, taking into consideration factors such as the similarity of the evidence in the related trials, a case management judge may be appointed to adjudicate the issue at a joint hearing for some or all of the related trials.

3. Attendance of the accused at trial

Where the alleged offence is a summary conviction offence, it is not necessary that the accused attend the trial. The *Code* provides that the accused may appear in person or by counsel or agent, although the court may “require the defendant to appear personally” and may issue a warrant for his or her arrest “if it thinks fit” (*Code*, s. 800).

In all other trials, presumptively, the accused is to be present at all times during the trial (s. 650(1)). However, there are some exceptions, such as s. 650(1.1), which permits the accused to be present by means of closed-circuit television at times when no evidence is being taken. This provision is often used to permit an accused who is in custody to appear via closed-circuit television from the jail for a “set date” or “remand” court appearance. Defence counsel may also appear on behalf of an accused with a designation in writing, except where evidence is being taken, a jury is being selected, an application for *habeas corpus* is being made, or the court orders otherwise (s. 650.01). Finally, the court may “permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper” (s. 650(2)(b)).

Where the accused misbehaves in court “by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible,” the court may order that the accused be removed (s. 650(2)(a)).

Sometimes, the accused is not a person. Where the accused is an “organization,” it “shall appear and plead by counsel or agent” (s. 620).

4. Arraignment

“Arraignment” is the formal reading of the charge to the accused and an inquiry by the court about how the accused pleads to each count. The arraignment is the legal beginning of the trial.

5. Plea

Once arraigned, the accused has several options when asked for a plea. It should be noted that it is preferable for the accused to enter his or her plea personally or, where counsel enters it on the accused’s behalf, at least to confirm that the accused agrees with and understands the plea as entered by counsel.

5.1 The guilty plea

A plea of guilty is a formal admission of all the elements of the offence charged. Accordingly, the client must understand what is being admitted and the potential penalties for the offence. Therefore, it is recommended that where an accused has indicated to counsel an intention to plead guilty, counsel should obtain written instructions that confirm that intention. The instructions should also set out the possible consequences of entering a plea. The accused should acknowledge that he or she is aware of the maximum penalty provided for by the *Code* and that the submissions of counsel as to the appropriate sentence may be rejected by the court (and that this is so even where there is a joint submission as to the appropriate sentence). Finally, the instructions should make it plain that the client understands that by pleading guilty he or she is forfeiting his or her right to a trial.

The *Rules of Professional Conduct* permit counsel to represent an accused on a plea of guilty only where the client “is prepared to admit the necessary factual and mental elements” (r. 4.01(9)). If the client maintains his or her innocence as to any element of the offence, counsel may not act on a guilty plea, even where the client wishes to do so, since this would mislead the court.

The court may accept a guilty plea only where it is satisfied that the plea is voluntary and that the accused understands that he or she is admitting all the essential elements of the offence, the nature and consequences of his or her plea, and that the court is not bound by any joint submission of counsel (s. 606(1.1)). Where there is any doubt about any of these issues or where the plea is equivocal in any way, the court should refuse to accept the guilty plea. While there is no duty imposed on a judge to inquire into the informed and voluntary nature of the plea (s. 606(1.2)), many judges conduct a brief inquiry by asking the accused a series of questions about the nature of the plea and the accused’s understanding of its consequences.

If this inquiry reveals that the accused is making an informed and voluntary plea, the judge will then typically hear a brief summary of the facts from counsel for the Crown. The accused will then be asked to confirm the accuracy of those facts. If those facts support the plea and the accused accepts them, a finding of guilt will follow.

However, the summary of the facts may make it clear that the facts do not support the plea. Moreover, the accused may refuse to accept some of the facts as read by the Crown. Where the evidence does not support the plea or where the accused refuses to admit facts supporting one or more of the elements of the offence, the trial judge should permit the accused to withdraw the plea.

If the accused admits sufficient facts to make out the offence charged but refuses to admit facts relating to some aggravating feature of his or her behaviour, for example, then the ordinary legal principles governing the proof of facts in criminal proceedings become applicable. The Crown will be asked whether it seeks to prove the disputed fact, and if so, a hearing is held to resolve the dispute. The Crown bears the burden of proving such disputed facts beyond a reasonable doubt. Alternatively, if the defence seeks to prove a mitigating factor that is contested by the Crown, the defence must provide evidence and prove the disputed mitigating factor on a balance of probabilities.

5.2 The not guilty plea

The accused may also plead not guilty. By doing so, the accused is putting the Crown to the proof of the alleged offence beyond a reasonable doubt and to the task of negating any defence that reasonably arises on the evidence. Thus, it will be seen that the plea of not guilty is not so much an assertion of innocence by an accused person as it is a declaration that the accused is holding the Crown to its onus of proof of its case.

Therefore, it is perfectly acceptable for counsel to act on behalf of an accused who has pleaded not guilty where the accused has in fact told counsel the accused is guilty of the offence charged. Counsel must be aware, however, of the provisions of r. 4.01(1) of the *Rules of Professional Conduct* that limit the ways in which such a case may be defended. For example, counsel must neither suggest that some other person committed the offence without an evidentiary link between that person and the offence charged nor call any evidence that the lawyer knows to be false. While counsel in this situation may argue that the Crown's evidence has failed to provide satisfactory proof that the accused is guilty of the offence, care should be taken not to suggest that someone else is responsible for its commission.

Where the accused has entered a plea of not guilty, he or she may change that plea to guilty at any time during the course of the trial.

5.3 Not guilty to the offence charged, but guilty to another offence

The accused has the option of pleading not guilty to the offence charged but guilty to “any other offence arising out of the same transaction, whether or not it is an included offence” (s. 606(4)). Typically, such a plea will be to what is known as a “lesser offence,” i.e., one of less seriousness. While the accused may make such a plea, the court may accept it only with the Crown's consent. Moreover, the court is not bound to accept the plea even where the Crown consents. Where either the Crown fails to offer its consent or the court rejects the plea of its own motion, the accused will be tried for the offence charged. Otherwise, the plea will be accepted, and the accused will be convicted of and sentenced for the lesser offence.

5.4 The special pleas

In rare cases, the accused may enter one of the four “special pleas” that are preserved in the *Code*: *autrefois acquit*, *autrefois convict*, pardon, and justification (ss. 607–612). The *autrefois* pleas represent the protection against what is popularly known as “double jeopardy,” which protection is also enshrined in s. 11(h) of the *Canadian Charter of Rights and Freedoms* (*Charter*). The plea of pardon is available to an accused who claims to have been pardoned for the offence charged through exercise of the Royal Prerogative. The plea of justification applies only to an accused charged with the offence of defamatory libel.

5.5 The refusal to plead

The accused who refuses to enter a plea will be deemed to have entered a plea of not guilty (s. 606(2)).

6. Jury selection

6.1 Qualifications of jurors

The *Code* delegates the responsibility for determining who may act as jurors to the provinces (s. 626(1)). In Ontario, the governing statute is the *Juries Act*.

6.2 Assembling the panel

In Ontario, the sheriff of the judicial district in which the trial is to occur has the task of assembling a group of prospective jurors. To do so, the sheriff sends letters summoning people to jury duty for a particular period of time. This group then comprises the jury panel from which the jurors for any particular case are chosen.

6.3 Challenging the panel

Where either the accused or the Crown is of the view that the panel has been assembled unfairly, they may challenge the jury panel. This challenge may be brought

only on one of the three following grounds: “partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned” (s. 629). While such challenges are rare, and succeed even more rarely, if one of the enumerated grounds is made out, the trial judge shall direct that a new panel be returned (s. 630).

6.4 Selecting from the panel

Section 631 provides that the names of each member of the panel shall be written on a separate numbered card and placed in a box and that the cards “be thoroughly shaken together.” Then, at the direction of the trial judge, the clerk of the court randomly draws a card from the box and reads out the number on each card as it is drawn. The prospective juror will step forward, and the clerk will confirm that the person is the person who is named on the card. In cases where it is necessary for the proper administration of justice, the judge may order the clerk to also read out the name on the card. This process of selecting cards is repeated until there is a sufficient number of prospective jurors to provide a full jury, allowing for orders for excuses, challenges, and directions to stand by.

Before the card selection process begins, the judge must decide whether it is advisable in the interests of justice to have one or two alternate jurors s. 631(2.1) or to have 13 or 14 jurors sworn, instead of the traditional 12 jurors (s. 631(2.2)).

6.4.1 Excusing jurors

At any time prior to the start of the trial, a prospective juror may be excused from jury duty on the grounds of

- having a personal interest in the case;
- having a relationship with the judge, the Crown, the accused, counsel for the accused, or a prospective witness; or
- personal hardship or any other reasonable cause that warrants excuse (s. 632).

6.4.2 Peremptory challenges

Each prospective juror is then asked to step forward in turn. The clerk then says, “Juror, look upon the accused, accused look upon the juror.” At this time, the accused or the Crown

- may indicate that they are content with the prospective juror;
- may make a challenge for cause (see below); or
- may make a peremptory challenge to the prospective juror (for which the procedure is set out in s. 635).

A peremptory challenge is simply an objection to that person’s inclusion on the jury in the absence of having to state any reason for so objecting. Each of the parties has a number of peremptory challenges that they have the right to exercise (The number of challenges varies depending on the offence being tried, the number of jurors selected, and the number of accused (ss. 634(2)-(4))).

With respect to the first juror, the accused must declare first whether he or she challenges. Thereafter the Crown and the accused are called upon alternately to declare first whether a juror is challenged or accepted (s. 635). Counsel must indicate either “challenge for cause” or “challenge” or “content.” If both the accused’s counsel and the Crown are content, then the juror is sworn and takes a seat in the jury box (s. 631(4)). This process is repeated until all of the jurors are selected or until the first group of people drawn is exhausted, at which time the initial procedure of drawing cards from the box is repeated.

As mentioned above, if the presiding judge considers it advisable in the interests of justice, one or two alternate jurors may be selected s. 631(2.1). An alternate juror shall attend at the commencement of the presentation of the evidence, and if there is not a full jury present, an alternate juror shall join the jury (s. 642.1).

Recent amendments to the *Code* now permit 12, 13, or 14 jurors to be selected (s. 631(2.2)) and to be present to hear the evidence on its merits. If there are more than 12 jurors remaining after the judge’s charge to the jury, the judge shall identify the 12 jurors who are to retire to consider the verdict. The selection procedure is set out in s. 652.1(2) and requires that the number of each juror be written on cards that are then placed in a box that is thoroughly shaken and from which one card, if 13 jurors remain, or two cards, if 14 jurors remain, are selected. The judge shall discharge any juror whose number is drawn.

6.4.3 Challenge for cause

In addition to the peremptory challenge, a potential juror may be challenged for cause. Section 638 sets out the “causes” that may justify such a challenge: the name of the juror does not appear on the panel, the juror has been convicted of a criminal offence and sentenced to a term of imprisonment exceeding 12 months, the juror is physically unable to perform the duties of a juror, or the juror does not speak the official language in which the trial is to be conducted. Most importantly, however, s. 638 provides for a challenge for cause where the “juror is not indifferent between the Queen and the accused.”

The challenge for cause procedure allows the party seeking the challenge to question the potential jurors in order to discover evidence of partiality. To embark on a challenge for cause, the accused or the Crown must apply to the court and establish that there exists a realistic potential for the existence of partiality on a ground sufficiently articulated in the application.

Historically, the challenge for cause procedure has been used most often in cases where there has been substantial pre-trial publicity and either of the parties has been able to establish that it is possible that pre-trial publicity had prejudiced the minds of prospective jurors. In recent years, the challenge for cause procedure has been used repeatedly to permit counsel for an accused who is a member of a racial minority to ask a limited number of questions of prospective jurors about racial prejudice.

The *Code* sets out a procedure for dealing with challenges for cause (s. 640). Where one of the parties indicates that they intend to challenge a particular person for cause, counsel will be permitted to ask a limited number of questions of that prospective juror. The decision as to whether the challenge for cause has been made out (the challenge is “true”) is left to two “triers.” The triers are the two most recently sworn jurors or, if there are no sworn jurors, two other people who are present in court and appointed by the judge to rule on the challenge. Where these triers find that the challenge is “not true” then the person challenged will be sworn into the jury (unless one of the parties exercises a peremptory challenge). On the other hand, if the challenge is found to be “true,” then the person challenged is excused. Where the triers are unable to agree as to whether the challenge is true, the court may discharge them from deciding the question and may direct two other persons to make the determination.

6.5 The juror who cannot continue

During the course of the trial, if one of the jurors is unable to continue to act as a juror “by reason of illness or other reasonable cause,” then that juror will be discharged (s. 644(1)). Where that illness or other reasonable cause comes to light before the jury has heard any evidence, the trial judge may select a new juror by drawing a name from the panel (s. 644(1.1)) or by substituting an alternate in accordance with s. 642.1. If the jury has begun to hear evidence, the ill juror is discharged but not replaced. The trial judge has a discretion to proceed with 11 or 10 jurors, but must declare a mistrial if the number of jurors falls below 10 (s. 644(2)).

7. The opening addresses

After the accused has been arraigned and pleaded in front of the jury, the trial judge will instruct the jury as to the basic procedure that will be followed during the trial and their role in it. Then, Crown counsel will be invited to make an opening address to the jury outlining the case that it intends to present. This address is designed to help the jury follow the evidence. It is to be an impartial summary of the evidence that the Crown expects the jury will hear and not an argument about the guilt of the accused. Moreover, Crown counsel should not refer in their opening to any evidence whose admissibility is yet to be determined.

Defence counsel has no right to make an opening statement immediately after Crown counsel’s opening. However, in cases that are expected to be complex or lengthy, counsel for the accused have been permitted to make an opening statement immediately after the opening address of Crown counsel.

In judge-alone trials, while opening statements are less common, in cases of any complexity, the Crown will often request and be granted the opportunity to make an opening statement in order to help the judge understand the case and follow the evidence as it unfolds.

8. The case for the Crown

The Crown calls evidence first in a criminal trial. Since the Crown bears the burden of proving the case against the accused beyond a reasonable doubt, it must through its witnesses lead evidence of each of the elements of the offence(s) charged, otherwise the court will order a directed verdict (see below) or the accused will be acquitted. The Crown will also want to lead evidence that negates any available defences.

Evidence is usually presented to the court by the calling of witnesses to testify under oath or through the filing of exhibits such as documents, photographs, expert reports, or physical items (e.g., a firearm or drugs seized during the police investigation). The clerk of the court is responsible for ensuring that all filed exhibits are properly identified on the record by counsel, numbered, labelled, and securely stored in order to preserve and protect the continuity of the exhibits for both the trial and any subsequent appellate review proceedings. Once an exhibit is filed during a court proceeding, the clerk of the court should not release the exhibit to anyone outside of the courtroom, such as counsel or members of the media, unless a court order authorizes the release of the exhibit. Typically at the conclusion of the trial, the exhibits are returned to the police to be dealt with by law (e.g. returned to the lawful owner, preserved for any

further court proceedings, or destroyed or forfeited in accordance with a court order).

The Crown need not call all available relevant evidence, but may instead call any relevant and material evidence that it intends to rely upon. The Crown is not permitted to call evidence for which the sole purpose is to bolster the credibility of its own witnesses. This is often referred to as the rule against oath-helping.

The Crown calls each of its witnesses and examines them in chief. During this examination, at least on controversial matters, the Crown is generally not permitted to ask leading questions. Leading questions will usually be permitted on introductory and other uncontroversial matters. Except in limited circumstances, the Crown is not permitted to cross-examine its own witnesses or seek to impeach the credibility of its own witnesses. The *Canada Evidence Act (CEA)* does, however, permit cross-examination of one's own witness in two situations: where the witness is declared "adverse" and where the witness has made a prior statement that is inconsistent with his or her testimony at trial (s. 9).

As the Crown completes the examination-in-chief of each witness, the defence is then permitted to cross-examine. Generally speaking, the defence should cross-examine on any points that the defence intends to dispute. Following the cross-examination, the Crown will have a limited right of re-examination on points that were raised in the cross-examination that deal with new matters or in respect of matters raised in the examination-in-chief that require some clarification as a result of the cross-examination. As with the examination-in-chief, leading questions are not permitted in the re-examination. With leave of the court, counsel will be permitted to adduce new evidence in the re-examination, in which case defence counsel will be permitted to cross-examine on the new facts.

Canadian law contemplates a very limited role for the trial judge to question witnesses. Questioning by the trial judge is ordinarily limited to clarification of some issue and not to the adducing of new evidence. Most judges will ask their question(s) after the examination by counsel is completed and then permit counsel to ask any further questions that may arise from the judge's question(s).

9. Admissions

While facts are usually established by evidence at a criminal trial, the *Code* permits the accused to admit "any fact alleged against him for the purpose of dispensing with proof thereof" (s. 655).

10. Certain evidentiary matters

Counsel must ensure throughout the trial process that an adequate evidentiary record is created for the purpose of supporting the submissions of counsel and for any subsequent appellate review.

The rules of evidence are, of course, many and complex. A lengthy discussion of the law of evidence in criminal trials is beyond the scope of this chapter, but there are several important rules of evidence that bear discussion here.

10.1 Expert evidence

Expert witnesses may be called by either the prosecution or the defence to give opinion evidence to assist the trier of fact. The four-part test for admitting expert opinion evidence is set out in the Supreme Court's judgment in *R. v. Mohan*. The party tendering the evidence must establish

- relevance;
- the need to assist the trier of fact;
- the absence of any exclusionary rule; and
- that the expert is properly qualified.

These issues will be addressed during a *voir dire* in which the party proposing to call the expert has the burden of satisfying the *Mohan* test. Where the test is met, the expert may be called and may provide relevant opinion evidence within the expert's sphere of expertise. Moreover, that opinion may be based on hearsay evidence.

Where the expert does rely on hearsay, unless that hearsay evidence is admissible pursuant to one of the recognized exceptions to the hearsay rule, is otherwise proved by admissible evidence, or is deemed sufficiently reliable, the trier of fact must not consider the hearsay evidence for the truth of its contents. In addition, the trier of fact must consider that the expert's opinion is entitled to diminished weight where the data upon which it relies is unproven at trial.

Non-expert witnesses are presumptively not entitled to offer opinion evidence or to repeat hearsay. There are, of course, exceptions to both of these rules. Despite the presumption against it, lay opinion evidence based on the personal knowledge and observation of the witness is routinely admitted with respect to a variety of recurring issues, including identification, handwriting, impairment, emotional condition, age, and speed. The hearsay rule has many exceptions, and a discussion of them is beyond the scope of this chapter.

10.2 Confessions

Prior out of court statements of the accused made to a person in authority (typically, a police officer) are admissible at the instance of the Crown. However, pursuant to the common-law confessions rule, they may be admitted (or used in cross-examination of the defendant) only where the Crown proves that the statement was made voluntarily. Proof of voluntariness is undertaken during a *voir dire* in which the Crown bears the burden of proof beyond a reasonable doubt. In a jury trial, the *voir dire* will be held in the absence of the jury, and no mention of the existence or contents of the statement should be made in the presence of the jury unless and until the trial judge has ruled it voluntary.

In order to prove voluntariness, the Crown must adduce evidence as to all of the circumstances surrounding the taking of the statement. A statement will be found to be voluntary where the defendant has had the opportunity to make a meaningful choice to speak by operation of his or her own free will. There are four kinds of cases in which confessions have been found to be involuntary: confessions made pursuant to threats or promises made by the police, confessions made by an accused who did not have an “operating mind,” confessions made as a result of police “oppression,” and lastly, confessions resulting from police using “dirty tricks” that would “shock the community” such that the admission of the statement into evidence would bring the administration of justice into disrepute (*R. v. Oickle*).

Counsel should also know that confessions may be excluded from the evidence pursuant to s. 24(2) of the *Charter*. In that case, however, the defence bears the burden of demonstrating that the police violated one or more of the accused’s *Charter* rights (typically the right to counsel provisions in s. 10(b) of the *Charter*) and that the admission of the evidence would bring the administration of justice into disrepute.

Once admitted, statements of the defendant are admissible for their truth both for and against the defendant. Subject to the editing of unfairly prejudicial comments, the entire statement of the accused should be admitted into evidence, including any exculpatory portion of it.

Prior exculpatory statements of the defendant are generally not admissible at the instance of the defendant. In that case, they are generally excluded pursuant to the rule against prior consistent statements. There are exceptions to this rule, however. For example, the defendant’s prior statement may be admitted to rebut the Crown’s allegation of recent fabrication.

10.3 Business records and other documents

Counsel must ensure throughout the trial process that an adequate evidentiary record is created for the purposes of supporting the submissions of counsel and for any subsequent appellate review.

Generally speaking, documents are hearsay and inadmissible for their truth unless they fall under some exception to the hearsay rule. In a criminal trial, business records will be admissible for the truth of their contents either pursuant to s. 30 of the *CEA* or pursuant to the common-law business-records exception to the hearsay rule. In addition, any documents, including business records, may be admitted pursuant to the “documents in possession” exception to the hearsay rule. Each rule is different, and counsel must understand and apply each of them separately.

Under s. 30 of the *CEA*, business records will be admissible for their truth where it is established that the records contain information that would be admissible were it given orally by a witness and that the records were “made in the usual and ordinary course of business” (s. 30(1)). Typically, the party tendering business records under this section either calls or offers the affidavit of a witness from the business in question who attests as to the authenticity of the records and to the manner in which they were prepared, stored, and reproduced (ss. 30(4) and (6)). In addition, it is important to note that no record is admissible under this section unless the party tendering it has provided all other parties at least seven days’ notice of its intention to produce the record (s. 30(7)).

Section 30 of the *CEA* has been found to cover a broad spectrum of documents from a similarly wide variety of “businesses” (the section defines “business” as including, among other things, “any undertaking of any kind”). What follows is a non-exhaustive list of the kinds of documents that have been admitted into evidence pursuant to this section: account statements, telephone records, inventory sheets, hospital records, customs records, way-bills, receipts, invoices, and correspondence.

Counsel should be aware that the admissibility of evidence in quasi-criminal prosecutions under the *Provincial Offences Act* is governed by Ontario’s *Evidence Act (EA)*. The provincial statute contains its own business records provision (s. 35), which is not exactly the same as the federal provision and arguably sets out a higher threshold for admissibility, given that it requires that the record be created in “the usual and ordinary course of business” and that it be “in the usual and ordinary course of business to make” the record in

question at the time of the transaction (s. 35(2)). The provincial statute also requires seven days' notice as a precondition to admissibility (s. 35(3)).

The common-law business-records exception to the hearsay rule applies to prosecutions under both federal and provincial statutes and will permit the admission of a document into evidence where it is a record containing an original entry made contemporaneously in the routine course of business by a person who has a duty to make the record and has no motive to make a false record. Under the common-law rule, no notice is required.

Finally, where it can be established that a document was in the possession of the defendant, the document may be admitted to establish the defendant's knowledge of the contents of the document. In addition, the document will be admitted for the truth of its contents where it is established that the defendant in any way recognized, adopted, or acted upon the document.

11. The directed verdict

At the conclusion of the Crown's case and before the defence decides whether to call a case, defence counsel may make an application for a directed verdict of acquittal on the basis that the Crown has failed to lead sufficient evidence on each of the elements of the offence charged such that it would be unreasonable to convict on the basis of the evidence led to that point. The test to be applied is whether there is any admissible evidence that could, if believed, result in a conviction. In other words, at this stage, questions of the weight, credibility, and reliability of the evidence are set aside. So, where there is before the court any admissible evidence that, if believed by a reasonable and properly instructed jury, would justify a conviction, the trial judge must not direct a verdict of acquittal. If there is no evidence of one or more of the elements of the offence, the accused must either be acquitted or directed to continue to stand trial on an included offence.

12. The case for the defence

The *Code* provides for an opening statement by counsel for the defence after the Crown has closed its case and before the defence begins calling evidence (s. 651(2)). As noted above, some judges have permitted defence counsel to make opening statements immediately following the Crown's opening address and before the Crown has called any evidence. Although a matter of some debate, the best approach is probably to decide on a case-by-case basis which of these options will provide the greatest advantage to the accused client.

When defence counsel does choose to open to the jury, the opening should be an impartial account of the

evidence that counsel expects will be given by the defence witnesses. Some counsel will also use the opening to disclose, where appropriate, that the accused has a prior criminal record in order to diminish the negative impact that the record will have on the jury's opinion of the accused. An accused person's prior criminal record can only be mentioned by the prosecution if the accused's character is put in issue by the accused or if the accused takes the stand. Therefore, defence counsel will usually only mention the existence of a prior record where the intention is to call the accused at trial. Under the rule set out in the Supreme Court's judgment in *R. v. Corbett*, the trial judge does, however, have a discretion to exclude evidence of previous convictions in an appropriate case, where allowing the accused's prior criminal record to be introduced would undermine the right to a fair trial.

Determining what, if any, evidence the defence will call is an important decision to be made by defence counsel, in consultation with the accused. Any admissions that have been made by the accused to his or her counsel may impose strict limitations on how the defence may be conducted, and therefore, the accused should be made aware of this in advance. For example, defence counsel cannot adduce evidence or suggest that some other person committed the offence or call any evidence which defence counsel believes to be false, by reason of the accused's admission. Similarly, the defence cannot set up an affirmative case inconsistent with such an admission, for example, calling alibi evidence intended to show that the accused could not have done or, in fact, has not done the act (*r. of Professional Conduct*, Rule 4.01).

It is permissible and proper for defence counsel to prepare any defence witness, including the accused, for examination-in-chief and cross-examination so that the witness will know what to expect in court.

Crown counsel is entitled to cross-examine any witness called by the defence, including the accused. Moreover, counsel for a co-accused may cross-examine a defence witness called by another accused even if the witness is favourable to the defence of both accused. The rules of evidence place certain limits on the scope of cross-examination of the accused, and Crown counsel must be aware of these limits. Subject to certain limited exceptions, the prosecution is not permitted to cross-examine the accused on other acts of misconduct or discreditable conduct for the purpose of showing that by reason of the accused's bad character, the accused should not be believed or that the accused is likely to have committed the offence. Counsel for the accused may re-examine witnesses subject to the same limitations as Crown counsel was subject to during re-examination. The trial judge does, however, have the discretion to permit

new matters to be adduced in re-examination. In those circumstances, the judge will permit opposing counsel to re-cross-examine on these new matters only.

13. Reply evidence

Occasionally the Crown will be permitted to call reply evidence after the defence has closed its case. The circumstances in which reply (or rebuttal) evidence may be adduced are limited. Generally speaking, such evidence is only admissible for non-collateral matters raised in the defence case for the first time. If the matter is one that ought to have been anticipated by Crown counsel, the Crown will not be permitted to “split its case.”

14. Surrebuttal

The trial judge also has the discretion to admit defence evidence in surrebuttal to rebut evidence led in reply by the Crown. Such evidence, if permitted, must be strictly limited to responding to the rebuttal evidence adduced by the prosecution.

15. Counsel’s closing addresses

Section 651 sets out the order in which counsel address the jury at the close of the evidence. Where a defence has been called, counsel for the accused must address the jury before Crown counsel. It is only if the accused does not elect (or where being tried jointly, none of the accused elects) to call defence evidence that the Crown is required to address the jury first. Once counsel’s jury address is complete, there is no right of reply by any counsel.

In their jury addresses, counsel should avoid the expression of personal opinion and suggestions not supported by the evidence. As well, counsel must not make suggestions that they know to be untrue, even if the suggestion would appear to be supported by the evidence adduced at trial and heard by the jury. Counsel’s closing address must not be inflammatory, that is, it should not be an appeal to prejudice or passion rather than to reason. In addition, s. 4(6) of the *CEA* prohibits Crown counsel from commenting on the fact that the accused or the accused’s spouse did not testify. Counsel for the accused is free to tell the jury that the accused was under no obligation to testify. In fact, in a joint trial, defence counsel may comment on the fact that a co-accused did not testify.

In closing to a jury, it is best to avoid any extended reference to the law that applies to the case, since explaining the law to the jury is the domain of the trial judge. In a trial by judge alone, submissions on law,

where applicable, are often interwoven with the evidentiary facts from the trial.

16. Charge to the jury

16.1 The pre-charge conference

Many judges invite counsel to make submissions concerning what ought to be included in the charge to the jury. A recent addition to the *Code* has given this practice statutory authority (s. 650.1) but has not made them mandatory. In any event, such conferences are becoming commonplace. In order to assist the court and so that effective objections might be made to the charge, counsel must be aware of at least the minimum requirements of a judge’s charge to a jury.

16.2 Contents of the charge to the jury

Case law has laid down a number of the elements necessary for a judge’s charge. While a non-exhaustive list of some of those elements follows, it should be noted that the necessary components of any charge to the jury will frequently be driven by the case’s peculiar facts:

- The trial judge must give the jury the law as it relates to a criminal trial generally, including, among other things, instructions concerning the burden and standard of proof, the presumption of innocence, the requirement of unanimity of verdict, and similar matters.
- The trial judge must give the jury the law as it relates to the specific offence, including instructions on the elements of the offence and any included offences. It will also include instructions on any defences that are reasonably raised by the evidence, whether or not those defences are relied upon by the accused.
- The trial judge must relate the evidence to the elements of the offence and the particular defences raised.
- The trial judge must summarize the position of the Crown and the position of the defence.
- The trial judge should review the evidence, but the review need not be exhaustive.
- The trial judge may comment on the evidence, but if he or she chooses to do so, then the trial judge must make it clear that it is for the jury to determine the facts and that the jury is required to disregard any opinion of the trial judge that does not accord with the jury’s view of the evidence.
- Like the Crown, the trial judge, pursuant to s. 4(6) of the *CEA*, is not permitted to comment on the fact that the accused or the accused’s spouse did not testify.

16.3 Objections to the charge to the jury

After the charge to the jury has been delivered, counsel will be given an opportunity to object to the charge and to ask the judge to correct errors or omissions (either factual or legal) in the charge by re-instructing the jury. While the failure to object at trial is not necessarily fatal to raising the point on appeal, it is a matter that the Court of Appeal would consider should the case proceed to an appeal. This is especially so where it is alleged for the first time on appeal that a piece of evidence that was vital to the defence was not alluded to by the trial judge in the charge to the jury.

17. Jury deliberations

Once the charge to the jury (and any re-charge) is complete, the jury is sequestered until they reach a verdict or are unable to agree, in which case a mistrial must be declared. Where the jury reports that they cannot agree, the trial judge is entitled to exhort the jury to try to reach a verdict, provided the judge uses language that avoids coercion and does not constitute an interference with the jury's right to deliberate uninfluenced by extraneous pressures. The language used by the trial judge to exhort the jury should avoid conveying to any juror that despite the juror's doubts, the juror is entitled to simply give way and agree with the majority. The jury should not be allowed to deliberate too far into the night, except in exceptional circumstances.

Any questions from the jury must be disclosed in open court in the presence of the accused, and counsel must be given an opportunity to make submissions about how the questions should be answered. The jury also has the right to have portions of the evidence read back; however, the trial judge must ensure that the jury hears any other part of the witness's testimony that may qualify the evidence requested by the jury. It is not necessary that all of the witness's evidence be read back where the jury has requested only a portion of it.

18. The verdict

The jury is required to render a verdict on each count in an indictment. If the jury finds that the full offence is not

proven, a verdict of guilty on any proper included offence or on an attempt to commit the offence may also be returned. If the jury's verdict is ambiguous or there is reason to doubt that the verdict is unanimous, the trial judge may make inquiries so that the trial judge is satisfied that any verdict will indeed be unanimous, complete, and expressive of the actual findings of the jury. There is no requirement that the jury be polled, that is, that each juror be asked if he or she agrees with the verdict as delivered by the foreperson. However, most judges will accede to a request that the jury be polled.

Counsel should be aware that, pursuant to s. 649, it is a criminal offence for a jury member to disclose any information relating to the jury's proceedings when the jury was absent from the courtroom that was not subsequently disclosed in the courtroom.

19. Mistrial

Section 653 states that where a judge is satisfied that a jury is unable to agree on a verdict and that further detention of the jury would be useless, the judge may declare a mistrial, discharge the jury, and adjourn the case to a date for a new trial.

A mistrial can, of course, occur for reasons other than the jury's inability to agree on a verdict. For example, where the number of jurors drops below 10 or where highly prejudicial evidence is introduced before the jury, the trial judge has the discretion to declare a mistrial. As well, a judge conducting a trial alone has jurisdiction to declare a mistrial and may do so, for example, because the judge feels it necessary to disqualify himself or herself from continuing the trial.

In the case of a mistrial, unless the court is satisfied that it would not be in the interests of justice, rulings that were made during the trial relating to disclosure, admissibility of evidence, or the *Charter* are binding on the parties in any new trial if the rulings are made or could have been made before the stage at which the evidence on the merits is presented (s. 653.1).

1. Objectives of sentencing

Section 718 of the *Criminal Code (Code)* together with ss. 718.1 and 718.2 provide the framework for all adult sentencing hearings by defining the objectives and principles of sentencing.

718.— The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Deterrence, the effort to discourage future criminal behaviour, may be general or specific. General deterrence is aimed at deterring the community at large by demonstrating the negative consequences of engaging in the criminal behaviour. Specific deterrence is an effort to ensure the offender is discouraged from re-offending.

The objectives set out in s. 718 are at the root of all sentencing. Which objectives are most pressing in any specific case (a function of the offence itself, the offender's history, the impact on the community, and many other factors) will often determine the outcome of the proceedings. The objectives provide a framework for counsel, when addressing the available and realistic sentencing options, to advocate for a particular sentence as the most appropriate in the circumstances.

2. The principles of sentencing

2.1 Proportionality

Proportionality is the fundamental principle of sentencing. Section 718.1 of the *Code* states: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." This elegantly captures virtually all aggravating and mitigating factors relevant to determining the appropriate sentence,

including the particular facts of the offence, the background and previous conduct of the offender, as well as the moral culpability of the offender.

Section 718.2 sets out other principles of sentencing including the following:

- **Parity:** Despite the need for an individual approach to sentencing, like offenders convicted of like offences should not be subject to widely disparate sentences.
- **Totality:** Where an offender is being sentenced for more than one offence or subsequent to an existing sentence, the sentencing judge must consider the combined sentences imposed to avoid a sentence that is unduly long or harsh.
- **Restraint:** The least restrictive sentence that meets the goals of sentencing and is appropriate in the particular circumstances ought to be imposed. This is particularly true of custodial sentences. It is preferable for a non-custodial sentence to be imposed if one can be fashioned that is appropriate in the circumstances. This principle applies with particular emphasis to Aboriginal offenders (s. 718.2(e)). Sentencing judges are encouraged to adopt a more flexible approach to sentencing Aboriginal offenders that embraces restorative justice.

Beyond these general principles, there are a number of more specific circumstances pertaining to the offence or offender that will be considered either mitigating or aggravating in fashioning a sentence that is proportionate and achieves the goals of sentencing. These are reviewed below with those factors specifically referred to in s. 718.2 noted with reference to the applicable subsection.

2.2 Factors pertaining to "the degree of responsibility of the offender"

2.2.1 Criminal record

A criminal record is an aggravating factor but may mean little if the convictions on the record are particularly dated and/or unrelated to the current offence. A lengthy record will raise concerns that the offender cannot be deterred and may not be able to successfully complete any period of probation or conditional sentence. The record may lead the court to conclude that the public needs to be protected from the offender.

The length of any previous sentence imposed for a similar offence will often serve as the low end of the

range for the current offence; that is, an offender will not usually receive a lesser sentence than previously imposed for essentially the same offence.

If an offender was on probation or parole at the time the offence was committed, it will be treated as an aggravating factor. The breach of any other court order—for instance a bail order, driving prohibition, or weapons prohibition—will also be considered aggravating.

2.2.2 Motive

A crime committed for no purpose or out of greed is treated as more aggravating than one committed under trying, personal circumstances. Perhaps the best example of this is one who sells drugs to support a habit in contrast to the commercial drug dealer who does so purely for profit. A motive of hate, bias, or prejudice (by virtue of race, nationality, language, religion, sex, age, or disability) is an aggravating factor (s. 718.2(a)(i)).

2.2.3 Behaviour post-offence

An accused's efforts to rehabilitate prior to sentencing will be viewed as mitigating. When the apparent cause of the criminal conduct is readily identifiable (such as a drug or alcohol dependency), progress in dealing with the problem can have a significant impact on sentencing.

Voluntary restitution or compensation to the victim will also be a mitigating factor.

On the other hand, an offender who reoffends or breaches a court order between the time of being charged and the time of being sentenced will be viewed as still in need of deterrence and rehabilitation.

2.2.4 Age

Youth (immaturity) is a mitigating factor. Greater emphasis will be placed on specific deterrence and rehabilitation in the case of youthful offenders, particularly those who are first offenders. Custody and other punitive sanctions are less likely to be imposed. The advanced age of an offender (frequently associated with health complications) may also be treated as a mitigating factor.

2.2.5 Guilty plea

A guilty plea is an expression of remorse and saves the court significant resources. On these bases, it is treated as a mitigating factor. On the other hand, it is an error for a judge to treat the fact that the accused had a trial as an aggravating factor.

2.2.6 Cooperation with the authorities

An accused that cooperates with the police or Crown will be treated more leniently. This is a particularly potent factor in the case of drug “mules” that are ordinarily subject to very harsh sentences. If they participate in a police orchestrated delivery of the drugs following their arrest, they may be able to secure a non-custodial sentence that would otherwise be unavailable.

2.2.7 Mental illness

Mental illness that falls short of justifying a finding of not criminally responsible by reason of mental disorder is a relevant factor on sentencing. It may be mitigating or aggravating, depending on the specific circumstances. Greater emphasis will be put on rehabilitation and protection of society, if needed, when sentencing such an offender, with less emphasis on general deterrence and denunciation.

2.3 Factors pertaining to “the gravity of the offence”

2.3.1 The range

While the gravity of the offence is not really an aggravating or mitigating factor, it is no doubt the most important single factor in the mix of factors considered in determining the fit sentence.

For all offences, there is a range of appropriate sentences not necessarily reflected by the minimum and maximum sentences provided for in the *Code*. In Ontario, the range for any specific offence is established informally over years of jurisprudence from both sentencing judges and the appellate courts. For some exceptional offences, a more formal “tariff” has been set by the Court of Appeal—sentences for those convicted of importing narcotics is the best example. Some other provinces rely on such well-defined “tariffs” more widely than Ontario. Tariffs, and less formal but recognized “ranges,” assist sentencing judges in achieving some consistency in the treatment of offenders but must not impede the individualized nature of all sentencing decisions.

2.3.2 Abuse of trust

An offence involving an abuse of a position of trust or authority is an aggravating factor (s. 718.2(a)(iii)). This applies to employees who abuse the trust of their employers. This also applies to those who commit sexual offences against those over whom they have some authority. Any abuse against a child under 18 is also an aggravating factor (ss. 718.01 and 718.2(a)(ii.1)).

2.3.3 Domestic offences

Under s. 718.2(a)(ii), an offence that involves abuse of one's spouse is an aggravating factor.

2.3.4 Planning and deliberation

All planned and deliberate criminal activity is treated more seriously than impulsive behaviour.

2.3.5 Duration

An offence that takes place over a prolonged period of time is indicative of a conscious and deliberate choice to engage in the activity and, thus, treated more seriously.

2.3.6 Magnitude or profitability

Some offences occur on a larger scale than others. This is particularly true of drug offences and commercial crime. The crack dealer who traffics a gram will be treated with considerably more leniency than his or her colleague who traffics in kilograms.

2.3.7 Prevalence

The prevalence of a particular offence in the community may indicate a need for general deterrence, and thus, the offence may attract a harsher sentence.

2.3.8 Violence and the use of weapons

All violence and use of weapons during the commission of an offence is considered aggravating and will result in greater emphasis being placed on the objectives of protection of the public, denunciation, and general deterrence. The use of a real or imitation firearm in the commission of an indictable offence attracts an additional minimum sentence of at least one year's imprisonment. This additional minimum sentence may be a function of the particular offence, as it is for robbery (s. 344), for instance, or the use of the firearm may be the subject of a separate charge pursuant to s. 85 of the *Code*.

2.3.9 Terrorism and organized crime

Offences involving terrorism or a manifestation of "organized crime" are treated as more serious (ss. 718.2(a)(iv)–(v)).

2.3.10 Vulnerability of the victim

Offences committed upon those who are particularly vulnerable are treated more harshly. Vulnerable victims include those who are young or old, or sick or disabled, or those who, through their employment, are put at risk, including police officers, taxi drivers, and convenience store clerks.

2.4 Other relevant factors

2.4.1 Delay in the proceedings and other Charter breaches

Delay between the time of the offence and the trial (that falls short of qualifying as a breach of the accused's right to be tried within a reasonable time under s. 11(b) of the *Canadian Charter of Rights and Freedoms (Charter)*) may be treated as mitigating. The accused must not be responsible for the delay.

In circumstances where there is no other available remedy, it may be appropriate for a lesser sentence to be imposed as a result of the offender's *Charter* rights having been breached in the course of the investigation or prosecution.

2.4.2 Pre-trial custody

When an accused is detained in custody pending the trial on a particular offence, the sentencing judge must consider this "dead time" in determining the fit sentence. The rationale for this is two-fold. First, time spent in custody pre-sentence is "worth more" in the calculation because that time is not subject to s. 127 of the *Corrections and Conditional Release Act (CCRA)*. Section 127 of the *CCRA* entitles most offenders to release from custody after they have served two-thirds of the sentence (e.g., an accused who has been detained awaiting trial for 30 days has been in custody for 30 days, whereas an offender who is sentenced to 30 days' incarceration will spend 20 days in custody). Second, pre-trial custody is spent in detention where conditions are worse and there are no or few programs available as there would be in a correctional facility. A sentencing judge may deduct time from a mandatory minimum sentence in order to give credit for pre-trial custody.

This credit can be given to a maximum of one day for each day spent in custody prior to sentencing, unless there are circumstances that justify additional credit. The maximum credit that can be given is 1.5 days for every day spent in pre-sentence custody. Enhanced credit cannot be given if a detention order was issued by the justice at the bail hearing as a result of previous convictions or where the accused was detained after a hearing pursuant to s. 524 where there was a breach of a release order. People charged prior to the coming into force of the *Truth in Sentencing Act* (Bill C-25) on February 22, 2010, may still be entitled to more credit for their pre-sentence custody. Customarily, pre-sentence custody was credited at two days for every day served.

The court must give reasons for any additional credit that is granted.

2.4.3 Pre-trial bail conditions

A sentencing judge should consider the amount of time, if any, that the offender was subject to very restrictive bail conditions (house arrest) while awaiting trial in fashioning the appropriate sentence.

3. Sentencing organizations

Section 718.21 of the *Code* sets out factors that the court must take into account when sentencing an organization rather than an individual. Considerations particular to organizations include any advantage the organization received by virtue of the offence, the cost to the public of investigating and prosecuting the offence, any other punishments imposed upon the organization or individuals within it, and the impact of the sentence on the continued economic viability of the organization and its role as an employer.

Organizations may be subject to a maximum fine of \$100,000 for a summary conviction offence. There is no maximum fine for indictable offences (s. 735(1)). An organization may also be given probation (s. 732.1(3.1)–(3.2)). There is no prohibition against ordering a corporation to pay restitution. Conditions may be designed to ensure that the organization is adequately addressing and correcting the underlying causes of the criminality by way of policies, standards, and procedures; by providing for increased accountability within the organization; and by communicating to the public the conviction and steps taken to reduce the likelihood of re-offence. An organization cannot be sentenced to a term of imprisonment or given a conditional sentence.

4. The sentencing hearing

4.1 The role of counsel

Sentencing hearings may have enormous practical results for the offender. The role of defence counsel in the sentencing proceeding is fairly straightforward—to advocate for the best possible sentence. While this is almost always the least restrictive sentence, given the various forms sentences may take, defence counsel must make certain they know the particular needs and capabilities of the offender and ensure they are seeking the sentence best suited to the particular client. This process must begin with a detailed interview with the client.

Defence counsel should prepare their clients by advising them of the legally available sentences as well as what they can realistically expect in the specific case. This will be of particular importance when an offender may have to step into custody at the conclusion of the hearing. He or she will need time to arrange childcare, alert employers, etc. Counsel must be very careful to ensure

the client knows that the ultimate decision is that of the sentencing judge, and the court may impose a sentence that exceeds what the Crown is asking for.

Crown counsel represents the public. While they must ensure that the victim is given an opportunity to be heard at the hearing, it is not their role to advocate for the sentence considered appropriate by the victim, but to pursue a sentence in the best interests of the community in light of all of the circumstances.

4.2 Evidence

Under s. 723, the strict rules of evidence do not apply to sentencing hearings. The sentencing judge may accept hearsay evidence that is credible and trustworthy. As a result, the hearing is often considerably less formal than trial proceedings. Counsel will often advise the court of the personal circumstances of their client by way of oral submissions or filing letters from employers and other supporting documentation without objection from the Crown.

4.3 The established facts of the offence

When sentencing follows a trial by judge alone, the judge will have made specific findings of fact, and the sentence will be based on those findings. When the conviction follows a jury trial, the factual basis of the conviction may be uncertain. The judge must accept all facts necessarily implied by the jury's verdict. The judge may also need to make findings of fact not addressed by the verdict. The judge may not rely on any aggravating fact unless satisfied that it has been proven beyond a reasonable doubt.

In the case of a guilty plea, the facts of the offence underlying the plea will often be put before the court by way of the Crown reading in the synopsis of the offence. The accused will be asked if the facts read in are correct or "substantially correct." If the accused does not acknowledge the facts as set out in the synopsis, it is preferable to know this in advance of the plea and to work with the Crown to come to an agreement on the facts with which both parties are content. This avoids putting facts before the sentencing judge that are disputed. The Crown may be content to forego reliance on certain aggravating factors to avoid a trial of the issue. If the factual dispute cannot be resolved in some fashion, then the Crown must establish all aggravating factors beyond a reasonable doubt. Other facts must be established on a balance of probabilities by the party seeking to rely on them.

4.4 Other offences

It is not uncommon for a synopsis on a guilty plea to include reference to other criminal offences that are not the subject of the guilty plea. Assuming these facts are not contested, the trial judge may take these into consideration when fashioning the appropriate sentence. No other proceedings relating to these “other offences” may be taken.

4.5 Victim impact statements

The victim of an offence may prepare a written statement of the harm and losses they have suffered. The court shall consider the statement when determining the fit sentence (s. 722). “Victim” is defined in the section, as are the circumstances under which a representative may make a statement on behalf of the victim. The victim may also ask to read the statement in court. The court may consider other evidence pertaining to the impact of the offence on any victim.

4.6 Proof of the offender’s criminal record

While there is a formal procedure set out in s. 667 for proving the criminal record of the offender, generally the Crown will produce a copy of the record as kept by the RCMP (known as a “CPIC” report). If the accused acknowledges the accuracy of the record, the CPIC report will be filed with the court. If the accused does not, the Crown must prove the record by way of the more formal procedure.

4.7 The pre-sentence report

Pursuant to s. 721(1) of the *Code*, a sentencing court may order that a probation officer prepare a pre-sentence report. The probation officer (guided by s. 721(2)) will interview the offender and his family, friends, employer, and others and prepare a report that outlines the offender’s family background and upbringing, education and employment history, significant relationships, any dependencies or other mental health issues, and future plans. The report will also refer to the offender’s attitude towards his situation including remorse, interest in any needed rehabilitation, or interest in any restorative justice efforts. The author of the report will specify whether it appears the offender will be amenable to community supervision by way of a probationary period.

A positive pre-sentence report can often be an invaluable tool for defence counsel seeking the least restrictive sentence possible for the client, and defence counsel may want to ask for a pre-sentence report themselves. If a client is particularly defensive or refuses to acknowledge what appear to be the obvious underlying causes of criminal behaviour, defence counsel may want to avoid a court-ordered report.

If a report is ordered, defence counsel will want to encourage the client to co-operate with the probation officer by providing information and being polite and honest with the author. If an appeal against conviction is anticipated, defence counsel may want to advise his or her client not to discuss the offence itself with the probation officer, keeping in mind that this approach will probably result in the author describing the offender as lacking remorse.

Once the report is finished, it will be provided to the parties and the court. Defence counsel must review the report with the client carefully. Inaccuracies can often be resolved by agreement between the parties without the need for any evidence. If not, whoever seeks to rely on a disputed fact must establish it on a balance of probabilities by calling evidence. If it is an aggravating fact, the Crown must prove it beyond a reasonable doubt.

4.8 Other reports

In some cases, defence counsel may want to have a psychological report prepared rather than ask for a pre-sentence report. The report will contain much of the same information contained in a pre-sentence report but will have the advantage of being prepared by a professional psychologist who will be better equipped to evaluate the offender’s maturity, mental health, dependencies, and other relevant personality characteristics.

Other reports that defence counsel may want to obtain in appropriate circumstances include a report from a doctor setting out the health condition of the offender or a report from a social worker who has worked with the offender as part of a treatment program (for drug abuse, anger management, etc.).

4.9 Witnesses

Either party can choose to call witnesses to establish any fact relevant to the sentencing decision.

4.10 The court’s power to require evidence

Under ss. 723(3)–(4), the sentencing judge may order the production of evidence or compel the attendance of witnesses if it would assist in determining the appropriate sentence.

4.11 Submissions on sentence

Defence counsel and the Crown are given an opportunity to make submissions as to what the appropriate sentence is and why. Where the Crown and defence counsel have negotiated a guilty plea, they may come to an agreement regarding a “joint submission” to the court as to the appropriate sentence. The court is not bound to accept

this joint submission (and the offender must be made aware of this in advance of the plea), but the sentencing judge must give it serious consideration and depart from the joint submission only where the proposed sentence is contrary to the public interest and would bring the administration of justice into disrepute. This high standard for “jumping a joint position” is intended to facilitate pleas by allowing the offenders to have some confidence that they know what they are getting into when they give up their right to a trial and enter a guilty plea.

4.12 The offender’s statement

Section 726 requires the sentencing judge to ask offenders if they have anything to say before the sentence is imposed. Defence counsel should discuss the advantages and disadvantages of any proposed statement the offender wants to make.

4.13 Reasons for sentence

A sentencing judge must provide reasons for sentence (s. 726.2).

5. Available sentences

For every criminal charge, there is a range of sentencing options available, and the maximum sentence available is defined in the *Code*, usually as part of the section that defines the offence. Otherwise, all summary conviction offences are punishable by a maximum fine of \$5,000 and a maximum sentence of six months’ incarceration (s. 787), and all indictable offences for which no punishment is specifically provided are subject to a maximum sentence of five years (s. 743). There is no set maximum fine for indictable offences. Certain kinds of sentences will be unavailable for specific offences and mandatory for others. More and more offences provide for a minimum sentence. Sentences for offences change, and counsel must ensure that they know precisely what sentencing options are available for the offence. This will depend, in part, on the date the offence was committed.

5.1 Alternative measures

An alternative measure is not a sentence, but a method of diverting a charge out of the criminal courts in appropriate cases. The accused agrees to participate in some kind of program, and when the program is successfully completed, the charges are stayed or withdrawn. Under s. 717, resort can be made to alternative measures when they are not inconsistent with the protection of society, the accused accepts responsibility for the act that forms the basis of the offence, and the accused consents to participate. The alternative measures may require that the accused

perform community service, write a letter of apology, or participate in treatment. There are programs designed for Aboriginal accused, the mentally ill, and drug-addicted persons. Otherwise, diversion is for the most part available to first-time offenders charged with relatively minor offences.

5.1.1 Peace bonds

As an alternative to a guilty plea, in some circumstances, counsel for an accused person may try to obtain the consent of the Crown to have their client enter a peace bond. These agreements are more likely in cases where the allegations are minor threats, assaults, or mischief. The peace bond may be imposed through the laying of an information pursuant to s. 810 of the *Code* or the common-law jurisdiction of a judge. Normally, in these cases, the prosecutor will withdraw the charges after the peace bond is entered.

5.2 Problem-solving courts

In some jurisdictions (e.g., the Ontario Court of Justice), there are special courts designed to take a more active and therapeutic role in the rehabilitation and management of certain kinds of offenders. This includes drug treatment court, mental health court, and domestic violence court. These courts are established as a way of addressing the underlying causes of the offender’s criminality with a view to preventing any re-offence. Drug treatment court, for instance, is “specially designed to supervise cases of drug-dependent offenders who have agreed to accept treatment for their substance abuse [problems].” The demands put on participants are significant, but in return for successful rehabilitation, including abstinence and a more productive lifestyle, the offender will receive a non-custodial sentence. Through regular court appearances, the progress of the participants is monitored closely by specially assigned judges. Mental health court offers the accused psychological or psychiatric assistance as a form of diversion—an acknowledgement of the lesser moral culpability of those whose criminality is a product of mental illness. Domestic abuse court offers anger management programs as a diversion measure in appropriate cases.

5.3 Discharges

Section 730 permits a judge to make a finding of guilt but not register a conviction against the offender. By imposing a discharge, the court avoids imposing the full impact of having a criminal conviction on the offender’s record for those who are “of good character, without previous conviction.” A discharge is particularly appropriate in cases where being charged and tried will

be sufficient deterrent and denunciation to address the conduct at issue and for those who will suffer disproportionate consequences (usually associated with loss of employment) if “convicted.” A discharge does not qualify as a “previous conviction.”

While not a conviction, a discharge is a record under the *Criminal Records Act (CRA)*. Pursuant to s. 6.1 of the *CRA*, all reference to a discharge is removed from CPIC (the record-retrieval system maintained by the RCMP) automatically after one year for an absolute discharge and after three years for a conditional discharge. The *CRA* only applies to federal authorities such as the RCMP. Courts and other police forces need not remove records of a discharge unless required to do so by provincial or municipal law. Clients should be advised of the potential implications of a discharge with regard to travel, immigration, and employment.

Discharges are not available for any offence where there is a minimum sentence or for any offence punishable by 14 years’ or life imprisonment. Discharges are not available to corporations.

An absolute discharge has no conditions and is essentially the absence of a sentence. A conditional discharge requires the offender to be subject to a probation order with conditions for a period of up to three years.

5.4 Suspended sentence

Paragraph 731(1)(a) permits a judge to suspend the passing of sentence. The offender is released under a probation order with conditions for a period of up to three years. If successfully completed, there is no further sentence imposed. If the probation order is breached, the offender can be charged with failure to comply with a probation order under s. 733.1. If the offender is convicted of an offence (including failure to comply with probation) while serving the probationary period, the Crown may apply to have the suspended sentence revoked and an alternative sentence substituted (s. 732.2(5)). The judge may alter the terms of the probation order, extend the term by one year, or impose an alternative sentence.

5.5 Probation

Probation is not a free-standing sentence, but is imposed as part of another sentence. If no custodial sentence is intended, a judge will order probation as part of a conditional discharge or suspended sentence. Probation will also be ordered with any intermittent custodial sentence. Probation may also be ordered in conjunction with a fine or a term of imprisonment (including a conditional sentence) if the imprisonment does not

exceed two years (s. 731(1)(b)). No probation order may be made if the sentence imposed, when combined with another sentence already being served, exceeds two years. Indeed, if an offender is subsequently sentenced to a custodial sentence that makes the aggregate sentence more than two years, any previously ordered probation becomes illegal.

Probation orders provide an offender with an opportunity to rehabilitate and, when ordered with a custodial sentence, offer a more gradual reintegration into the community. This process is supervised, and the offender is subject to conditions for this purpose, not as further punishment.

The maximum term of a single probation order is three years (s. 732.2(2)(b)). Certain conditions are mandatory:

- keep the peace and be of good behaviour;
- attend court as required; and
- notify the court or the probation officer of any change of name, address, or employment.

Optional conditions are provided for in s. 732.1(3) and include up to 240 hours of community service over a period of up to 18 months. While conditions requiring the offender to abstain from consuming alcohol or drugs are common, treatment may not be ordered unless the offender consents. While the Supreme Court of Canada has found that an offender cannot be ordered to submit bodily samples as a method of ensuring compliance, legislation has now been passed to respond to that decision but has yet to come into force (ss. 732.1(3)(c)–(c.2)).

The Crown, the offender, or the probation officer may apply to the court to change the conditions or length of the order under s. 732.2(3).

5.6 Fines

A fine may be imposed as part of the sentence when the court is satisfied that the offender has the means to pay the fine. Under s. 734(5), a term of imprisonment, the duration of which is calculated based on the amount of the fine, will be imposed in default. The judge may order that the fine be paid in instalments or allow time for the offender to pay the fine.

The maximum fine for an individual charged with a summary conviction offence is generally \$5,000, but for a corporation the amount is \$100,000. Unless the section setting out the offence otherwise provides, there is no maximum fine for individuals or corporations convicted of indictable offences.

In addition to any other punishment, the judge must impose a “victim fine surcharge,” unless the offender

establishes that the order would cause “undue hardship” on the offender or his or her dependants. The calculation of the surcharge is established in s. 737.

5.7 Forfeiture of proceeds of crime

Under s. 462.37 of the *Code*, the judge may order the forfeiture of the proceeds of crime as part of the sentence.

5.8 Prohibition orders

Orders prohibiting certain conduct may, and in some circumstances must, be made as part of a sentence. A weapons prohibition under s. 109 is mandatory whenever the conviction is for an indictable offence involving violence, the threat of violence, drugs, firearms and other weapons, or criminal harassment. A discretionary weapons prohibition is provided for under s. 110 of the *Code*.

Driving prohibitions are mandatory (s. 259) for impaired driving and “over 80” offences and are discretionary following conviction for other offences involving motor vehicles. It is important to note that the *Highway Traffic Act* also imposes automatic licence suspensions relating to certain offences that may be longer than the mandatory prohibition required under the *Code*.

After a proscribed period, offenders may operate a motor vehicle during part of the prohibition if they participate in the provincial alcohol ignition interlock program (ss. 259(1.1)–(1.2)).

5.9 Restitution

Section 738 permits the judge to order the offender to make restitution to a victim for any loss of or damage to property as long as the amount is readily ascertainable. The section also provides that the judge may include an amount as compensation for financial losses associated with bodily harm the victim has suffered as a result of the offence. A ready example is a spouse who must move out of the family home to extricate himself or herself from an abusive relationship. The ability of the offender to pay is a relevant consideration but not a prerequisite to making the order. The order may be satisfied through the forfeiture of money seized at the time of arrest, provided there is no dispute as to the ownership of the money (s. 741(2)).

5.10 Conditional sentence of imprisonment

A conditional sentence of imprisonment is a sentence of imprisonment where the offender is permitted, conditionally, to serve the sentence in the community. The regime (set out in ss. 742–742.7) is intended to reduce our reliance on incarceration in a prison setting. A

conditional sentence is designed to be punitive while improving rehabilitative prospects.

The statutory preconditions to the imposition of a conditional sentence under s. 742.1 include

- the offence must not be a serious personal injury offence;
- the offence must not be a terrorism offence or a criminal organization offence prosecuted by indictment for which the maximum sentence is 10 years or more;
- the appropriate sentence must be for a period of less than two years (prior to taking into account any pre-trial custody);
- the offence must not be punishable by a minimum term of imprisonment; and
- the judge must be satisfied that the order will not endanger the community and is consistent with the fundamental purpose and principles of sentencing.

Once these criteria are met, the decision whether to impose a conditional sentence must be based on principle and the specific circumstances of the case.

Section 742.3 sets out both mandatory and optional conditions of the order. It is presumed (but not required) that conditional sentences will be significantly punitive and thus house arrest or strict curfews are normally included. The order may also require the offender to attend various therapeutic facilities, even residential ones.

Unlike a custodial sentence, which may be effectively reduced in duration by the granting of parole (for instance), there is no reduction of a conditional sentence. The sentence imposed is in effect for the entire duration of the order.

While a sentence for a single offence may not combine a period of incarceration with a conditional sentence, if an offender is being sentenced for two or more offences, a judge may order incarceration for one offence to be followed by a conditional sentence for another, so long as the total duration is less than two years. A judge may also order an intermittent sentence for one offence to be followed by a conditional sentence for another, so long as the total duration is less than two years.

If an allegation arises that the conditional sentence has been breached, the Crown must satisfy the court (in practice, often the original sentencing judge) of the allegation on a balance of probabilities. The offender then has an opportunity to establish a reasonable excuse. If the offender fails to do so, the court may

- do nothing;
- change the conditions of the order; or

- order the offender to serve a portion or all of the remainder of the sentence in custody.

The procedure for the hearing of an allegation of a breach of the conditional sentence is set out in s. 742.6.

5.11 Imprisonment

The maximum custodial sentence for a summary conviction offence is six months and for an indictable offence is five years, unless the specific offence section provides otherwise (ss. 787(1) and 743). Increasingly, the Code provides for “super summary” offences, where the available custodial sentence is as high as 18 months.

All sentences of less than two years are served in provincial institutions. While historically this kept an offender closer to his or her own community, this is less true with the introduction of “super jails” in Ontario. Sentences of two years or more (either by virtue of a single sentence or an aggregate of sentences imposed) are served in a federal penitentiary.

A judge imposing a sentence of imprisonment for 90 days or less may order that the sentence be served intermittently (s. 732). The judge specifies a particular schedule of intermittent incarceration, and when not in custody, the offender is subject to a probation order. While an intermittent order is often made for the purposes of maintaining employment, it is available for any appropriate purpose, including education or childcare. If sentenced to further imprisonment while serving an intermittent sentence, the intermittent sentence will collapse and be served on consecutive days, unless the court orders otherwise.

A judge may also recommend an offender be considered for a temporary absence program that allows for an offender to leave the institution on a regular basis for the purposes of employment, education, healthcare, or other rehabilitative purposes. The force of the judge’s recommendation is much greater when the sentence imposed is 90 days or less.

Upon conviction for certain offences, a term of imprisonment is mandatory. The most notable examples of minimum periods of incarceration are those for offences involving firearms, alcohol-related driving offences, and certain sexual offences committed upon young people. For instance, see the following:

- Section 85: Use of a firearm in the commission of certain offences attracts a one-year minimum sentence for a first offence and a three-year minimum sentence for any subsequent offence.
- Section 151: Touching the body of a person under 16 years of age for a sexual purpose attracts a minimum sentence of 14 days (summary conviction) or 45 days (by indictment).

- Section 255: Impaired driving (or care and control), “over 80,” and refusing to provide a breath sample attract a minimum sentence of 14 days’ incarceration for a second offence and 90 days for any subsequent offence.

Pre-trial custody may be considered and operate to reduce the mandatory minimum.

Note: Whenever a provision provides for an increased penalty for a subsequent offence, the Crown must prove they have notified the accused of their intention to rely on the increased penalty prior to any plea. If they fail to do so, the court need not (but may, nonetheless) impose the mandatory minimum as set out for a “subsequent offence” (s. 727).

Sentences are presumed to run concurrently, unless specifically ordered to be served consecutively. Generally, sentences for offences arising out of one series of events should be ordered to be served concurrently or at least with careful attention to the totality principle. If an offender is being sentenced for unrelated conduct arising out of two distinct incidents, the sentences should be ordered served consecutively, although the overall effect of the combined sentences is still a relevant consideration.

5.12 Parole eligibility orders

For the most part, an offender is eligible for parole after serving one-third of the sentence. An offender is eligible for parole after serving seven years of a life sentence, unless otherwise provided. Under s. 743.6, the judge may (when sentencing for certain offences) delay parole eligibility until the offender has served one-half of the sentence or 10 years, whichever is less. Denunciation as well as specific and general deterrence are the paramount considerations for the judge when considering this extraordinary order.

All adult murder convictions (and youth murder convictions where an order is made sentencing the youth as an adult) result in a life sentence. The provisions for parole eligibility following convictions for murder are set out below:

Age of offender	Degree (first or second)	Parole Eligibility
Adult	First	25 years
	Second	10–25 years
16 or 17	First	10 years
	Second	7 years
Under 16	First or Second	5–7 years

For adults being sentenced for second degree murder and youth under 16 being sentenced for first or second degree

murder, there is a range of parole eligibility orders available. After the jury has reached a verdict of guilty, they are asked for their recommendation regarding parole eligibility, and the judge takes these recommendations into consideration in making the order.

Although not yet in force, new legislation will allow parole ineligibility periods to be served consecutively when a person is convicted of more than one murder (ss. 745.21 and 745.51).

5.12.1 Faint hope clause

Currently, offenders serving a sentence of life imprisonment may apply in writing to the Chief Justice of the province for a reduction in the parole ineligibility period after 15 years. If the applicant shows on a balance of probabilities that there is a reasonable prospect that the application will succeed, the Chief Justice will empanel a jury to hear the application. The jury will consider

- the character of the applicant;
- the applicant's conduct while serving the sentence;
- the nature of the offence for which the applicant was convicted;
- any information provided by a victim at sentencing or during the application; and
- any other matters that the judge considers relevant in the circumstances.

The jury may determine that the parole ineligibility period be reduced. An inmate who has been convicted of more than one murder, where at least one of the murders was committed after January 9, 1997, may not apply for a review of his or her parole ineligibility period.

New legislation has passed, but is not yet in force, that will put an end to these hearings for any offence committed after the coming-into-force date and will limit the application period for current offenders.

5.13 Dangerous and long-term offenders

A dangerous offender designation results in an indeterminate sentence. The offender is entitled to apply for parole after seven years. A long-term offender designation results in a fixed sentence of at least two years followed by an extended period of community supervision (not exceeding 10 years.) The Attorney General of the province must consent to the Crown bringing the application.

Both designations are premised on the judge finding the offender poses a significant and continuing danger to the public by virtue of previous and current offences and expert evidence. A long-term offender is one for whom it

appears there is a "reasonable possibility of eventual control of the risk in the community."

Part XXIV of the *Code* sets out the substantive and procedural considerations that apply to both dangerous and long-term offender proceedings.

5.14 Ancillary orders

The *Code* provides for the sentencing judge to make certain additional orders that are not strictly speaking part of the sentence because they are not punitive, but instead assist in the future detection and punishment of crime.

5.14.1 DNA orders

Section 487.051 provides for the making of an order that permits the taking of a DNA sample from those found guilty (or not criminally responsible) of certain offences. In relation to certain offences (such as murder), the order is mandatory. For other offences (such as sexual assault), there is a presumption that the court will make the order unless the offender satisfies the court that the impact of the order would be "grossly disproportionate to the public interest." For a third category of offences (such as assault), the order may be made if the prosecution satisfies the court that it is in the best interests of justice to do so. For other offences (such as theft under \$5,000), no DNA order is available.

5.14.2 Sex offender registry

Section 490.012 requires the court to make an order requiring the offender to comply with the *Sex Offender Information Registration Act (SOIRA)*, upon application by the prosecution, when the underlying offence is of a sexual nature. The length of time the offender will be required to comply with *SOIRA* is a function of the seriousness of the offence as reflected in the maximum punishment for the offence. The order will be for 10 years, 20 years, or life. The order will be made unless the offender satisfies the court that the impact of the order would be "grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature." In Ontario, the offender will have to comply with *Christopher's Law* (Ontario's own sex offender registry) in any event and without the need for the court to make any order.

6. Post-sentence applications

After sentencing, an application may be brought to alter conditions or restrictions imposed by the judge. Application may be brought, for example, to issue a licence or registration certificate for a firearm for sustenance or employment purposes, despite a prohibition order (s. 113). One may also bring an

application before a judge to transfer a probation order or conditional sentence order to another jurisdiction (ss. 733 and 742.5), to change the conditions in paying a fine (s. 734.3), and to change the optional conditions of a conditional sentence order (s. 742.4) or of a probation order (s. 732.2(3)). Application may also be made to collapse an intermittent sentence and serve the remainder on consecutive days (s. 732(2)).

Counsel may also want to advise their client when they may be eligible to apply for a pardon under the *Criminal Records Act*. For serious personal injury offences where the offender was sentenced to a period of 2 years or more, they are not eligible to apply for pardon until 10 years after the completion of the sentence; for all other indictable offences, 5 years; and for summary conviction offences, a period of 3 years.

Appeals and bail pending appeals

1. Introduction

An appeal is a review of the trial proceedings by an appellate court to see that the proceedings were carried out according to law. The appellate review is conducted on the written record of the trial court, without the attendance of witnesses and, ordinarily, without the accused being present.

Appeals are creations of statute. Accordingly, rights of appeal and the jurisdiction and powers of courts of appeal are restricted to what has been expressly conferred upon them by legislative authority. In criminal matters, the legislation dealing with appeals from indictable matters is set out in Part XXI of the *Criminal Code (Code)*. The Court of Appeal for Ontario hears indictable appeals. The practice and procedure in indictable appeals are contained in the *Criminal Appeal Rules*.

Appeals from summary conviction cases are dealt with in Part XXVII of the *Code*. Summary conviction appeals are heard before the Superior Court of Justice. The procedure for these appeals is contained in the Superior Court of Justice *Criminal Proceedings Rules*.

1.1 Jurisdiction

It is the nature of the proceedings that determines the forum for the appeal. When one is in doubt as to whether the trial was proceeded with summarily or by indictment, an examination of the information should reveal the manner of proceeding.

All cases involving indictable proceedings are appealed to the Court of Appeal, regardless of where the trial was held. There are three common situations in which even experienced lawyers may mistakenly file an appeal in the wrong court:

- (1) Where the offence is within the absolute jurisdiction of a provincial court judge under s. 553 of the *Code* and the Crown proceeds by indictment: Although the case is tried in the Ontario Court of Justice, the proceedings are by way of indictment.
- (2) Where the accused elects to have an indictable offence tried before a provincial court judge pursuant to s. 536 of the *Code*: The election does not affect the indictable nature of the proceedings.
- (3) When an accused person is charged with and tried for an indictable offence, but is convicted of a lesser summary conviction offence: The appeal will still be

heard in the Court of Appeal because the proceedings were by way of indictment.

On occasion, an accused person may wish to appeal convictions or sentences from both summary and indictable offences that arose out of the same circumstances and were dealt with together before the same judge. In order to avoid an unnecessary duplication of the appeal process, s. 675(1.1) of the *Code* permits an appeal from a summary conviction matter to be heard by the Court of Appeal, with leave of the court or a judge thereof, where it was tried with an indictable offence and there is an appeal in relation to the indictable offence.

2. Indictable appeals

2.1 Rights of appeal

2.1.1 By the accused

An accused person may appeal against his or her conviction on the following grounds:

- on a question of law alone (s. 675(1)(a)(i)): Examples of issues that have been found to involve questions of law include the availability of a defence, the admissibility of evidence, the interpretation of a statute, and a ruling as to whether the accused's rights under the *Canadian Charter of Rights and Freedoms (Charter)* were infringed.
- on a question of fact or mixed fact and law, with leave of the Court of Appeal or a judge thereof (s. 675(1)(a)(ii)): An example of a question of fact is the sufficiency of the evidence to support a conviction. A common ground of appeal involving a question of mixed fact and law is the admissibility of a confession.
- on any ground that appears to the Court of Appeal to be sufficient, with leave of the court (s. 675(1)(a)(iii)): Issues that have been dealt with by the Court of Appeal under this rubric include incompetent representation by defence counsel and improper cross-examination by Crown counsel.

An accused may also appeal against his or her sentence, with leave of the Court of Appeal or a judge thereof, unless the sentence is one fixed by law (s. 675(1)(b)). A sentence appeal is not restricted to matters such as the imposition of a jail term or its length. The term "sentence" has been extended by s. 673 of the *Code* to other dispositions, including weapons prohibitions, driving prohibitions, and the terms of a probation order.

The *Code* does not set out any specific grounds upon which a sentence appeal must be taken.

Although leave to appeal is a requirement for some appeals against conviction and all sentence appeals, the Court of Appeal for Ontario ordinarily does not require the question of leave to be argued separately from the appeal itself. An exception to this general rule occurs in relation to appeals against sentence only, where the appellant is seeking bail pending appeal. The issue of leave to appeal must be determined before the appellant can be granted bail. In general, the leave application will be heard together with the application for release. The importance of the leave application should not be underestimated, since a denial of leave to appeal by a single judge of the Court of Appeal cannot be appealed to the full court.

2.1.2 By the Crown

The Crown may appeal the following:

- an acquittal on a question of law alone (s. 676(1)(a)): An acquittal includes a situation where the accused was acquitted of the full offence, but convicted of a lesser and included offence (s. 676(2)).
- an order quashing an indictment or failing to exercise jurisdiction on an indictment (s. 676(1)(b)).
- an order of a trial court staying proceedings on an indictment or quashing an indictment (s. 676(1)(c)).
- a sentence, with leave of the court or a judge thereof, unless it is one fixed by law (s. 676(1)(d)).

2.2 Procedure on appeals

Although some appellants pursue their appeals without the assistance of counsel, this section will focus on the procedure involved in appeals where the appellant is represented by counsel.

2.2.1 The stages of an appeal

The *Criminal Appeal Rules* set out the steps to be followed to ready an indictable appeal for hearing. This procedure, called perfecting the appeal, is designed to ensure that all of the material necessary for a proper hearing will be put before the court. Once the appeal is perfected, a hearing date can be obtained from the court.

(a) Notice of appeal

In order to launch an appeal, a notice of appeal or notice of application for leave to appeal in Form B must be filed. The notice must set out the particulars of the conviction, the grounds of appeal, and the appellant's address for service.

Rule 4 sets out the time requirements for service of this document. In general, a notice of appeal must be served and filed with the Court of Appeal within 30 days of the order under appeal. However, a notice of appeal from conviction does not need to be served and filed until 30 days after the sentence is imposed (r. 4(2)). Pursuant to s. 678(2) of the *Code* and r. 7(1), a judge of the Court of Appeal may extend the time within which a notice of appeal must be filed.

An appellant in a solicitor appeal serves the notice of appeal by sending three copies by registered mail to the Registrar of the Court of Appeal or by delivering them to the Office of the Registrar. In a Crown appeal, the accused must be personally served with the notice and three copies must be filed with the registrar, together with proof of service on the accused (r. 5).

(b) Transcripts

Cases before the Court of Appeal are argued on the basis of a complete or partial transcript of the trial proceedings (r. 8). In general, an appellant is required to file a certificate from the court reporter, indicating that five copies of the transcript have been ordered, either at the time that the notice of appeal is served or within 15 days of filing the notice of appeal. A failure to comply with these requirements may result in the registrar taking steps to have the appeal dismissed as abandoned (r. 9).

The contents of the transcript for an appeal are set out in rr. 8(8)–(11). It should be noted that certain portions of the trial proceedings are routinely omitted from the transcript, such as the evidence taken on a *voir dire* or counsel's addresses to the jury. Accordingly, if a ground of appeal pertains to one of these areas, counsel should seek an order from a judge of the Court of Appeal for its inclusion in the transcript.

Once the transcript has been completed, the reporter will notify both parties and the registrar. The reporter will deliver the court's copies to the registrar. The appellant must serve the transcript on the respondent.

(c) Appeal book

The appeal book is a collection of all of the significant documents relating to the trial proceedings. In order to prepare it, the appellant must file a requisition with the trial court, requiring the court to forward all of the documents and exhibits capable of reproduction to the registrar (r. 11).

The contents and form of the appeal book are set out in r. 14.

(d) Factums

A factum is a written statement of the party's position on the appeal. It is designed to give the Court of Appeal an appreciation of the facts of the case and the legal issues prior to oral argument.

Rule 16 governs the form and content of factums. In appeals from conviction alone or conviction and sentence, the factums contain a summary of the facts, a statement of the issues to be raised and the applicable law, the order requested, and appendices of the authorities to be cited and the relevant legislative provisions.

The factum for a sentence appeal must be in Form D (r. 17). The main difference between a sentence appeal factum and other factums is that it begins with a list of factual recitals, which provides a quick picture of the case, before moving into a review of the facts and the legal issues common to all factums.

All factums must be dated and signed. No factum can exceed 30 pages in length without an order from a judge of the Court of Appeal. Where a factum does not comply with the *Criminal Appeal Rules*, it will not be accepted for filing at the Court of Appeal.

(e) Perfection of the appeal

An appeal is "perfected" and can be listed for hearing when copies of the transcript, appeal book, appellant's factum, and certificate of perfection have been served on the respondent and filed with the Court of Appeal (r. 18). In general, the appellant must perfect the appeal within 90 days after delivery of the transcript to the Court of Appeal. In sentence appeals and appeals from a decision of a Superior Court judge not sitting as a trial judge, the time frame for perfection is shorter.

Failure to perfect an appeal in accordance with r. 18 may lead to the appeal being dismissed as abandoned or the appellant's bail being revoked (r. 20).

2.3 The hearing

The Court of Appeal for Ontario generally sits in panels of three judges. During the hearing of the appeal, counsel, who are robed, are able to expand upon the legal propositions they have set out in their factums.

In appeals from conviction and from acquittal, the court reviews time estimates provided by the parties and notifies counsel of the amount of time allocated for oral argument. All other appeals have fixed time limitations for oral argument. Sentence-only appeals are restricted to a half hour in total; other appeals, to a total of one hour.

When the oral argument is completed, the court usually retires to consider its decision. On resuming, the court may render judgment from the bench. If the court wishes to consider its decision further, it will reserve judgment. The court will advise counsel when the judgment is ready to be released.

2.4 Powers of the Court of Appeal

2.4.1 Power to receive evidence

While most appeals are argued solely on the basis of the trial transcript, s. 683 of the *Code* permits a court of appeal to order the production of documents, to direct that witnesses attend, and to admit the evidence of any witness, where it is necessary in the interests of justice.

The most significant aspect of the court's powers under s. 683 is the ability to receive "fresh" evidence. Fresh evidence usually consists of new information, relevant to a determination made at trial, which came to light after the case was heard. In order to be admissible, fresh evidence must meet the following four requirements:

- (1) The evidence could not have been introduced at trial through the exercise of due diligence.
- (2) The evidence is relevant, since it bears on a decisive or potentially decisive issue at the trial.
- (3) The evidence is credible.
- (4) When considered together with all of the other evidence led at trial, the fresh evidence could reasonably be expected to have affected the verdict.

In order to put fresh evidence before the court, the appellant will place an affidavit containing the new information in a sealed envelope, which is served on the Crown and filed with the court, along with a notice of application. The Crown has the right to cross-examine the affiant, and the transcript of the cross-examination must also be placed in a sealed envelope and filed with the court. At the start of the hearing, counsel will argue as to whether the fresh evidence should be admitted. If the motion to adduce the fresh evidence is not dismissed, judgment on its admission is reserved, and the appeal is heard. This permits the court to assess the fresh evidence in the context of the case as a whole. If the fresh evidence could not reasonably have affected the verdict, the motion will be dismissed, and the case will be dealt with on the basis of the other grounds of appeal. If the fresh evidence is of sufficient weight that it might have altered the result, the fresh evidence will be admitted, and a new trial ordered.

The court's approach to fresh evidence is somewhat different where the evidence is directed to the validity or fairness of the trial proceedings (e.g., where there are allegations of juror misconduct, Crown non-disclosure,

or incompetent representation by defence counsel). Fresh evidence of this type is received in “the interests of justice” without meeting the four traditional requirements. However, the admission of this evidence does not determine the outcome of the appeal and automatically lead to a new trial. Instead, the fresh evidence is considered in conjunction with the trial record in determining whether the appellant has established a miscarriage of justice.

In sentence appeals, fresh evidence often relates to events subsequent to the sentence or consists of information from the correctional institution regarding the accused’s progress. The Crown may consent to the introduction of such fresh evidence where the facts reported are not controversial. While the court may take into account the fact that the Crown has consented, the fresh evidence will only be admitted where the court is satisfied that all four requirements are met.

2.4.2 Power to dispose of appeals

The powers of an appellate court in disposing of appeals generally parallel the rights of appeal, described earlier in this chapter.

(a) Conviction

A court of appeal may allow an appeal on the following grounds:

- where the verdict is unreasonable or unsupported by the evidence (s. 686(1)(a)(i)): The function of an appellate court under this provision is to determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. Accordingly, the court must examine and evaluate the evidence adduced at trial in assessing the reasonableness of the verdict, while giving recognition to the advantageous position of the judge or jury, who heard and saw the witnesses.
- where there is a wrong decision on a question of law (s. 686(1)(a)(ii)): The mere existence of an error of law will not be sufficient to successfully invoke this clause and award a new trial. It must be shown that the legal error caused prejudice to the accused and that it affected the verdict.
- where there has been a miscarriage of justice (s. 686(1)(a)(iii)): A miscarriage of justice has been held to occur when there is an appearance of unfairness in the trial proceedings, even where no actual prejudice to the accused occurred.

In allowing an appeal, a court of appeal can enter an acquittal or order a new trial (s. 686(2)).

The Court of Appeal will dismiss an appeal where none of the grounds set out in s. 686(1)(a) have been made out. In particular, in recognition of the fact that no trial is

perfect and justice is served so long as an accused’s trial is a fair one, the court has the power to dismiss an appeal where there was a wrong decision on a question of law, provided it gave rise to no substantial wrong or miscarriage of justice (s. 686(1)(b)(iii)). In exercising this power, the court will consider

- the seriousness of the error;
- the effect it likely had on the jury’s reasoning; and
- the probable guilt of the accused on the basis of the properly admissible evidence.

Similarly, an appellate court may dismiss an appeal where there was a procedural irregularity at trial that caused no prejudice to the appellant (s. 686(1)(b)(iv)).

(b) Acquittal

In an appeal from acquittal, the onus is on the Crown to satisfy the appellate court that but for the error of law, the verdict would not necessarily have been the same. In allowing an appeal by the Crown, the Court of Appeal has jurisdiction to order a new trial or, in cases tried by a judge alone, to enter a conviction (s. 686(4)). To secure a conviction on appeal, the Crown must demonstrate that the accused should have been found guilty but for the error of law by showing that all of the findings necessary to support a conviction had been made, either explicitly or implicitly, or were not in issue. Alternatively, the court may dismiss the appeal.

(c) Sentence

The fitness of the sentence is the sole consideration in a sentence appeal. An appellate court will only interfere with a trial judge’s sentencing discretion where there is an error in principle or where the sentence imposed by the trial judge is a substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.

When dealing with a sentence appeal, the Court of Appeal may dismiss the appeal or vary the sentence (s. 687). The power to vary a sentence permits the court to increase or decrease the penalty imposed at trial. Accordingly, in a defence appeal of the accused’s sentence, the Court of Appeal has the ability to increase the accused’s disposition at the request of the prosecutor, despite the failure of the Crown to file its own notice of appeal. This power is rarely exercised, but is an outcome the accused must be made aware of before instructing counsel to launch a sentence appeal.

2.5 Further appeals

The jurisdiction of the Supreme Court of Canada to determine appeals from indictable offences is set out in ss. 691–695 of the *Code*. The procedure for such appeals

is contained in the *Supreme Court Act* and the *Rules of the Supreme Court of Canada*. All appeals to the Supreme Court are restricted to questions of law alone. In very limited circumstances, an appellant will have an appeal as of right to the Supreme Court, but in the vast majority of cases, leave to appeal will be required (ss. 691 and 693).

An application for leave to appeal to the Supreme Court of Canada is an entirely separate proceeding from the appeal itself. In general, leave applications are made only in writing. Three members of the court review the materials filed in the leave application and grant or deny leave without providing any reasons for their decision. Leave to appeal is not routinely given and is only granted in cases that raise questions of national importance.

3. Summary conviction appeals

In many respects, the procedure involved in summary conviction appeals is the same as that for indictable appeals. This section will focus on the areas of distinction between the two types of appeals.

3.1 Rights of appeal

There are two routes of appeal in summary conviction matters. The majority of appeals are launched pursuant to s. 813 of the *Code*. The narrower and less frequently used form of appeal is by way of s. 830.

3.1.1 Section 813 appeals

Pursuant to s. 813(a), an accused person may appeal a conviction, order, or sentence. This is a broad right of appeal, with no leave requirements or other restrictions. Similarly, the Crown may appeal from an acquittal, a stay of proceedings, or a sentence (s. 813(b)). Unlike the situation in indictable appeals, in summary conviction proceedings, the Crown has a right of appeal on a question of fact or mixed fact and law.

3.1.2 Section 830 appeals

Pursuant to s. 830, the accused and the Crown can only appeal in three narrow circumstances, where there is

- a question of law alone;
- an excess of jurisdiction; or
- a refusal or failure to exercise jurisdiction on the part of a trial judge.

By filing an appeal under s. 830, an appellant is deemed to have abandoned his or her right of appeal under s. 813 (s. 836).

3.2 Procedure on appeals

3.2.1 Notice of appeal

In order to launch a summary conviction appeal, a notice of appeal in Form 2 of the *Criminal Proceedings Rules* must be filed with the clerk of the court (r. 40.03(2)).

Rule 40.03 of the *Criminal Proceedings Rules* sets out the time frames for launching an appeal. The rule mirrors the 30-day time frame for filing a notice of appeal in indictable appeals. An extension of time to file the notice of appeal can be sought pursuant to r. 40.18.

Rule 40.04 deals with service of the notice. An accused person serves a notice of appeal by filing two copies with the court or by sending the copies by registered mail to the clerk. The Crown must personally serve the accused with the notice prior to filing two copies with proof of service at the court.

3.2.2 Transcripts

Rule 40.06 requires that a court reporter's certificate be filed along with the notice of appeal. An appellant who has an application to legal aid pending or who has been granted a provisional legal aid certificate may file a notice of appeal without ordering the transcript. The certificate must be filed within 15 days after a legal aid certificate authorizing the carrying on of the appeal is granted.

The contents of the transcript are set out in rr. 40.06(5)–(10). As with indictable appeals, certain portions of the trial proceedings are not generally included in the transcript, but where the omitted areas are relevant to a ground of appeal, they may be obtained by a judge's order. In appeals where the evidence is not in dispute, an agreed statement of facts may be filed in place of the transcript, together with the reasons for judgment and reasons for sentence. In sentence-only appeals where there was a trial after a plea of not guilty, Crown and defence counsel must make every effort to produce an agreed statement of facts. Assistance in settling the statement of facts can be obtained from a judge in chambers. Subrule 40.06(13) encourages agreement on the facts by making unnecessary transcription of evidence a factor in determining whether costs should be awarded on the appeal.

3.2.3 Appeal books

The contents of the appeal book are set out in r. 40.08(2). Within 15 days after the completion of the transcript or the filing of an agreed statement of facts, r. 40.08 requires that a copy of the appeal book be served on the respondent and filed with the court.

When the transcript and appeal book are filed, the appeal is perfected and ready for hearing.

3.2.4 Notice of hearing

Once the appeal has been perfected, the registrar (of the Superior Court of Justice) will set a date for the hearing of the appeal. Unless contact is made with the registrar to arrange an acceptable date, the appeal will be scheduled without regard to counsel's schedule. A notice of hearing is mailed to the parties. The notice will set out the date by which the appellant's factum must be filed; the date for the hearing of the appeal; and the date the appellant must appear, if the factum is not filed on time, to show cause why the appeal should not be dismissed as abandoned (r. 40.10).

3.2.5 Factums

The form for the appellant's and respondent's factums in summary conviction appeals from conviction, conviction and sentence, and acquittal is described in r. 40.13. The factum in a sentence-only appeal is in Form 19. Factums in summary conviction appeals must be no longer than 10 pages.

The appellant's factum must be served and filed on or before the date set out in the notice of hearing. The respondent's factum must be served on the appellant and filed with the court within 15 days of receipt of the appellant's factum and no later than seven days before the date fixed for the hearing of the appeal (r. 40.13(6)).

3.3 The hearing

A summary conviction appeal is heard before a single judge of the Superior Court of Justice. Counsel must be robed for pre-hearing motions and for the appeal itself. Apart from sentence-only appeals, which are restricted to a half-hour in total, there are no time limitations placed on the duration of oral argument.

3.4 Powers of the appeal court

3.4.1 Section 813 appeals

Under s. 822 of the *Code*, ss. 683–689, which delineate the powers of a Court of Appeal in indictable matters, are incorporated for summary conviction appeals.

3.4.2 Section 830 appeals

In an appeal pursuant to s. 830, the appeal court may

- affirm, reverse, or modify the trial decision (s. 834(1)(a)); or
- remit the matter back to the trial court with the opinion of the summary conviction appeal court (s. 834(1)(b)).

3.5 Further appeals

Pursuant to s. 839 of the *Code*, both the accused and the Crown have a further right of appeal to the Court of

Appeal for Ontario, with leave of the court or a judge thereof, on a question of law alone.

4. Stays of orders

Parliament has recognized that although an accused person has been convicted of a criminal offence, there may be circumstances in which it would be oppressive or unfair for the accused to have to comply with the terms of a sentencing order prior to the hearing of an appeal. Accordingly, provision has been made in the *Code* for certain sentencing orders to be stayed pending appeal.

Pursuant to s. 683(5), a judge of an appellate court has the power to stay the following orders pending an appeal:

- a fine;
- an order for the forfeiture or disposition of forfeited property;
- an order for restitution;
- a victim fine surcharge; and
- a probation order.

A precondition for such an application is the filing of a notice of appeal. Before granting a stay under this subsection, the judge must be satisfied that the order is in the interests of justice.

Where an accused person has been convicted of a *Code* offence that carries with it a mandatory driving prohibition, once an appeal has been taken against the conviction, an order staying the driving prohibition pending appeal may be obtained from a judge of the appeal court under s. 261. In order to obtain a stay, the accused bears the onus of establishing on a balance of probabilities all of the following:

- The appeal is not frivolous.
- The driving prohibition is not necessary in the public interest.

When granting a stay pursuant to s. 261, the judge may place conditions on the accused, such as restricting the accused's driving to going to and from work or requiring the accused to refrain from driving for a specific period of time after consuming alcohol.

In seeking a stay in relation to a summary conviction appeal, under either s. 683(5) or 261 of the *Code*, R. 41 of the *Criminal Proceedings Rules* sets out the appropriate procedure. The Crown must be served with the following materials two clear days prior to the application:

- a notice of application for the stay;
- a copy of the information;
- a copy of the notice of appeal;
- an affidavit from the accused; and
- any other supporting materials.

Where the Crown files a written consent to the stay, the order may be obtained without having to appear before the judge.

The *Criminal Appeal Rules* do not specifically address the practice to be followed in seeking a stay pending an indictable appeal. In general, the procedure set out in R. 41 of the *Criminal Proceedings Rules* for summary conviction appeals should be adopted. In indictable matters, even where the Crown is consenting to an order for a stay, an attendance before the motions judge is necessary. If the appeal is one for which leave to appeal is required, leave must be obtained before applying for the stay. The applications for leave to appeal and for a stay can be heard at the same time, but counsel must also file a factum, an application record, and any relevant transcripts in relation to the issue of leave to appeal.

5. Bail pending appeal

Bail pending appeal has been recognized as a crucial aspect of the appellate process. Indeed, the Court of Appeal for Ontario has indicated that reviewability of convictions leading to imprisonment is a principle of fundamental justice under s. 7 of the *Charter* and that access to bail pending review is a necessary adjunct of an effective right of appeal.

The outcome of an application for bail pending appeal can have serious implications for an accused person. In the appellate context, the accused no longer has the benefit of the presumption of innocence, nor is there a presumption in favour of release. Yet, a sense of injustice may be created where a person is denied bail following a conviction and is subsequently acquitted on appeal. Moreover, an unsuccessful release application can have a significant impact on the practical and strategic approach taken by counsel in the conduct of the appeal. Even where the appeal is not rendered moot by the passage of time inherent in readying it to be heard, the pace at which the preparation of an appeal must proceed increases dramatically when the client is in custody.

5.1 Release pending an indictable appeal

Section 679 of the *Code* deals with applications for release from custody pending appeal in relation to indictable offences. For the purposes of this provision, “custody” includes incarceration, a conditional sentence, and parole. Section 679 covers release pending an appeal to a court of appeal from conviction-alone, sentence-alone, or conviction and sentence. It is also used in seeking bail pending an appeal or an application for leave to appeal to the Supreme Court of Canada.

The prerequisite for any such application is the filing of a notice of appeal or a notice of application for leave to appeal.

5.1.1 Criteria: appeals from conviction alone or conviction and sentence

Pursuant to s. 679(3), the appellant may be granted bail pending appeal provided a judge of the Court of Appeal is satisfied of all of the following:

- The appeal or application for leave to appeal is not frivolous.
- The appellant will surrender into custody in accordance with the terms of the release order.
- The appellant’s detention is not necessary in the public interest.

The onus is on the applicant to satisfy the judge of each of these criteria on a balance of probabilities.

(a) The appeal is not frivolous

In order to fulfill this initial requirement for bail pending appeal, the appellant need only establish that there is an arguable ground of appeal. The courts have interpreted “frivolous” to mean the appeal is totally devoid of merit and could not possibly succeed. Some common methods of demonstrating that there is an arguable appeal are by filing a portion of the transcript to illustrate the error listed in the notice of appeal; by filing an affidavit from the appellant’s trial counsel; or, where applicable, by providing the court with the opinion letter written by defence counsel in support of the appellant’s legal aid application.

(b) The appellant will surrender

This second criterion is akin to the primary ground in s. 515(10)(a) of the *Code*. In order to satisfy the surrender criterion, counsel will want to file material to establish that the appellant has “roots in the community” and, where applicable, that the appellant was on bail prior to conviction and fulfilled all of the conditions of release. Another common means of establishing that the appellant will surrender as required is to present viable sureties who are prepared to sign a recognizance guaranteeing a substantial amount.

A standard term of each order for release pending appeal is that the appellant surrender into custody by 6:00 p.m. on the day prior to the hearing of the appeal, failing which the appeal will be deemed abandoned (r. 33).

(c) Detention is not necessary in the public interest

The term “public interest” in s. 679(3)(c) encompasses considerations akin to those of the secondary ground in

s. 515(10)(b), which bear on the protection and safety of the public. However, “public interest” also includes considerations relating to the public perception of and confidence in the administration of justice.

It is in dealing with serious offences that “public interest,” as it relates to the public’s confidence in the administration of justice, may support detention in custody. Yet, Parliament clearly envisaged that there would be some cases in which a person convicted of a serious violent offence, including murder, could properly be granted bail pending appeal. Circumstances in which release might be warranted in the public interest include any of the following:

- The hearing of the appeal is long delayed and the probability of success is very strong.
- The appellant is the recipient of strong support and confidence in the community.
- There are compelling compassionate grounds.

5.1.2 Criteria: sentence-only appeals

A precondition for bail pending a sentence appeal is that leave to appeal must have been granted (s. 679(1)(b)). In general, r. 31 of the *Criminal Appeal Rules* requires that the leave application be heard together with the application for release. To some extent, the issues in the leave application and the application for bail pending appeal overlap, since both involve a consideration of the merits of the appeal. However, if leave for a sentence-only appeal is denied, there is no right to appeal that decision to the full Court of Appeal (s. 675(4)).

Once leave to appeal is obtained, the appellant may be granted bail pending appeal pursuant to s. 679(4) if all of the following are established:

- The appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if the appellant were detained in custody.
- The appellant will surrender into custody in accordance with the terms of the release order.
- The appellant’s detention is not necessary in the public interest.

The latter two criteria are identical to those discussed in relation to bail pending an appeal against conviction.

(a) Unnecessary hardship

In addressing this requirement, one of the hardships commonly relied upon is that the sentence imposed on the appellant will have been served by the time the appeal can be heard, which would render the appeal moot. While this is a weighty consideration, it is not conclusive in itself, since the appellant must also demonstrate that the appeal has merit. Other

circumstances that may be advanced as creating unnecessary hardship include a potential loss of employment, health reasons, and the likelihood of harm to the appellant’s family.

5.1.3 Procedure for obtaining bail

In order to bring an application for bail pending appeal, counsel should prepare a package of documents that includes the following:

- a notice of application for release pending appeal;
- a copy of the notice of appeal;
- an affidavit from the appellant that complies with r. 32 and provides as much information as possible about the appellant’s background and circumstances; and
- other materials in support of the application that are relevant to the statutory criteria, including affidavits from a spouse or other family member, an employer, a surety, or the appellant’s trial counsel; portions of the trial transcript; exhibits such as a pre-sentence report or a victim impact statement; and any relevant case law.

These documents must be served on the Crown three clear days prior to the hearing of the application and filed with the Court of Appeal (r. 37). The Crown is entitled to file affidavits in support of the appellant’s detention, although this is not routinely done. The parties may cross-examine on any affidavits that are filed, and the transcripts of those cross-examinations should be provided to the court (r. 32(3)).

5.1.4 The hearing

An application for bail pending appeal is heard before a single judge of the Court of Appeal. Counsel, who are not robed, make submissions based on the materials filed.

When the application is on consent, release will usually be granted on the agreed terms. If bail is opposed or the terms of release are in dispute, the judge will proceed to hear the application. Usually judgment is given orally, immediately after the hearing, with brief reasons endorsed on the notice of motion.

5.1.5 The order

Where the application for bail pending appeal is denied, the judge can order that the hearing of the appeal be expedited. When release is granted, it may be in the form of an undertaking with or without conditions, or a recognizance with or without sureties, with or without a cash deposit, and with or without conditions (s. 679(5)). Ordinarily, release will be ordered on a recognizance with conditions and with one or more sureties. Rule 33 sets out the mandatory conditions that are to be included in all orders for release from custody pending appeal. The

order will also include terms that are relevant to the appellant's circumstances, such as requirements as to residence, employment, curfew, non-association, abstention from alcohol, and continuation of treatment. Counsel must ensure that the appellant is able to comply with the terms included in the bail order; otherwise, the order may be breached and bail cancelled.

If bail is granted, a release order must be prepared and taken to the jail. The appellant's sureties must attend before a justice of the peace at the jail to enter into their recognizances.

5.1.6 Altering the order

(a) Variation of the order

A judge of the Court of Appeal has the power to vary an order for bail pending appeal made by himself or herself or another judge. No material change in circumstances is required before a variation can be made, provided that the appellant satisfies the statutory criteria for release. Once the variation is made, the appellant and his or her sureties, if any, are required to enter into a new undertaking or recognizance.

(b) Extension of the order

In order to ensure that an appeal is pursued with due diligence once bail is granted, judges of the Court of Appeal routinely include a "sunset clause" as a term of the release order. This term provides that the order will terminate on a specific date or on the date of the hearing of the appeal, whichever should occur first. Where the appeal cannot be heard prior to the specified termination date, an application may be brought for an extension of the release order. The material filed in support of such an application should include

- an assurance that the surety is willing to continue in that role; and
- information about the current status of the appeal:
 - the remaining steps, if any, needed to perfect the appeal;
 - any explanation for the failure to perfect the appeal before the expiry of the order; and
 - the earliest feasible date on which the appeal could be heard (r. 34(3)).

Where due diligence in perfecting the appeal is not established, an extension of the bail order may be denied.

A judge can make an order varying or extending a release order without the attendance of counsel where the written consent of the Crown has been filed (r. 34(2)).

(c) Review of the order

The correctness of a decision granting or denying bail pending appeal may be reviewed pursuant to s. 680 of the *Code*. A challenge of this nature proceeds in two stages. Initially, an application for a direction that the court review the order must be made to the Chief Justice of the Court of Appeal. The test, to be applied by the Chief Justice in deciding if a review should be directed, is whether the court could possibly conclude that the initial application should have been allowed. Subsequently, if the direction is made, a panel of the Court of Appeal hears the review. The review is conducted as an ordinary appeal, with appeal books and factums being filed. The court has the authority to confirm or vary the initial order.

Where the correctness of the initial order granting or denying bail pending appeal is conceded but it is alleged that there has been a material change of circumstances, a second application can be made under s. 679. It is usually preferable for the judge who heard the initial application to deal with any subsequent bail applications.

(d) Revocation of the order

An order for bail pending appeal may be revoked where the appellant has violated or is about to violate the terms of his or her release order or where the appellant has committed an indictable offence (s. 679(6) of the *Code*). When the appellant is out of custody, Crown counsel will bring an application for a warrant for the arrest of the appellant before a judge of the Court of Appeal. Where a warrant is issued, the appellant may be brought before the judge and given an opportunity to show cause why he or she should be released. When the appellant is already in custody, no arrest warrant is necessary. It is sufficient if the appellant receives proper notice of the revocation application and has an opportunity to be represented by counsel at the revocation hearing. The judge may order the appellant released or may cancel the order, thereby reviving the original warrant of committal.

5.2 Release pending a new trial

Where an appeal has been heard, either by the Court of Appeal or the Supreme Court of Canada, and a new trial has been ordered, a judge of the appeal court has the jurisdiction to grant bail pending the new trial. The issue of release is to be determined under s. 515 or 522 of the *Code* as if the appellant were charged with the offence for the first time (s. 679(7.1)).

5.3 Release pending a summary conviction appeal

An application for bail pending a summary conviction appeal is made under s. 816 or 832(1) of the *Code* before

a judge of the Superior Court of Justice. As with indictable appeals, a prerequisite to a bail application in summary matters is the filing of a notice of appeal.

5.3.1 Criteria

No test for the granting of bail in these circumstances has been set out in the *Code*. However, in *R. v. Simpson*, criteria for release, which mirror the requirements in s. 679, were articulated. The appellant must establish the following:

- There are good grounds for the appeal.
- There would be a hardship if the appellant remained in custody pending the appeal.
- Release would not be contrary to the public interest.

In general, the short sentences imposed for summary conviction offences militate in favour of granting bail pending appeal. Otherwise, the delay inherent in the preparation of the trial transcript would result in the entire sentence being served before the appeal could be heard, thereby making the matter moot.

5.3.2 Procedure for obtaining bail

The procedure for seeking bail pending a summary conviction appeal is set out in R. 42 of the *Criminal Proceedings Rules*. The appellant must prepare an application record containing:

- a copy of the notice of application;
- a copy of the information;
- a copy of the notice of appeal and any supplementary notices of appeal;
- an affidavit of the appellant in compliance with r. 42.05(2); and
- any other material that may be assistance to the court.

The Crown must be served with this material two clear days prior to the hearing of the application and a copy of the material along with proof of service must be filed with the clerk of the court. If the Crown takes the position that the appellant's detention is necessary in the public interest, an affidavit of any additional materials to be relied upon must be filed. The parties have the right to cross-examine on these affidavits.

Where the Crown consents to the appellant's release, the materials can be filed along with a written consent and a draft order. The judge may grant bail without the need for the parties to appear.

6. Judicial review

Once a case has moved from the preliminary inquiry to the trial stage, extraordinary remedies, such as

certiorari, are available where the trial court has made a jurisdictional error or an error of law on the face of the record. Applications for judicial review of a decision of a judge of the Ontario Court of Justice are dealt with in the Superior Court of Justice; an application to review a decision of a Superior Court of Justice judge must be brought by way of an application for leave to appeal to the Supreme Court of Canada pursuant to s. 40 of the *Supreme Court Act*.

The discretion to grant an extraordinary remedy is rarely exercised in criminal cases. There are no interlocutory appeals in criminal matters. Judicial review of rulings made during the course of a trial, where there is an appellate remedy at the conclusion of the proceedings, cause unnecessary interruptions in the criminal process. However, in unusual circumstances, where the interests of justice require immediate intervention, the jurisdiction to grant an extraordinary remedy will be exercised. This is most commonly seen where the interests of a third party, not directly involved in the criminal proceedings, are at stake (such as the media in *Dagenais v. Canadian Broadcasting Corp.* or the lawyer who was not permitted to withdraw his services in *R. v. Cunningham*).

7. Post-appellate remedies

Pursuant to s. 696.1 of the *Code*, an application may be made to the Minister of Justice to review a conviction or a finding that a person is a dangerous or long-term offender on the basis of a miscarriage of justice. This application can only be made after all appellate remedies have been exhausted. The Minister's ability to address a miscarriage of justice is only exercised in exceptional cases where there is new and significant information that casts doubt on the correctness of the person's conviction (s. 696.4).

Upon receiving an application, the Minister will conduct a preliminary assessment to determine whether to start an investigation. Where there is a reasonable basis to conclude that a miscarriage of justice likely occurred, an investigation will take place. The Minister may exercise the powers of a commissioner under the *Inquiries Act* in carrying out the investigation or may delegate conduct of the investigation to a lawyer, retired judge, or other appropriate person (s. 696.2). At the conclusion of the investigation, the Minister may dismiss the application. Or if satisfied that a miscarriage of justice likely occurred, the Minister may order a new trial or hearing or refer the matter to the Court of Appeal for hearing and determination (s. 696.3).

Aboriginal peoples and the criminal justice system

1. Introduction

This chapter will address the practical aspects of the relationship between Aboriginal peoples and the criminal justice system.

2. Jurisdiction — on reserve and off reserve

2.1 Federal jurisdiction

Criminal or quasi-criminal laws enacted by the federal Parliament apply to Aboriginal persons to the extent that they do not unjustifiably infringe upon the constitutionally protected Aboriginal and/or treaty rights of the accused person.

Any action by the federal or provincial governments that interferes with or restricts the existing Aboriginal or treaty rights of an Aboriginal person infringes those rights. Although there is no explicit justification requirement or test laid out in s. 35 of the *Constitution Act, 1982*, the Supreme Court of Canada has held that Aboriginal and treaty rights may be infringed if the infringement is “justified” according to tests set out by that court. Note that s. 1 of the *Canadian Charter of Rights and Freedoms (Charter)*, Part I of the *Constitution Act, 1982*, which mandates limits on *Charter* rights, does not apply to s. 35.

In *R. v. Sparrow* the Supreme Court of Canada enunciated a two-part test for justification. First, the infringement of the right must be in furtherance of a legislative objective that is “compelling and substantial.” The court indicated that compelling and substantial objectives would include matters of conservation and safety. In *Delgamuukw v. British Columbia*, this test was later broadened by the court such that the development of agriculture, forestry, mining, hydroelectric power, the general economic development of an area, protection of the environment or endangered species, the building of infrastructure, and the settlement of foreign populations to support those aims may be sufficient to satisfy the first part of the test for justification.

The second part of the test requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples. The theory behind this principle is that the fiduciary relationship requires Aboriginal interests to be considered first, although they need not always be given

priority. The primacy of the fiduciary duty is a function of the nature of the Aboriginal right at issue. For example, although Aboriginal food fisheries have been given priority after valid conservation measures, where the Aboriginal right was to sell fish commercially, that right was held to be “constitutionally satisfied if the government had taken those rights into account and has allocated a resource ‘in a manner respectful’ of [the Aboriginal] priority.”

2.2 Provincial jurisdiction

Subsection 91(24) of the *Constitution Act, 1867* confers legislative authority on the Parliament of Canada in “all matters” coming within the subject “Indians, and lands reserved for the Indians.” Provincial laws apply to Aboriginal persons in two ways. First, provincial laws apply directly to Indians of their own force (*ex proprio vigore*) as long as the following criteria are met:

- The laws do not invade exclusive federal authority over Indians and lands reserved for Indians.
- The laws are not inconsistent with federal law.

Therefore, laws such as highway traffic legislation, business licensing and regulation, and environmental regulations normally apply. The major limitation to provincial jurisdiction is that a provincial law cannot affect “Indianness” or derogate from the “status and capacities” of Indians, and may not affect Indian reserve lands or Aboriginal or treaty rights.

Second, provincial laws apply to Indians by operation of s. 88 of the *Indian Act*:

88.— Subject to the terms of any treaty and any other Act of the Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal and Statistical Management Act*, or any order, rule, regulation or by-law made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

Section 88 of the *Indian Act* operates to incorporate into federal law those provincial laws of general application that do invade exclusive federal authority. The operation of the incorporated provincial statute is, however, subject to treaties and federal laws and is only applicable to the extent that such laws are not inconsistent with the *Indian*

Act, the *First Nations Fiscal and Statistical Management Act*, or any order, rule, regulation, or band by-law made under those Acts.

Subsection 35(1) of the *Constitution Act, 1982* still applies to provincial laws that might be referentially incorporated as a result of s. 88. In other words, even if such a law is found to apply to Indians as a result of s. 88, it must still not unjustifiably infringe Aboriginal or treaty rights. The province must comply with the same tests as the federal Crown to justify infringement of those rights. Moreover, although the federal government had the capacity to extinguish Aboriginal and treaty rights in certain circumstances prior to 1982, provincial governments have never had jurisdiction to do so. Since Aboriginal and treaty rights go to the “core of Indianness,” it is not within the jurisdiction of the province to legislate in this area.

For example, provincial seizure legislation has been held to apply to Indians except to the extent that it calls upon seizure of property that is exempt according to s. 89 of the *Indian Act*. Some hunting and fishing legislation has been held to apply except where it conflicts with the *Indian Act*, band by-laws, and Aboriginal and/or treaty rights. It is primarily sections of hunting and fishing legislation that have been held not to apply to Indians.

3. Advising the Aboriginal accused

3.1 Aboriginal and/or treaty rights

Subsection 35(1) of the *Constitution Act, 1982* states as follows: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Section 35(2) defines “aboriginal peoples of Canada” to include the Indian, Inuit, and Métis peoples of Canada. Because of the potential that criminal or quasi-criminal legislation may be inapplicable to an Aboriginal accused by reason of Aboriginal and/or treaty rights, it is important for counsel to consider the nature of the charges and the accused’s Aboriginal status. Protection of Aboriginal and/or treaty rights applies to Indians, Métis, and Inuit, as defined in s. 35(2) of the *Constitution Act, 1982*.

It should also be kept in mind that, in most cases, the cost of mounting a competent defence based upon Aboriginal and/or treaty rights is prohibitive for a single accused. A great deal of historical, geographical, and genealogical research is needed, in addition to the legal preparation and knowledge required.

Many lawyers who practice Aboriginal law are aware of unfortunate situations where a poorly prepared Aboriginal/treaty rights defence is put forward by an accused, only to be denied by the court. Negative

judgments on the interpretation of Aboriginal/treaty rights impact more than the single accused. As a precedent, these judgments can limit the scope and application of rights for an entire Aboriginal community. Most criminal lawyers are not aware of the potential costs and the broader implications of asserting an Aboriginal/treaty rights defence for their client.

For this reason and because a ruling on Aboriginal and/or treaty rights will have a definite impact upon other members of the Aboriginal community, it is important for the accused to have the support of his or her First Nation or Aboriginal community.

Certain types of charges should lead counsel to automatically consider whether there may be a defence of existing Aboriginal and/or treaty rights. These include all hunting and fishing charges, licensing charges, hunting and fishing safety-related charges, trespass charges, firearms charges, and unlawful possession or cutting of timber charges.

3.2 Jurisdictional issues

There will also be some cases where counsel must consider whether the province or Parliament, whatever the case may be, has jurisdiction to legislate in relation to the charges faced by the Aboriginal accused, particularly where the charge was laid on reserve land. If the charge is based upon a provincial statute or regulation, it must first be determined whether the province has jurisdiction to regulate the matter according to the two ways that provincial laws can apply to Indians, as described above. If there is *prima facie* jurisdiction, the issue of paramountcy of legislation must be considered. For example, even if there is jurisdiction for provincial legislation in a particular area, such legislation or regulation will not apply on a reserve if there is concurrent legislation enacted by Parliament or through a First Nation law or by-law.

It should be kept in mind that the *Indian Act*, enacted by Parliament pursuant to s. 91(24), applies to Indians and reserve land only. The potential jurisdictional issues described above would not apply to Métis or Inuit.

Jurisdictional issues may arise for an accused, either Aboriginal or non-Aboriginal, who has some contact with or resides on an Indian reserve (and in some cases in the traditional territory of a First Nation). The following are examples of where jurisdictional issues may arise:

- business regulation/licensing/fees/taxes;
- trespass charges;
- hunting and fishing violations;
- highway traffic charges; and

- policing by First Nations constables, band officers, and other police services on and off reserve lands.

The effect of s. 89(1) of the *Indian Act* should also be noted for its practical application in criminal and quasi-criminal law matters, particularly in hunting- and fishing-related charges. Subsection 89(1) states:

Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

Although this section provides an exemption from seizure for execution of civil judgments, it has been held not to apply where there is a seizure of property for evidentiary purposes as part of a criminal process. If the seizure is not for the purposes of obtaining evidence but for the purposes of penalty, obtaining security, or possible sale, the exemption will apply. This provision is particularly important in hunting- and fishing-related charges, since the Ministry of Natural Resources generally has authority to seize all hunting and fishing equipment, including vehicles, and exercises this power as a matter of course.

4. Procedural matters

Once jurisdictional issues have been addressed, other procedural issues unique to an Aboriginal accused must be considered. The two issues that have the most direct impact on an accused receiving a fair trial are jury selection and sentencing.

4.1 Jury selection

In a criminal jury trial of an Aboriginal accused, consideration must be given to the potential of racial bias of the jury. The impartiality of the jury may be attacked by challenging the array of jury members itself. Counsel for Aboriginal accused have attempted, through various arguments, to ensure that a minimum number of Aboriginal persons are empanelled on the jury. Pursuant to s. 629 of the *Criminal Code (Code)*, the accused or the prosecutor may challenge the jury panel only on the ground of partiality, fraud, or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned. The systematic exclusion of Aboriginal persons from the array may provide the basis for a challenge for partiality. It is argued that this is the only way to account for factors of culture, language, and geography that would have a negative impact on the accused’s ability to receive a fair trial.

Challenging individual jurors for cause on the ground that a potential juror may be partial (or biased against Aboriginal persons) has been more successful. The Supreme Court of Canada in *R. v. Williams* held that

where issues of racial prejudice arise, it is best to err on the side of caution, because one cannot expect an individual with racist attitudes to set aside bias and act impartially just because he or she is called upon as a juror.

4.2 Sentencing

Sentencing provisions contained in s. 718.2(e) of the *Code* specifically take into account Aboriginal offenders and the role of their communities in their rehabilitation.

718.2— A court that imposes a sentence shall also take into consideration the following principles:

...

- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

In *R. v. Gladue*, the Supreme Court of Canada has provided direction:

In sentencing an aboriginal offender, the judge must consider:

- (A) The unique systemic or background factors which may have played a part in bringing the particular offender before the courts; and
- (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

The *Youth Criminal Justice Act (YCJA)* contains similar sentencing directions for Aboriginal youth. Paragraph 38(2)(d) states: “all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons.”

As a result of s. 718.2(e), minimum sentencing provisions of the *Code* have been found to violate the s. 15 equality rights under the *Charter* for Aboriginal accused. The argument is that minimum sentences do not allow courts to consider the underlying systemic and substantive inequality Aboriginal offenders face in the sentencing process, which s. 718.2(e) was specifically intended to address.

When considering other types of sentences or sanctions, even prior to the enactment of s. 718.2(e), courts have considered requiring attendance at meetings of Clan leaders and “healing circles,” “sentencing circles,” community service in the First Nation community under supervision of the band council, and banishment.

Although firearms prohibitions are now a common element of sentencing, Aboriginal defendants may be

more severely affected by such a prohibition since, for some, hunting may be a means of sustenance. In such cases, defence counsel should consider the application of s. 113 of the *Code*, which permits the lifting of firearms prohibitions orders for sustenance or employment.

Restorative justice objectives may also be advanced by diversion of the offender from the criminal justice system to an Aboriginal community mediation committee or

similar mechanism that determines and oversees the appropriate measures to deal with the offender. A statutory basis for diversion and the use of “alternative measures” is provided by s. 717(1) of the *Code* and ss. 6 and 10 of the *YCJA*.

In cases involving hunting and fishing, consideration may also be given to a pre-hearing application to restore any hunting and fishing equipment that has been seized.

Youth criminal justice

1. Introduction

Parliament has devised a separate criminal justice system for youths. The purpose of that youth justice system, as set out in the Preamble to the *Youth Criminal Justice Act (YCJA)*, is to prevent crime by addressing its underlying causes and reducing over-reliance on incarceration for non-violent young persons.

While youths are governed in their conduct by the same criminal strictures as adults—that is, the *Criminal Code (Code)*—the procedure by which youths are tried and sentenced is governed by the *YCJA*. The *YCJA*, among many other things, ensures the following:

- Non-violent, first offender youths are diverted out of the youth court system.
- Youths are not subjected to pre-trial detention except in specified circumstances.
- Youths are tried separately from adults, and their charges proceed more speedily.
- Youths are not given custodial sentences unless strict criteria are first satisfied.

2. Jurisdiction of the youth justice court

The *YCJA* gives the youth court exclusive jurisdiction in respect of any offence allegedly committed by an individual while he or she was a young person. The age of the accused when the alleged offence was committed determines whether the accused is tried in youth court. The Supreme Court has affirmed that young persons are entitled to a separate legal and sentencing regime. Accordingly, young persons cannot be jointly tried with adults but must be tried separately.

Young persons are those who committed the alleged offence between the ages of 12 and 17. The youth justice court also has jurisdiction in respect of an offence allegedly committed by young persons on the day of their 18th birthday.

All proceedings under the *YCJA* occur in the youth justice court, including any federal offence allegedly committed by a young person, with the exception of regulatory offences under the *Contraventions Act* and offences under military jurisdiction pursuant to the *National Defence Act*. Proceedings begun under the *YCJA* continue after the young person turns 18, and a youth sentence continues in effect after the young person turns 18.

Section 13 of the *YCJA* provides that a youth justice court is any court established by a province as a youth justice court. A youth justice court judge is a person appointed as a judge of a youth justice court or a judge sitting in a court established as a youth justice court. Justices of the peace may also carry out proceedings relating to young persons except for pleas and trials. Justices of the peace may decide on judicial interim release. They may also conduct peace bond proceedings in respect of young persons under s. 810 of the *Code* only if the young person consents. If the young person refuses to enter into the order, the justice of the peace must refer the matter to the youth justice court.

Section 140 of the *YCJA* states that the provisions of the *Code* apply in respect of offences allegedly committed by young persons, with necessary modifications, except to the extent that they are inconsistent with or excluded by the *YCJA*. Subject to the exceptions set out below, all trials in a youth justice court are conducted in accordance with the summary conviction offence provisions of Part XXVII of the *Code*. An indictable offence prosecuted under the *YCJA* remains an indictable offence, but the trial proceeds as if it were a summary conviction offence.

Subsection 67(1) of the *YCJA* provides that a young person is entitled to an election if

- he or she is charged with murder;
- he or she is charged with attempted murder, manslaughter, or aggravated sexual assault and is 14 years or older;
- the Crown has given notice of intention to seek an adult sentence and the young person is 14 years or older; or
- it is unclear whether the young person was under or over 18 years of age at the time of the offence and it is not an absolute jurisdiction offence.

The available elections are as follows:

- before a youth justice court judge, without a preliminary inquiry, in the Ontario Court of Justice;
- before a judge alone of the Superior Court of Justice, following a preliminary inquiry; or
- before a judge of the Superior Court of Justice, with a jury, following a preliminary inquiry.

A young person is not entitled to an election if he or she is charged with a non-enumerated offence, as noted

above, and the Crown gives notice prior to election that an adult sentence is not being sought.

The Supreme Court of Canada has affirmed that young persons do not have any special right to a preliminary inquiry distinct from adults. The preliminary inquiry is optional, and it is not available if the Crown prefers a direct indictment.

If a young person does not make an election, he or she will be deemed to have elected to be tried by a court composed of a judge and jury. Section 13 of the *YCJA* provides that when a trial is held before a Superior Court of Justice judge, with or without a jury, then that trial court is deemed to be a youth justice court, and the presiding judge becomes a youth justice court judge for the duration of the matter.

3. Declaration of Principle

The Declaration of Principle in s. 3 of the *YCJA* sets out the policy framework for the interpretation of the entire *Act*. Young persons must be dealt with according to these principles as well as the other principles that apply to specific sections of the *YCJA*, such as extrajudicial measures, youth sentencing, and custody and supervision. The Declaration provides as follows:

- The youth criminal justice system is intended to contribute to the long-term protection of society by preventing crime, rehabilitating and reintegrating young persons into society, and ensuring meaningful consequences for offences.
- The youth criminal justice system must reflect the fact that young persons are not adults. It must emphasize measures of accountability consistent with the greater dependency and reduced level of maturity of young persons, provide enhanced procedural protections, emphasize rehabilitation and reintegration, and recognize the importance of timely intervention.
- Within the limits of fair and proportionate accountability, the measures taken against young persons should reinforce respect for societal values, encourage reparations to victims and the community, and be meaningful to the young person. Where appropriate, parents, the extended family, the community, and social or other agencies should be involved; and the youth criminal justice system should respect gender, ethnic, cultural, and linguistic differences and respond to the needs of aboriginal young persons and young persons with special requirements.
- Special considerations apply in respect of proceedings against young persons. Young persons have rights and freedoms; victims should be treated with courtesy, compassion, and respect and be kept informed and given the opportunity to participate; and parents should be kept informed of proceedings

involving their children and be encouraged to support them in addressing their offending behaviour.

4. Extrajudicial measures and extrajudicial sanctions

4.1 Extrajudicial measures

Police and Crown counsel can hold young persons accountable for criminal conduct without resort to the formal justice system through the use of extrajudicial measures. Extrajudicial measures and extrajudicial sanctions allow minor criminal charges to be diverted out of the formal criminal process. They are presumed an adequate sanction if the offence is not violent and the young person has not previously been found guilty.

Before a police officer lays a charge, the officer must consider whether it would be sufficient to

- take no further action;
- warn the young person;
- administer a caution (if a program is established); or
- with the young person's consent, refer the young person to a community program or agency.

Crown counsel may also issue a formal caution. If these measures are inadequate, the young person may be referred to an extrajudicial sanctions program. Evidence that an offence was dealt with by extrajudicial measures is not admissible as proof of prior offending behaviour by a young person in any subsequent youth justice court proceedings.

4.2 Extrajudicial sanctions

Extrajudicial sanctions were previously known as "alternative measures" under the *Young Offenders Act* (YOA). These sanctions are used to divert a young person out of the criminal process where extrajudicial measures are inadequate to deal with the offending behaviour because of the seriousness of the offence, the nature and number of previous offences committed, or any other aggravating circumstances.

Crown counsel ordinarily refers relatively minor non-violent offences, such as property offences, to the current alternative measures program in place in Ontario. More serious offences may still warrant consideration for extrajudicial sanctions if it is in the interests of the young person and of society.

If the Crown approves the program and the young person consents, the young person is referred to a probation officer, and the Crown will stay the proceedings pursuant to s. 579 of the *Code*. In the event that a young person fails to complete the sanctions, the Crown may

recommence the prosecution in accordance with s. 579(2) of the *Code*.

Subsection 10(2) of the *YCJA* sets out preconditions for the use of extrajudicial sanctions. For example, the Crown must have a reasonable prospect of conviction, the young person must fully and freely consent, and the young person must accept responsibility for the offending behaviour. A parent must be informed of the extrajudicial sanction, and on request, victims must be informed of the identity of the young person and how the offence has been dealt with.

5. Pre-trial detention

Sections 28–31 and 33 of the *YCJA* deal with pre-trial detention of young persons. Generally speaking, all of the *Code* provisions that apply to judicial interim release for adults also apply to young persons. Detention of a young person is justified only on the same grounds used for adults, as found in s. 515(10) of the *Code*. The *Code* provisions do not apply if they are inconsistent with or excluded by specific *YCJA* provisions.

If the circumstances are such that the young person could not receive a custodial sentence upon conviction, the judge is required to presume that pre-trial detention is not required. The *YCJA* also contains a prohibition on the use of detention as a substitute for child welfare, mental health treatment, or other social measures.

Section 31 of the *YCJA* requires that the judge inquire about the availability of a responsible adult as an alternative to pre-trial detention. If a responsible adult is willing and able to take care of the young person and the young person consents, the young person may be placed with the adult instead of being detained.

When the accused is a young person charged with an offence not listed in s. 469 of the *Code*, his or her initial show cause hearing may be conducted by a regular justice or by a youth justice court judge. Where a justice of the peace conducts the initial application, both the young person and the prosecutor are entitled to a *de novo* release hearing before a youth court judge. Further reviews are conducted pursuant to ss. 520–521 of the *Code* before the Superior Court of Justice. If a youth justice court conducts the young person's initial show cause hearing, the general review provisions are applicable, and applications must be made to a judge of the Superior Court of Justice. Only a youth justice court judge may release a young person charged with an offence listed in s. 469 of the *Code*, such as murder. A review of that decision is to the Court of Appeal in accordance with s. 680 of the *Code*.

6. Right to counsel

As guaranteed by s. 10(b) of the *Canadian Charter of Rights and Freedoms (Charter)*, young persons must be advised without delay of the right to counsel upon arrest or detention. Under the *YCJA*, the right to counsel is considerably expanded.

The *YCJA* provides that a young person may exercise the right to counsel personally and not through a parent or guardian. Where it appears that there is a conflict of interest between the parent/guardian and the young person or that it would be in the best interests of the young person, the court must ensure that the young person has independent counsel.

The requirement to inform the young person of the right to counsel is not restricted to simply arrest or detention. Section 25 of the *YCJA* provides that where a young person is not represented, he or she must be advised of the right to retain and instruct counsel and be given an opportunity to obtain counsel at various points in the proceedings, including a bail hearing, a hearing to determine whether the young person should be liable to an adult sentence, at trial, and at sentence and custody review hearings. A young person is entitled only to an opportunity to obtain counsel, not to an appointment of counsel.

After advising an unrepresented young person of the right to counsel on a guilty plea, the youth justice court judge must also

- ensure that the young person understands the charge;
- explain the consequences of being liable for an adult sentence, if applicable, and explain the process for applying for a youth sentence; and
- explain the plea options and, if applicable, the election options.

If the court is not satisfied that the young person understands these matters, the court must direct that counsel represent the young person.

7. The questioning of young persons

Section 146 of the *YCJA* governs the taking of statements from a young person. If these provisions are not complied with, the statement may not be admitted. Before a statement is taken, the young person must be advised of the following:

- There is no obligation to give a statement.
- The statement may be used in evidence.
- The young person has the right to consult counsel, a parent or other adult relative, or in the absence of a parent or adult relative, any other appropriate adult.

- The young person has the right to make the statement in the presence of this other person.

Any waiver of the right to consult another person or have that other person present must be recorded on videotape, on audiotape, or in writing.

The Crown must prove beyond a reasonable doubt that the rights and options of the young person were clearly explained to them. If the Crown seeks to rely on a waiver of the young person's rights, that waiver must be clear, unequivocal, and accompanied by a proper understanding of the right in question and an appreciation of the consequences of declining its protection.

A youth justice court judge may admit a statement even if there was a technical irregularity in complying with the rules, provided that admission of the statement would not bring into disrepute the principle that young persons are entitled to enhanced procedural protections. A breach of the informational components cannot be considered a "technical irregularity."

8. Notice to parent

The *YCJA* also provides that parents will be at least informed of the criminal justice process by requiring a "notice to parent" at various stages of the proceedings. For example, a parent must be given notice when a summons or an appearance notice is issued; when the young person is released on a promise to appear, undertaking, or recognizance; or when the young person is arrested and detained.

Notice may be given to an adult relative or any other adult considered appropriate where the parents are unknown or unavailable. In circumstances where a parent is not notified, the court may adjourn the proceedings to allow for notice to be given or dispense with notice. The court may also order the attendance of a parent at any stage of the proceedings.

9. Assessments

Under s. 34(2) of the *YCJA*, a youth justice court may order a medical or psychological assessment for a number of purposes, including a bail review, an adult sentence hearing, a sentence review, and other custodial matters. A youth justice court may order such an assessment on consent of the parties or on its own motion if it believes the report is necessary for one of the enumerated purposes and any one of the following factors exist:

- There are grounds to believe that the young person is suffering from a physical or mental illness or disorder.

- The young person's history indicates a pattern of repeated findings of guilt.
- The young person is alleged to have committed a serious violent offence.

There is a statutory prohibition against the use of statements made by a young person in the course of the s. 34 assessment for the purpose of cross-examination, with exceptions relating to the original purpose for which the assessment was ordered.

10. Sentencing

The *YCJA* sentencing sections apply only when a young person is given a youth sentence. The *YCJA* provides specific guidance to judges, setting out detailed sentencing principles and regulating sentencing options. Mandatory restrictions are placed on the use of custodial sentences.

If an adult sentence is imposed, the *Code* provisions apply with some modifications. The court may impose an adult sentence if it is proven that the offence was committed after the young person turned 18. The Crown may also seek to have an adult sentence imposed on a young person aged between 14 and 17 at the time of the offence, but the young person must be served with notice of that intention. The youth court justice must also advise the young person of the potential liability for an adult sentence at the first appearance. The Crown bears the onus of justifying the imposition of an adult sentence on a young person, regardless of the offence.

10.1 Purpose and principles of sentencing

The purpose of youth sentencing is set out in s. 38(1) of the *YCJA*. It provides that the young person is to be held accountable for an offence by imposing just sanctions that

- have meaningful consequences for the young person; and
- promote his or her rehabilitation and reintegration into society.

The Supreme Court of Canada has repeatedly affirmed Parliament's intention to reduce the over-reliance on incarceration for non-violent young persons. All available sanctions other than custody that are reasonable in the circumstances must be considered with particular attention to the circumstances of aboriginal young persons.

General and specific deterrence are not sentencing principles under the *YCJA*. Denunciation is not a sentencing principle either, but it may be read in as long as it is not used to increase the severity of the sentence. The sentencing principles must be encompassed within the statutory concept of "accountability," that is,

preventing re-offending by addressing the circumstances underlying offending behaviour through rehabilitation and reintegration and reserving custodial sanctions for the most serious crimes.

The following is a non-exhaustive list of factors to be considered when sentencing young persons:

- degree of participation in the offence;
- harm to victims and whether it was intentional or foreseeable;
- reparation made to the victim or community;
- previous findings of guilt; and
- time spent in pre-trial detention.

Generally speaking, a young person should receive a credit of 1:1 for pre-trial detention, although in an exceptional case, the court may exercise its discretion to reduce the credit given to below 1:1.

10.2 Restrictions on custodial sentences

Subsection 39(1) of the *YCJA* provides that the court must not impose a custodial sentence unless at least one of the following conditions are met:

- (a) The young person has committed a violent offence.
- (b) The young person has failed to comply with previous non-custodial sentences.
- (c) The young person has been found guilty of an indictable offence for which an adult can be sentenced to imprisonment for more than two years, and the young person has a history of convictions.
- (d) In exceptional cases, the young person has been found guilty of an indictable offence, and the aggravating circumstances would make a non-custodial sentence inconsistent with the purpose and principles of youth sentencing.

A “violent offence” is not defined in the *YCJA* or the *Code* but it must be one that involves some evidence of physical or psychological harm that is caused, attempted, or threatened. This is to be contrasted with a “serious violent offence,” which is defined in the *YCJA* as an offence in which a young person causes or attempts to cause serious bodily harm.

If one of conditions (a)–(c) applies, the court must still consider all reasonable alternatives to custody and determine that there is no reasonable alternative or combination of alternatives that achieves the purpose and principles of youth sentencing.

The fact that a young person had received a non-custodial sentence for a prior offence does not preclude the court from using the same non-custodial sentence or any other non-custodial sentence. As with pre-trial detention, custody is not to be used as a substitute for

appropriate child protection, mental health treatment, or other social measures.

A youth justice court that decides to impose a custodial sentence must give reasons why a non-custodial sentence would not achieve the purpose of youth sentencing. If the custodial sentence is imposed as an exceptional case under s. 39(1)(d) of the *YCJA*, the court must also give reasons as to why the circumstances are so extreme that nothing less than custody would fulfill youth sentencing purposes.

10.3 Pre-sentence report

The court may order a pre-sentence report that is typically prepared by a probation officer in order to provide the court with background information on the young person. However, the court *must* order a pre-sentence report before ordering a custodial sentence, unless the parties consent and the court is satisfied that a report is not necessary.

10.4 Youth sentences

When imposing a youth sentence, the court will impose one or more of the sanctions set out in s. 42(2) of the *YCJA*. Before doing so, the court must consider the conference recommendations, any pre-sentence report prepared, representations made by the parties and the parents of the young person, and any other relevant information before the court. Conference recommendations typically involve either citizens from the community who assist in the resolution of matters arising from the offence (family group conferences, peer mediation, victim offender reconciliation, etc.) or professionals who consult about the young person’s case or circumstances (for example, bail or proposed treatment programs). A conference could give advice on decisions such as

- appropriate extrajudicial measures;
- conditions for release from pre-trial detention;
- appropriate sentences; and
- plans for reintegrating the young person back into his or her community after being in custody.

Subsection 42(2) allows a court to impose any one or more of the following sanctions, provided they are not inconsistent with each other:

- (a) a judicial reprimand (a warning from a judge);
- (b) an absolute discharge;
- (c) a conditional discharge with reporting and supervision conditions;
 - this sanction cannot be combined with probation, an intensive support and

- supervision program (see (l), below), or an attendance program;
- it may be combined with community service and restitution;
- (d) a maximum \$1,000 fine;
 - the court must consider present and future means of the young person to pay;
- (e) an order to pay compensation or damages to any person;
 - the court must consider present and future means of the young person to pay;
- (f) an order for the restitution of property obtained as a result of the commission of the offence;
- (g) an order to compensate an innocent purchaser of property when the court has made a restitution order;
 - the court must consider present and future means of the young person to pay;
- (h) an order of compensation in kind or by way of personal services to an aggrieved party instead of the payment for any loss, damage, or injury;
 - the time limit is 240 hours within 12 months;
 - the person being compensated must consent; and
 - the court must decide that the young person is a suitable candidate and ensure that the order will not interfere with work or education;
- (i) an order to perform community service;
 - the time limit is 240 hours within 12 months;
 - the court must decide that the young person is a suitable candidate and ensure the order will not interfere with work or education; and
 - the community service must be part of a program approved by the provincial director, or the placement must consent;
- (j) any order of prohibition, seizure, or forfeiture that may be imposed under federal legislation;
 - except a prohibition order under s. 161 of the *Code*;
- (k) probation for a period not exceeding two years;
- (l) an intensive support and supervision program (ISSP) approved by the provincial director;
 - an assessment report is required to assess the young person's suitability for the program;
- (m) attendance at a non-residential program approved by the provincial director;
 - attendance centres are supervised sites for young persons in need of a highly structured community sentence;
 - the time limit is 240 hours within six months; and
- the court must decide that the young person is a suitable candidate and ensure the order will not interfere with work or education;
- (n) a custody and community supervision order;
 - this cannot exceed two years (three years if the young person has been convicted of an offence punishable by life); and
 - two-thirds of the sentence is spent in custody and one-third under community supervision;
- (o) a custody and supervision order for the presumptive offences of attempted murder, manslaughter, or aggravated sexual assault;
 - this cannot exceed three years;
 - there is no restriction on the custodial versus community supervision aspects of the sentence; and
 - the Crown may apply under s. 104 of the *YCJA* to keep the young person in custody and not release them on community supervision;
- (p) a deferred custody and supervision order (DCSO) (similar to conditional sentences for adults);
 - the time limit is six months and subject to appropriate conditions;
 - the offence cannot be a serious violent offence and must be consistent with the purpose and principles of sentencing; and
 - some youth courts in Ontario have declared this section unconstitutional to the extent that a youth court justice is precluded from imposing a DCSO if the offence is a serious violent offence or if the custodial sentence imposed is greater than six months;
- (q) custody and supervision for murder;
 - where the young person has been found guilty of first degree murder, the sentence cannot exceed 10 years comprised of a maximum of six years in custody followed by conditional supervision in the community for the remainder; and
 - where the young person has been found guilty of second degree murder, the sentence cannot exceed seven years comprised of a maximum four years' custody followed by conditional supervision in the community for the remainder;
- (r) intensive rehabilitative custody and supervision (IRCS) approved by the provincial director;
 - this is only available for murder, attempted murder, manslaughter, aggravated sexual assault, and the third serious violent offence;
 - a s. 34 assessment report is required to determine that the young person suffers from a mental illness or disorder and assess their suitability for the program; and

- there must be reasonable grounds to believe a plan of treatment will reduce the risk of recidivism.
- (s) any other reasonable and ancillary conditions that the court considers advisable and in the best interests of the young person and the public.

10.5 Duration of youth sentences

Generally, any single youth sentence is limited to two years. If an adult could have received a life sentence for the offence, the maximum duration of the youth sentence is three years. If more than one youth sentence is imposed with respect to different offences, the maximum continuous duration of the youth sentences is three years even if the offences were committed at different times. However, if a young person is sentenced for an offence he committed prior to the sentence he is currently serving and both sentences are custodial, then the maximum sentence is six years. In the case of first and second degree murder convictions, the combined duration of youth sentences is 10 and seven years, respectively.

Subsection 38(3) of the *YCJA* requires the judge to take pre-sentence custody into account in determining the appropriate length of sentence. As noted, a young person should generally receive a credit of 1:1 for pre-trial detention.

11. Adult sentencing hearing

Under the *YCJA*, transfer hearings (hearings to transfer young persons to adult court) are eliminated. Instead, the hearing to determine whether a young person should be sentenced as a youth or as an adult takes place only after a finding of guilt in youth court.

Young persons aged 14–17 are eligible for an adult sentence for any offence for which an adult would be liable to imprisonment for more than 2 years under the *Code*. Young persons aged 12–13 at the time of the offence are not eligible for an adult sentence.

After a finding of guilt, the court may hear the Crown's application for an adult sentence. The onus will always be on the Crown to justify the imposition of an adult sentence on a young person, even where that young person has been found guilty of a presumptive offence (first or second degree murder, attempted murder, manslaughter, aggravated sexual assault, or the third serious violent offence) (*YCJA*, s. 2(1) "presumptive offence"). The provisions requiring the youth to satisfy the burden in the case of a presumptive offence have been declared unconstitutional. The young person must be served with notice of the Crown's intention to seek an adult sentence, if an adult sentence is sought, in all cases.

The purpose of the hearing is to determine whether the young person will be sentenced as an adult or a youth. In making a decision as to whether a youth or adult sentence is appropriate, the court must consider the following factors:

- seriousness and circumstances of the offence;
- age, maturity, character, background, and previous record of the young person; and
- any other factors that the court considers relevant.

The court may take into account the time spent in pre-trial detention in the application for an adult sentence.

The Crown must satisfy the youth court judge that a youth sentence would be of an insufficient length to hold the young person accountable for his or her offending behaviour. If the Crown does not meet its burden, a youth sentence is imposed. If the Crown does meet its burden, an adult sentence is imposed. The court must also give reasons for its decision.

If the young person is sentenced as an adult, the young person could receive any sentence imposed on an adult who has been convicted of the same offence, including the application of the *Code* sections regarding long-term and dangerous offenders. The finding of guilt becomes a conviction when either the appeal process has been completed or the time limits for appeal have expired.

12. Custody placement hearing

The youth justice court must determine whether the youth will serve his or her adult custodial sentence in a youth facility, an adult provincial correctional facility, or if the sentence is two years or longer, a penitentiary.

There are statutory presumptions about where a young person will serve the custodial sentence that turn on the age of the young person at the time he or she is sentenced:

- under 18: a youth custody facility separate from adults;
- 18 or older: an adult provincial correctional facility; and
- 18 or older and the sentence is two years or more: a federal penitentiary.

The presumptions apply unless the youth justice court is satisfied that the presumed placement would not be in the best interests of the young person or would jeopardize the safety of others. There is also a presumption that a young person would move to an adult facility after the age of 20 unless the court orders otherwise.

13. Review of sentences

13.1 Youth sentences

Subsection 59(1) of the *YCJA* provides that non-custodial sentences may be reviewed six months after they are imposed or earlier with leave of the court. Custodial sentences are reviewed on a mandatory annual basis or at any time with leave of the youth justice court.

At the conclusion of the review, either custodial or non-custodial, the court may confirm the sentence or vary it. There is also an early release procedure where the provincial director initiates a hearing.

13.2 Records, publication, and information

The *YCJA* provides a complete and comprehensive scheme with respect to record-keeping in relation to young persons dealt with under the *Act*. All youth records, other than those where adult sentences were imposed, are unavailable except to persons who fall within a specified category (the young person and their counsel, the Attorney General, parents, peace officers, courts, corrections, etc.).

Section 119 of the *YCJA* sets out those who may either access the records or receive the information in them and the time periods in which access is allowed, with one important exception. The records of an adult sentence imposed on a young person in youth justice court is treated the same as other adult records. After any appeals have been completed or the appeal period has expired, the adult sentence becomes a conviction, and the records provisions of the *YCJA* do not apply.

A young person is generally deemed not to have been found guilty or convicted of the offence, for most purposes, if any of the following apply:

- The young person is sentenced to an absolute discharge.
- The youth sentence is completed.
- The disposition has ceased to be in effect (other than a mandatory weapons prohibition order).

This means, for example, that the young person is no longer subject to any federally legislated disqualification

as a result of having been found guilty of an offence. In addition, the young person is not required to disclose that he or she has been found guilty of an offence under the *YCJA* or the *YOA* when applying for employment with the federal public sector or any federally regulated business.

There are some circumstances in which the prior finding of guilt can be used

- to test the credibility of a young person acting as a witness in a future proceeding;
- for a young person's argument of *autrefois convict* in respect of any subsequent charge relating to the same offence;
- by the youth justice court in future cases on judicial interim release or sentence;
- by the National Parole Board or any provincial parole board in considering an application for conditional release or pardon;
- to establish that an offence is a serious violent offence; or
- to determine whether to impose an adult sentence.

The *YCJA* also tries to ensure that the identities of young persons are protected, including young persons who are victims/witnesses to the offence. The general rule is that the name or any other information identifying a young person as having been dealt with under the *YCJA* as an accused, victim, or witness cannot be published.

There are exceptions to the general prohibition against publication for young persons who receive adult sentences or who receive a youth sentence for a presumptive offence. In the case of a youth sentence for a presumptive offence, however, the Crown bears the burden of proving that the young person's name should no longer be subject to a publication ban. The Supreme Court of Canada ruled that a publication ban (or lack of) is part of the sentence and that requiring the young person to demonstrate that the publication ban should be maintained is unconstitutional. The young person's name can also be published by the consent of the young person when he or she turns 18.

Controlled Drugs and Substances Act

A substantial percentage of charges before the criminal courts arise from four offences set out in the *Controlled Drugs and Substances Act (CDSA)*: possession, trafficking, importing, and production of drugs.

1. The schedules to the CDSA

The *CDSA* divides drugs into four schedules. Offences and penalties are defined with reference to these schedules. The more serious or dangerous the drug, the greater the potential penalty if found guilty of any of the offences set out in the *CDSA*. Offences involving Schedule I drugs (for instance, cocaine and heroin) are more likely to be defined as indictable or prosecuted by indictment (if hybrid) and attract the most serious sentences. Marihuana and its derivatives are found in Schedule II; these offences are more likely to be summary and attract lesser maximum sentences. The maximum sentence for each offence by schedule is set out in the Chart of Offences and Maximum Penalties at the end of this chapter.

2. The offences

2.1 Possession

Subsection 4(1) of the *CDSA* makes it an offence to possess any substance set out in Schedule I, II, or III of the *CDSA*. The Crown must prove beyond a reasonable doubt that the substance is a prohibited substance and that the accused was in possession of the drug by having knowledge and control over the substance. Possession may be actual (physical) or vicarious (including constructive and joint possession).

2.2 Possession for the purpose of trafficking

To establish the offence under s. 5(2) of the *CDSA*, the Crown must prove possession as set out above as well as the intention to traffic the drugs. The intention to traffic is often an inference drawn from the quantity and value of drugs possessed by the accused or other circumstantial evidence (e.g., scales also found in the accused's possession or the packaging of the drugs into small packets).

2.3 Trafficking

Subsection 5(1) of the *CDSA* prohibits trafficking in controlled substances. To traffic means

- (1) to sell, administer, give, transfer, transport, send, or deliver the substance;

- (2) to sell an authorization to obtain the substance; or
- (3) to offer to do anything mentioned in paragraph (1) or (2), otherwise than under the authority of the regulations (s. 2(1)).

Essentially, trafficking in its many forms involves possession plus the intent or act of making the substance physically available to others. This definition, in conjunction with the various methods in which trafficking may be committed, is broad. Nonetheless, the courts have held the definition must not become so broad as to include activity “right-minded people” would not consider criminal.

The prohibition on trafficking extends not just to substances included in Schedules I to IV but also to “any substance represented or held out by that person to be such a substance” (s. 5(1)). The accused need not explicitly hold the substance out as a drug to be guilty, but may “hold out” by actions. When the prosecution is unable to prove the nature of the substance, it may nonetheless be able to prove trafficking by holding out. One can also traffic “by offer.” In those cases, the Crown must prove beyond a reasonable doubt that the accused made an offer with the intention that it would be taken as a true offer to traffic, even if the offer was a fraudulent one.

2.4 Production of substance

Subsection 7(1) of the *CDSA* prohibits the production of drugs. “Produce” is defined in s. 2 and includes manufacturing, synthesizing, altering the chemical or physical properties of a substance, cultivating, and harvesting. Manufacturing includes distilling marihuana into *cannabis* resin. Altering the chemical or physical properties includes making crack from powder cocaine. In Ontario, production charges often pertain to the cultivation of marihuana.

The *Marihuana Medical Access Regulations* provide a scheme under which those who require medical marihuana may possess it and produce or obtain it legally, with strict limitations. Difficulties in access, even with the regulations, led to a finding by the Superior Court of Justice that the *Marihuana Medical Access Regulations* and the prohibitions against the possession and production of cannabis (marihuana) contained in ss. 4 and 7, respectively, of the *CDSA* are constitutionally invalid and of no force and effect (*R. v. Mernagh*). That

decision has been stayed pending the hearing in the Court of Appeal.

2.5 Possession for use in production or trafficking

It is an offence under s. 7.1(1) of the *CDSA* to possess, produce, sell or import anything, knowing it will be used to produce or traffic methamphetamine or ecstasy.

2.6 Importing/exporting

Subsection 6(1) of the *CDSA* prohibits the importing and exporting of drugs. Subsection 6(2) prohibits possession of a drug for the purpose of exporting it. Importing is not defined but is given its ordinary meaning of “to bring into the country or to cause to be brought into the country.” Most trials will turn on whether the Crown has established beyond a reasonable doubt that the accused had knowledge he or she was importing drugs in circumstances where the drugs were well-hidden in the accused’s luggage or other transported items. Wilful blindness on the part of the accused is sufficient to make out the offence, but recklessness is not.

Importing attracts very high sentences and is one of the very few offences for which the Court of Appeal in Ontario has established a “tariff” or well-defined sentencing range. Drug “mules,” whose involvement in the drug trade is restricted to transporting the drugs (usually on one occasion) and are otherwise very sympathetic, are sentenced harshly. For practical purposes, the important factors that can reduce the otherwise harsh sentence are the following:

- the accused’s status as a mule with no part in the larger importing scheme;
- the accused’s assistance to the police in apprehending those behind the importation scheme (i.e., by participating in a controlled or police-orchestrated delivery of the drugs);
- the accused’s established belief that the drug imported was a less serious substance (i.e., importing cocaine while believing it was hash).

3. Defences

Drug prosecutions often involve intercepted communications and/or searches and seizures that give rise to arguments under the *Canadian Charter of Rights and Freedoms (Charter)*. Crown and defence counsel must analyse the case closely for *Charter* issues (usually under ss. 8–9) that may lead to a successful application to have the seized drugs excluded under s. 24(2).

Entrapment issues may arise through the police use of undercover officers as purchasers of drugs.

4. Special procedural considerations under the CDSA

4.1 Bail

Drug offences punishable by a maximum sentence of life are subject to a reverse-onus bail hearing.

4.2 Proving the nature of the substance

The Crown must prove the nature of the substance. Health Canada analyzes the drugs seized and produces a certificate of analysis. The certificate is admissible at trial as proof of the nature of the substance, provided reasonable notice of the intention to rely on the certificate was given to the defence.

4.3 Proceeds of crime and offence related property

The forfeiture of offence-related property (i.e., the drug or controlled substance seized and production equipment) is addressed in s. 16 of the *CDSA*. Other property (most commonly money and cell-phones) seized will often attract a separate charge under s. 354(1) of the *Criminal Code (Code)*. If the court is satisfied on a balance of probabilities that the property is offence-related and the offence was committed in relation to that property, forfeiture is mandatory (s. 490.1).

4.4 Restraint orders

Restraint orders for “offence-related property” are becoming more frequent. Pursuant to s. 14 of the *CDSA*, the Attorney General may apply *ex parte* in writing to a judge for an order of restraint. A restraint order prohibits any person from disposing of or otherwise dealing with any interest in the offence-related property other than as specified. The judge must find that there are reasonable grounds to believe that the property is offence-related property. The order will remain in effect until

- there is an order of restoration to an innocent owner under s. 19(3);
- there is an order revoking any restraint order where the subject of the restraint order is real property and the effect of forfeiture would be disproportionate to the circumstances under s. 19.1(3);
- a judge or justice is satisfied that the detention is no longer required for a lawful purpose under s. 490(9) of the *Code*;
- a judge or justice is satisfied that the period of detention has expired and proceedings have not been instituted or the items will not be required for court purposes;
- an order of forfeiture is made.

5. Sentencing

5.1 Principles and aggravating factors

Subsection 10(1) of the *CDSA* makes rehabilitation and treatment of offenders an important factor on sentencing, in addition to those principles and purposes set out in the *Code*. Subsection 10(2) sets out additional aggravating factors to those set out in the *Code*. The use of any weapon or violence is aggravating. Trafficking (or possessing for the purpose of trafficking) in a school area or other place frequented by people under 18 is aggravating, as is involving anyone under 18 in the offence. A prior conviction for any offence under the *CDSA* other than possession is aggravating. A sentencing judge must give reasons for not imposing imprisonment when one or more of these factors exist.

5.2 Weapons prohibition

Under s. 109(1)(c) of the *Code*, a weapons prohibition order is mandatory following a finding of guilt of trafficking, possession for the purpose of trafficking, importing, or production of a drug or controlled substance. On a first conviction, the order prohibits possession of any

- prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life; and
- firearm that is neither restricted nor prohibited, cross-bow, restricted weapon, ammunition, and explosive device for 10 years from the date the order is imposed or, if sentenced to custody, 10 years from the day of release from custody.

5.3 Forfeiture of offence-related property

Although not part of the sentence (and not a factor in fashioning a fit sentence), once someone has been convicted of trafficking, possession for the purpose of trafficking, production, or importing, s. 16 of the *CDSA* permits the Attorney General to apply for a forfeiture order in regards to “offence-related property.” Such applications may be made in regards to real property (for instance, a house being used to cultivate marihuana) and are being brought with increased frequency. When the property at issue is real property, the court must consider not only the connection between the property and the offence, but also whether the forfeiture order would be disproportionate to the overall circumstances of the offence and the offender. In the case of a dwelling-house, the court must also consider the impact of the forfeiture order on other members of the offender’s family.

Chart of Offences and Maximum Penalties

Offence	Schedule	Procedure	Maximum Penalty
Possession	I	Hybrid	Summary — 6 months and/or \$1,000 for first offence, and 1 year and/or \$2,000 for second offence Indictable — 7 years
	II	Hybrid*	Summary — 6 months and/or \$1,000 for first offence, and 1 year and/or \$2,000 for second offence Indictable — 5 years less a day (*unless small quantity of marihuana or cannabis resin, where the offence is summary only and carries a maximum penalty of 6 months and/or \$1,000.)
	III	Hybrid	Summary — 6 months and/or \$1,000 for first offence, and 1 year and/or \$2,000 for second offence Indictable — 3 years
Trafficking (including possession for the purpose of and trafficking in a substance held out)	I	Indictable	Life
	II	Indictable	Life (unless 3kg or less of marihuana or cannabis resin, where the maximum is 5 years less a day)
	III	Hybrid	Summary — 18 months Indictable — 10 years
	IV	Hybrid	Summary — 1 year Indictable — 3 year
	V	Hybrid	Summary — 1 year Indictable — 3 year
	VI	Hybrid	Summary — 18 months Indictable — 10 years
Importing and exporting	I	Indictable	Life
	II	Indictable	Life
	III	Hybrid	Summary — 18 months Indictable — 10 years
	IV	Hybrid	Summary — 1 year Indictable — 3 years
Production	I	Indictable	Life
	II	Indictable	Life (unless marihuana, where maximum is 7 years)
	III	Hybrid	Summary — 18 months Indictable — 10 years
	IV	Hybrid	Summary — 1 year Indictable — 3 years
Possession, production, sale, or import of substance to be used in production		Indictable	10 years less a day

Family Law

Procedure and the Family Law Rules

1. Consultation

A potential client phones a newly called lawyer and wants to meet as soon as possible. What should the lawyer do?

The lawyer should refrain from giving legal advice on the phone. An appointment should be booked for a detailed consultation. Potential clients should be informed on the phone of the consultation fee (if any), the length of time it will take, with whom they will be meeting, and the necessary documents they should bring. A conflicts check should also be done to ensure that the client will not inadvertently meet with a lawyer who has, or whose associate or partner has, acted for the client's spouse.

Most consultations take between 45 and 90 minutes and involve a charge, either flat-rate or based on the lawyer's hourly rate. In some circumstances, lawyers may do some or all of the interview without charge. There is no set formula for doing a proper consultation, although the following is offered as a guide:

Step #1 — Introduction: The lawyer greets the client and informs him or her of the structure and cost of the consultation, method of payment, amount of time the interview will take, confidentiality rules, and exceptions to those rules. In the event the potential client brings a friend or relative to the meeting, the lawyer should be aware and discuss in advance the confidentiality, privacy, and privilege issues that may arise when third parties are present during interviews.

Step #2 — Information gathering: The lawyer obtains important biographical information from the client, including but not limited to full names and birth dates for him or her, the other party, and their children, if any; the dates when they started dating, began cohabiting, married, and started living in separate homes; details of how much time they spend with the children; their employment history, including current and historic income, job titles, and particulars of any periods out of the workforce; details about the matrimonial home, including ownership, purchase price, current fair market value (if known), and any encumbrances, liens, or judgments; and details about their finances and assets, including rough figures as to their investments, pensions, and accounts. Without this information, it is very difficult for the lawyer to give any meaningful advice as to the client's situation. A standard interview form is strongly recommended as a way to ensure all relevant information is captured at the outset.

Step #3 — Listening: The lawyer listens carefully as the client talks about why he or she has come for the appointment. The lawyer should act as a guide allowing clients to tell their story in their own words, resisting interruption unless absolutely necessary, but checking back from time to time to let the potential client know that the information is being received and understood. The lawyer should strive to understand both what is and what is not being said—in other words, the underlying motivations and interests that are not always apparent at first blush. As the lawyer listens, he or she should make notes, marking the legal issues and thinking about how to handle the situation if retained. Very often the potential client brings some documents or a letter recently received from the other party or lawyer that should be reviewed.

Step #4 — Informing: The lawyer provides an overview of the law in relation to each relevant legal issue and informs the client of the impact on and applicability to the client's case. The outcome in court may be uncertain and depend on a number of factors unknown to the lawyer at the time. Lawyers should therefore be cautious about appearing too certain or providing an overly optimistic view as to the likely result they can deliver.

Lawyers should inform clients of options available to resolve the dispute, estimated cost, and approximate time commitment. In addition to traditional litigation with which almost all clients are familiar, lawyers should explain the basic tenets, advantages, and disadvantages of negotiation, mediation, mediation-arbitration, and collaborative family law, if applicable.

Lawyers should also outline the specific strategy he or she would employ if retained, the hourly rate, and the initial deposit, which is known as the retainer. The lawyer should not feel bound to accept the case and should make it clear to the potential client if the file is not going to be accepted. The lawyer should also refrain from accepting a file if the lawyer will not have the required time necessary to work on the file given the demands it will entail or does not have the necessary skills to take on a more complex case. Doing otherwise could prejudice the client if documents need to be prepared in order to meet a court-ordered or rule-made deadline. The lawyer should also be clear in setting out what steps and documents will be required in the event the client wishes to proceed, including what would transpire at the next meeting, the

timetable, and likely cost. The lawyer should also discuss options to minimize the fees, such as delegating to a law clerk or junior associate. If the lawyer is not retained, a non-retainer letter should be sent to the potential client.

The lawyer should also prepare a “retainer agreement,” which sets out the hourly rate at which the client will be charged and other important aspects of the lawyer-client relationship. Lawyers should be very wary of accepting cases where the retainer agreement is unclear or the client does not provide any funds in trust. Once the file has commenced, the lawyer will be under an obligation not to prejudice the client’s rights and may not be released from the file by a court if the request for removal comes right before an important event in the case that cannot be postponed.

Step #5 — Discussing and strategizing: Unlike the first four parts of the consultation where one person does the majority of the talking and the other the listening, the final part of the consultation consists of an interactive and free-wheeling discussion between the lawyer and client. Often a client will bring a family member or friend who patiently sits through the first three parts; this is when both the client and friend can participate fully, express their views, and ask questions. In this part, the client can air their thoughts in response to the lawyer’s comments. The lawyer responds, and ideally, after a vigorous and honest discussion, a strategy is jointly formulated that establishes a clear understanding of all the steps that will take place if the client retains the lawyer. If the client wants the family member or friend to continue to be involved in the file, this should be noted in the retainer.

Step #6 — Conclusion: The lawyer may want, but is not obligated to, reduce his or her basic recommendations and advice in writing. The client pays for the session and receives a receipt. A file is opened, the money is recorded in the lawyer’s books, and the notes are kept in a safe place, easily retrievable in the event the client calls back at a later date to retain the lawyer for further services. If the client decides to retain the lawyer for further services, the lawyer should review the essential terms of engagement with the client and confirm these terms by way of an engagement agreement.

If the client is in receipt of a Legal Aid certificate, the lawyer will sign the certificate and remit it to Legal Aid and bill the government instead of the client.

2. Negotiation

2.1 Introduction

In almost every situation where a client retains a lawyer for help in a family law matter, a detailed discussion of

the importance of negotiation is crucial. Even when the lawyer is retained while a court case is underway, negotiations of some kind between the new lawyer and the opposing side occur and should almost always be explored.

Counsel should never commence litigation without exploring with the client whether it is better to try to negotiate first. Negotiation is a key component of resolution, and clients should fully understand the numerous ways in which settlement can arise:

- The parties negotiate the terms of an agreement on their own, without lawyers, and never “paper” the deal with a formal written separation agreement.
- The parties negotiate the key terms of an agreement on their own after which they each retain lawyers who add other clauses, clarify, revise the already-agreed-upon terms, and prepare a formal written separation agreement that is then signed and witnessed.
- The parties, through their lawyers, attempt to negotiate an agreement but fail, causing one of them to initiate court proceedings, which after some degree of judicial intervention results in either a separation agreement (and the discontinuance of the court case); a final consent order; or failing agreement, a trial.
- One party initiates a court proceeding without first attempting to negotiate with the other, and the case is eventually resolved by way of separation agreement, consent order, or trial.

The particular way in which a client’s case proceeds depends on the facts, the personalities of the client and opposing party, the client’s wishes, the interactions of the two lawyers, and the perceptions of both the lawyer and the client of the best way to achieve the client’s goals, including the benefits, values, and costs in continuing with or abstaining from a court proceeding.

Clients should be made aware of the potential consequences of negotiating or failing to negotiate. Consideration must be given to all of the circumstances of the case, including the all-important *status quo* and which party is more motivated to try to change it, as well as the costs, both financial and emotional, of starting litigation without having first explored all avenues of settlement. Sometimes it is preferable to engage in negotiations only after a court case has been initiated. This allows for the possibility of a negotiated agreement, failing which the party motivated to change the *status quo* has the benefit of upcoming judicial intervention. Commencing negotiation prior to litigation affords the benefit of resolving all issues without the additional stress, time, and expense of preparing court documents. There is always a risk that if no settlement is reached,

time will be lost since a court case must now be commenced.

Consideration must thus be given to the importance of time. Meaningful negotiations take time and have an impact on almost every issue in family law, from the length of time a recipient goes without support, to the length of time a parent goes without seeing his or her child, to the length of time before a party's right to claim an equalization payment expires. The longer life continues without a change in the *status quo*, the more likely that person's case will either be strengthened or weakened, depending on the facts and his or her perspective.

The lawyer must be aware of the constraints inherent in the court system, including what can and cannot be obtained from a judge in the applicable court and the cost and length of time it takes to get a judicial opinion or determination. It is unwise to spend eight months negotiating and then, when something happens, start a court case and attempt to convince a judge to bypass the normal requirement of a case conference on the grounds that something urgent has occurred. On the other hand, knowing it will take two months from the time the application is issued to the first case conference may influence the lawyer's advice in terms of whether negotiations should be pursued first or only after the proceeding has been commenced. In such a case, it may be advisable to initiate the lawsuit first and use the weeks preceding the case conference to try and negotiate all issues so that the application does not have to proceed.

The opposing side usually takes great offence to the commencement of the proceedings without even attempting negotiation first. Sometimes the case becomes more difficult to resolve than it otherwise would have been because of this. Lawyers must be mindful that every action has a reaction, and it is therefore incumbent on them to canvass the cost-benefit analysis of pursuing or refraining from negotiating with the client before any concrete steps are taken.

2.2 Effective negotiation

In an ideal situation, the lawyer will not engage in negotiation without a thorough understanding of what the other party seeks as well as full financial disclosure, including all supporting documentation. Often, the situation is not ideal, and the lawyer is forced to negotiate in less than perfect circumstances. To maximize outcomes, lawyers may want to consider the following suggestions, all designed to enhance effective negotiation:

- **Prepare the clients fully for any negotiation:** Spend significant time with clients to determine

what is important to them, what they are prepared to give up, and what they cannot live without. Do this at the outset of the case and again before the actual negotiation to ensure you appreciate any changes in their position, which is not uncommon.

- **Think about the strengths and weaknesses of your case as objectively as possible:** It is easy to get caught up in being the strong advocate and to forget about the weaknesses of your client's case. Being aware of these is just as important as understanding where your case is strong and will ensure that you provide wise counsel about when to push forward and when to settle.
- **Ensure all negotiations are without prejudice:** If you are going to have a face-to-face, four-way negotiation, ensure it is "without prejudice," meaning any offers made or positions taken cannot be recorded by a party for use in a motion or trial in any future court proceeding. Consider drafting a short memo for execution by each party with both lawyers confirming this and have them sign it before the session begins. Confirm that any documents exchanged are not without prejudice; although offers and positions are without prejudice, any tax returns or bank statements at a settlement meeting are not without prejudice and can be used in the case. It is helpful, however, to simply confirm this in advance.
- **Refrain from personalizing the case:** Lawyers tend to negotiate more effectively when they remember that they are not a mouthpiece for their client. They should refrain from taking on the client's case as their own personal cause and should refrain from making comments that impair their ability to speak professionally with the other side's lawyer.
- **Learn from the experience:** Even if no agreement is reached, use the negotiation as a means to better understand the other side's perspective, motivations, and interests, not just an opportunity to convey your own. Sitting down with the other side face-to-face enables you to see and evaluate the other side. Sometimes hearing what the other side is saying or offering will cause you to re-evaluate your own position.
- **Use it as preparation for litigation:** If the negotiations fail to produce any kind of agreement, at least you will have a better understanding of the other side's strengths and weaknesses for purposes of litigation. You will be better able to anticipate arguments and prepare your client when it comes time to prepare court documents or for questioning or cross-examination at trial.

The circumstances of each case dictate whether it is preferable for the clients to have a written agreement drafted and signed at the actual negotiation session. In most cases, a complicated case will only be properly resolved once both parties have agreed on terms in negotiation and then had a full fleshing out of the details

in a comprehensive agreement that has been thoroughly reviewed by the lawyers. In other cases, it may be preferable to sign a short agreement setting out the key ingredients of the deal so that it is clear what the essential terms are. Since there are many cases where parties have left the negotiating table with differing impressions of what was and what was not agreed to, it is imperative that the lawyers communicate clearly with each other so that there is no doubt what the status is with respect to each term when the negotiation ends.

3. The litigation process

Assuming negotiation does not produce an agreement and alternative dispute resolution is not pursued, one party may commence a court case to change the *status quo*. This part of the chapter briefly introduces the reader to the key steps in a typical matrimonial lawsuit under the *Family Law Rules (Rules)*: the application, answer, case conference, motion, settlement conference, trial management conference, trial, and appeal.

In Ontario, three courts deal with family law matters:

- the Family Court of the Superior Court of Justice or the Superior Court of Justice (Family Court);
- the Superior Court of Justice; and
- the Ontario Court of Justice.

The Family Court of the Superior Court of Justice is a specialized court that deals with all aspects of family law. It is also referred to as the Superior Court of Justice (Family Court). These courts can be found throughout Ontario and provide specialized judges and additional services. In areas of Ontario that do not have a Family Court of the Superior Court of Justice, the Superior Court of Justice is the court of superior jurisdiction. In the family law context, this court deals with the issues of property, divorce, custody and access, and support. It does not deal with child protection or adoption proceedings. The Ontario Court of Justice deals with the issues of custody, access, support, child protection, and adoption. It does not deal with divorce or property issues.

The *Rules* apply to all family law proceedings in the Ontario Court of Justice, Superior Court of Justice, and Superior Court of Justice (Family Court).

3.1 The primary objective

At each step in the case, the court is required to promote the primary objective, which is to enable the court to deal with cases “justly” (r. 2(2)). The court is required at all times to promote the primary objective by identifying the issues and separating and disposing with those that do not need full investigation and trial; encouraging and facilitating the use of alternatives to the court process; helping the parties settle all or part of the case; setting

timetables or otherwise controlling the progress of the case; considering whether the likely benefits of taking a step justify the cost; dealing with as many aspects of the case as possible on the same occasion; and if appropriate, dealing with the case on the basis of written documents or holding a telephone or video conference (r. 2(5)).

3.2 The application and service requirements

Rule 8 governs the rules associated with starting a case. Unless a party asks the court to change an order or an agreement for support filed under s. 35 of the *Family Law Act (FLA)* (which requests are commenced by notice of motion and affidavit and are governed by R. 15), a person starting a case files a document called an “application” and, if required, a summary of court cases. There are six different application forms, depending on the case.

An application may contain a claim against more than one person and more than one claim against the same person (r. 8(3)). It allows the claimant, called the applicant, to seek relief by checking off one or more boxes under various applicable legislation and requires him or her to set out the grounds for such claims. Once filed, the application must be served immediately on every other party by “special service” unless otherwise provided (r. 2(5)). Special service is carried out by

- leaving a copy with the opposing party, called the respondent (but note rr. 6(3)(a)(i)–(v) for service on mentally incompetent people, children, corporations, and children’s aid societies);
- leaving a copy with the respondent’s lawyer of record or with a lawyer who accepts service in writing on the document (r. 6(3)(b));
- mailing a copy to the respondent and having him or her send back a signed form called an “acknowledgment of service” (r. 6(3)(c) and Form 6); or
- leaving a copy at the respondent’s residence with anyone who appears to be an adult and mailing another copy to the same address that day or the next day (r. 6(3)(d)).

If the respondent cannot be served by special service, the applicant has three options. If the applicant does not know where the respondent lives or works or knows where he or she lives or works but is unable to effect special service for other reasons (e.g., because they are evading service), the lawyer can apply for an order for substituted service. (Substituted service is effected when the court orders that the documents may be served on a person other than the respondent in the expectation the person will bring them to the respondent’s attention.) The applicant must show detailed evidence in his or her

affidavit of the steps taken to locate and serve the respondent along with proof that service in this manner can reasonably be expected to bring the documents to the respondent's attention (r. 6(15)).

If all efforts to serve the respondent by special service have failed and there is no reasonable expectation that an order for substituted service would bring the documents to his or her attention, an order that service is not required, commonly known as "dispensing" with service, should be applied for (r. 6(16)).

Finally, when a document has been served by a manner not approved in the *Rules* but the court is convinced the documents still came to the attention of the respondent or would have had the respondent not evaded service, the court can make an order approving "irregular" service, commonly known as an order "validating" service (r. 6(18)).

In the event the applicant is under a disability and unable to provide instructions, the court may authorize a person to represent that "special party" if the person is appropriate for the task and willing to act as representative (r. 4(2)). If there is no appropriate person willing to act as a special party's representative, the court may authorize the Office of the Children's Lawyer or the Office of the Public Guardian and Trustee to act as representative, but only with that office's consent (r. 4(3)).

If an applicant wishes to retain a lawyer but cannot afford one, that applicant may be entitled to Legal Aid. The applicant must first apply to Legal Aid Ontario, and if he or she qualifies financially and the case is something Legal Aid is prepared to cover, the client will be provided with a legal aid "certificate" that he or she can then give to any lawyer willing to accept it. Sometimes the certificate is "free." Other times Legal Aid will put a lien against the client's home and/or require monthly payments of an agreed-upon amount.

A lawyer acting for a client with a Legal Aid certificate has the same duties and obligations as when acting for a "private" client. In addition, the lawyer must periodically report to Legal Aid on the progress and outcome of the case. Further, the client must advise Legal Aid of any changes in his or her financial situation and from time to time provide copies of bank statements to ensure eligibility.

3.2.1 The continuing record

The continuing record contains all of the documents filed in a particular case. The person who starts the case must file the record, serve it on the other party, and file it in court with an affidavit of service proving it was served.

The continuing record consists of two volumes: an endorsements volume and a documents volume. The endorsements volume contains a cumulative table of contents, an endorsements section, and an orders section. The documents volume contains all the documents filed in the case.

The endorsements volume is not necessary in joint applications for divorce, uncontested divorces, the filing of a change information form, or a consent motion for a final order, but in those cases a separate section for endorsement and one blank sheet is included in the documents volume on which the judge will note the disposition and the date.

There are different continuing records for support enforcement cases, child protection cases, and status review hearings (rr. 9(3)–(5)). While it was previously permissible for parties to elect to have separate records for each party, an order for separate records is now required (r. 9(7)). There are detailed rules when a record may be "separated" or "combined" (rr. 9(7)–(10)). All documents must be referred to by their tab number (r. 9(15)). Documents must not be removed from the record except by order (r. 9(16)), and no party shall serve or file any document that is already in the record despite any requirement in the *Rules* that the document be served and filed (r. 9(13)).

Under the court clerk's supervision, the parties are jointly responsible for adding to the record (r. 9(11)) and must maintain it according to the requirements set out in the publication entitled "Formal Requirements of the Continuing Record under the *Family Law Rules*," published by the *Family Law Rules* Committee and available on the Ontario Court Forms website.

3.2.2 The First Appearance Court and mandatory information program

In those areas in Ontario where the Family Court branch of the Superior Court of Justice does not exist, the jurisdiction over family law disputes is divided between the Superior Court of Justice and the Ontario Court of Justice. Cases that have divorce or property claims are brought exclusively in the Superior Court of Justice, and child protection and adoption cases must be commenced solely in the Ontario Court of Justice. Each of these two courts has jurisdiction over child and spousal support, as well as custody and access claims.

In those places where the Family Court branch of the Superior Court of Justice has been established, there is no divided jurisdiction in family law matters. It exercises a single, comprehensive jurisdiction over all legal matters and disputes related to the family. Furthermore, as a unified family court, it allows family problems to be dealt

with in an integrated manner, with mediation, resource, information, and legal services attached to each court site. These services complement the judicial side of the court and mitigate the adversarial nature of court proceedings. They help in achieving non-adversarial resolutions of family disputes by narrowing down the number of contentious issues and attempting to divert as many disputes as possible from formal court hearings.

When an application is filed in the Superior Court of Justice or Family Court of the Superior Court of Justice (formerly known as the Unified Family Court), whether a court date is set depends on whether the case is “standard track” or “fast track.” Applications that contain a claim for divorce or a property claim are standard track (r. 39(7)); all other cases are fast track.

In a standard track case, the clerk does not automatically set a court date when the application is filed. The applicant waits until the respondent has been served and has filed an answer before the next step is taken, namely, the booking of a case conference. If the applicant wishes to obtain a case conference date at the time the application is filed, most courts (but not all) will allow you to do so by serving and filing a conference notice as per Form 17. The conference will not be held until at least six weeks thereafter to give sufficient time for the application to be served and for the respondent to file responding materials.

In the Ontario Court of Justice, the first court date is always before a court clerk called the First Appearance Court (FAC). The clerk’s role is to

- confirm that all the necessary documents have been served and filed;
- refer the parties to sources of information about the court process, alternatives to court (including mediation), the effects of separation and divorce on children, and community resources that may help the families;
- if no answer has been filed, send the case to a judge for a final decision on the basis of affidavit evidence or, on request, schedule a case conference; and
- if an answer has been filed, confirm that the case is ready for a hearing, case conference, or settlement conference and schedule it accordingly (R. 40).

In most courts, if there are claims other than a divorce (and costs) or the incorporation of the terms of an agreement or prior court order, litigants must attend a Family Information Session (FIS) (r. 8.1(1)). This in-person session led by a facilitator, lawyer, and social worker provides parties with information about the legal process and includes information on alternatives to court, such as mediation, arbitration, and collaborative family law; the impact separation has on children; and

resources available to deal with problems arising from separation. Unless a party provides a certificate that they have attended an FIS, they may not take any further step in the case (r. 8.1(7)). Separate dates are given for applicants and respondents.

In many courts in the Greater Toronto Area, in any case where a party seeks to change a final order on parenting or financial issues, the first step is called a “Dispute Resolution Officer” (DRO) hearing. This is a session presided over by a senior family law lawyer who reads all of the materials and offers the parties his or her opinion on the likely outcome of the case and guidance on possible avenues of settlement. Although the DRO has no power to make any orders, the session provides litigants and counsel with an excellent chance to hear from experienced counsel how their case appears to a neutral evaluator and, accordingly, the opportunity to settle before moving the case any further into the litigation process. Case conference briefs are helpful but not required. The DRO always takes place after a FAC (in cases where there is a FAC) but may occur before or after the FIS. While a judge has the power to deny a litigant relief for failure to attend the FIS, judges invoke such power very rarely.

3.3 The answer

The person against whom an application is made is called the respondent. He or she must serve an answer on every other party named in the application and file it within 30 days after being served (r. 10(1)). If the application is served outside Canada or the United States, the time for filing an answer is 60 days (r. 10(2)).

As with the application, the answer allows the respondent to set out his or her version of the dispute and ask for relief. The answer should contain sufficient clarity about the respondent’s position to allow the applicant to be aware of the case that has to be met and for the court to understand the issues in dispute. A respondent may include a claim against the applicant or any other person, who then also becomes a respondent in the case (r. 10(3)).

The consequences for respondents who fail to file an answer are severe. They are not entitled to any further notice of any steps in the case or to participate in the case in any way. The court may then deal with the case in their absence and set a date for an uncontested trial (r. 10(5)).

After the respondent serves an answer, the applicant has 10 days in which to serve and file a response, called a reply (r. 10(6)). Often the applicant will need an extension of time; this can be effected by the parties by consent in writing. If the respondent refuses to consent, it is relatively easy to obtain an extension from the court.

3.4 Reply

A party may, within 10 days after being served with an answer, serve and file a reply (Form 10A) in response to a claim made in the answer. It is common for counsel to grant an extension in preparing the reply since often 10 days is not enough. Counsel need only respond to any issue in the reply not already fully canvassed in the application.

3.5 Amendments to pleadings

If no answer has yet been filed, an applicant may amend the application without any permission from the court. If the answer has already been filed, consent from the other side must be obtained, absent which an order from the court will be required (r. 11(1)). Courts will allow an amendment unless the amendment would disadvantage the other party in a way for which costs or an adjournment would not compensate (r. 11(3)).

Amendments must be clearly shown by underlining all changes, and the rule or order permitting the amendment and the date of the amendment must be noted in the margin of each amended page (r. 11(4)).

Once the respondent receives an amended application, he or she has 14 days to serve on the other side and file with the court an amended answer. If the application has not been amended and the respondent wishes to amend his or her answer, this may be done provided the applicant consents (r. 11(2)).

3.6 The case conference

The case conference is the most important step in family law litigation. With certain exceptions (see r. 14(6)), no motion may be heard and no notice of motion may be served until a case conference dealing with the substantive issues in the case has been completed, unless there is a situation of urgency or hardship or a case conference is not required for some other reason in the interest of justice (rr. 14(4) and (4.2)).

A case conference allows the litigants and their lawyers to hear a judge's views on the case at an early stage, before thousands of dollars are spent on motions and other expensive steps. Early airing of the issues promotes early resolution of disputes. The purposes of the case conference are summarized in r. 17(4):

- **Exploring the chances of settling the case:** A case conference allows the parties to understand how far apart they are on the major issues. Central to this is a judge who is willing to explain how he or she sees the law applying to the facts of the case, including any particularly unusual or difficult facts and the way such facts might be perceived at a motion or trial. Often the case conference judge
- elaborates on a particular point of law, either clarifying or changing one of the client's previously held views, with the hope of bringing the parties closer to settlement than before.
- **Identifying the issues in dispute:** Sometimes after a thorough discussion with the judge, the parties realize that what they previously thought was an impassable issue is resolvable. It is also possible that what was once taken for granted as not being in dispute may turn out to be very contentious. A case conference will also entail a frank discussion of the costs and benefits of settling or proceeding, legal fees, stress on the parties, and time commitments involved.
- **Exploring ways to resolve disputed issues:** A case conference judge proposes realistic and achievable solutions that are acceptable to both parties and is able to reframe an issue so the parties see it and their role in a new light, paving the way for settlement.
- **Ensuring financial disclosure is made:** One of the most crucial functions a case conference judge performs is ensuring that full and complete financial disclosure is exchanged. Without it, a lawyer is unable to properly advise his or her client, which makes settlement impossible.
- **Noting admissions that may simplify the case:** Judges who are good listeners can often get the parties and their lawyers to talk openly about their true underlying motivations, not just their stated legal positions, and can help identify common interests that tend to generate settlement.
- **Setting the date for the next step in the case:** The judge should discuss whether the case conference has been "completed" as required by r. 14(4) and, if so, whether a motion or a settlement conference will follow.
- **If possible, having the parties agree to a specific timetable:** Disclosure orders with specific deadlines are vital. If the conference is held before the respondent files an answer, a deadline for its filing should be made. Any amended materials, pension valuations, or home appraisals will all require dates for production and exchange.
- **Organizing a settlement conference or holding one if appropriate:** Usually if the parties agree, the next step will be a motion; a settlement conference date is booked only after the motion is heard. When a temporary settlement is reached at the case conference, the parties often agree to move directly to a settlement conference, which occurs four to eight weeks later.
- **Giving directions with respect to any intended motion:** If the next step is a motion, some judges will set deadlines for the exchange of motion material, including responding and reply affidavits.

A judge must conduct at least one case conference in every case where an answer is filed (r. 17(1)). In a child protection case, a case conference may be conducted if a party requests it or if the court considers it appropriate (r. 17(1.1)). A case conference is even required for a motion to change an order or agreement under R. 15 (rr. 17(3) and (11)).

Unless the court orders otherwise, the parties and their lawyers must attend the case conference (r. 17(15)). Failure to attend a conference could lead to a financial penalty called “costs” or any other order the court may be inclined to make (r. 1(8)).

In Milton, a Dispute Resolution Conference (DRC), where at least one party is represented by counsel and both parties consent, can be scheduled before an experienced family law lawyer who will attempt to identify and resolve the outstanding issues on a consent basis. Where a DRC has been held and issues remain outstanding, the parties may be provided with a case conference with a judge on a date earlier than cases in which there has been no DRC.

For each case conference, each party must serve and file a case conference brief (r. 17(13)). The party requesting the conference (or if the conference is not requested by a party, the applicant) must file his or her brief not later than seven days before the conference, and the other party must file his or her brief not later than four days before that date (r. 17(13.1)). Case conference briefs do not form part of the continuing record unless the court orders otherwise and are returned to counsel at the end of the conference (r. 17(22)). Finally, at a case conference, the judge may, if it is appropriate to do so, make an order for documentary disclosure or questioning (r. 17(8)) (see RR. 19 and 20), a temporary or final order if notice has been served (r. 17(8)(c)), and an unopposed or consent order and, provided it is on consent, refer any issue for alternative dispute resolution. A litigant who wants an order made at a case conference should so indicate in para. 13 of the case conference brief. While this does not guarantee that an order will be made, it definitely heightens the chances and constitutes notice from most judges’ point of view.

The goal for most parties at a case conference is to reach an agreement, either temporary or final, commonly known as a consent or minutes of settlement. An agreement may be temporary on some issues and final on others. An agreement may result in the parties choosing to bypass the traditional means of resolving interlocutory matters (namely, the motion) and moving right to a settlement conference. On the other hand, it may simply detail what documents must be exchanged so that a motion can proceed efficiently. In order for the

agreement to be legal, it must be signed by the parties and witnessed (r. 17(19)). Once this has been completed, unless the court orders otherwise, copies are provided to everyone, and the original is filed as part of the continuing record (r. 17(20)).

3.7 The motion

Sometimes after a case conference has been held, a litigant may seek an order on motion. It goes without saying that motions may be resolved prior to argument before a court if both parties agree. Motions are generally expensive in terms of time and effort by counsel, and all reasonable efforts to avoid this kind of step in a proceeding are usually first exhausted before proceeding.

Motions for temporary orders are governed by R. 14. A person who wants

- a temporary order;
- directions on how to carry on the case; or
- to make a change to an already-existing temporary order

may bring a motion provided a case conference has been completed or is not required (rr. 14(1) and (4)). A case conference must be held before a motion unless there is urgency or hardship.

Whether it is made with or without notice, a motion requires two documents: a notice of motion and an affidavit (r. 14(9)(a)). An affidavit must, as much as possible, contain only information within the personal knowledge of the person swearing that affidavit (r. 14(18)). The affidavit may contain information that the person learned from someone else, but only if the source of the information is identified by name and the affiant states that he or she believes the information is true (r. 14(19)(a)).

The party bringing the motion serves all the evidence in support of the motion. The responding party then serves his or her evidence in response. The moving party then has the right to serve evidence that replies to any new matters raised in the responding materials. No other evidence may be used unless the court orders otherwise (r. 14(20)).

The moving party must serve his or her material on the responding party not later than four days before the motion date and file the documents in court not later than two days before the motion date, along with a special form confirming that the motion is proceeding. The form, Form 14C, can be filed by fax and should specifically state what issues are being litigated and what documents in the record must be read by the judge (r. 14(11)). A motion may also be supported by other admissible evidence in writing, a transcript of questions

and answers under R. 20, or orally with the court's permission. In reality, in most cases the court will grant an adjournment requested by the opposing lawyer where he or she needs more time to respond and where the materials were served less than seven days before the motion.

Motions before case conferences are strongly discouraged. The case law has established that prior to bringing any motion before a case conference, the moving party should establish both of the following:

- An early or urgent case conference could not be obtained from the case conference coordinator.
- He or she has attempted to resolve the supposedly critical situation.

Without establishing both criteria, courts are usually reluctant to hear a motion prior to a case conference on an "urgent" basis (*Rosen v. Rosen*).

3.7.1 Without notice motions

Without notice motions are rare since their very nature is contrary to the fundamental principle that before any order is made, any party affected by the order should have full opportunity to know what is being sought and to respond fully (r. 14(12)). Nevertheless, sometimes certain facts give rise to one party bringing a without notice motion. The *Rules* provide that such a motion may be made in any of the following circumstances (r. 14(12)):

- The nature or circumstances make notice unnecessary or not reasonably possible.
- There is an immediate danger of a child's removal from Ontario, and the delay involved in serving a notice of motion would probably have serious consequences.
- There is an immediate danger to the health or safety of a child or of the party making the motion, and the delay involved in serving a notice of motion would probably have serious consequences.
- Serving the notice of motion would probably have serious consequences.

A party seeking a without notice order has an obligation to make full and frank disclosure of all material facts, even where some of those facts may not be helpful to his or her position. Having regard to this very high standard, it should not be surprising that failure to provide a salient fact to the court will constitute grounds for setting aside the order.

3.7.2 Form 14B Motions

If a motion is limited to procedural, uncomplicated, or unopposed matters, the moving party may use what is known as a Form 14B motion form, instead of a notice of motion and affidavit (r. 14(10)). The kinds of cases where

this form may be used include obtaining an adjournment or any temporary or final orders on consent or changing an FAC into a case conference. The form is not to be used for substantive relief, and if it is, the motion will almost always be adjourned to allow the other side to file material in response and/or for oral submissions.

If a party uses a Form 14B motion form and no person served with the motion form serves and files a response within four days after being served, the motion is dealt with by the court as an unopposed motion (r. 14(10.1)). A party who uses a Form 14B motion form and who is served with a response to it may not serve or file a reply (r. 14(10.2)).

3.7.3 Orders

There are different types of court orders. Pursuant to R. 2 of the *Rules*, a temporary order is an order that is effective only for a limited time. Prior to the enactment of the *Rules*, these were called "interim" orders. A "final order" includes an order, other than a temporary order, that decides a claim in an application on a final basis and includes an order made on a motion to change a final order (R. 15). Prior to the enactment of the *Rules*, final orders were called "judgments."

A "contempt order" is an order finding a person in contempt of court for violating either a final or temporary order. A separate procedure is set out for contempt orders at R. 31.

A "payment order" means a temporary or final order requiring a person to pay money to another person.

If the parties agree, the court may make an order without the parties or their lawyers having to come to court (r. 25(1)). The proper procedure is to send in the original agreement, called a consent, along with a Form 14B asking for an order to issue pursuant to its terms.

An order sent to the court for signature (or "execution" as it is formally known) must be accompanied by an approved draft order from the other side's lawyer or, if unrepresented, the actual party (r. 25(4)). If the other side refuses to approve the form and content of the draft order, the court may sign the order without that party's input (r. 25(8)). If neither party has a lawyer, the court clerk shall prepare the order for the judge to sign (r. 25(11)). If the parties cannot agree on the wording of the order, there is a procedure for "settling" the wording (r. 25(5)).

An order is effective from the date on which it is made, not signed or processed by the court office (r. 25(18)).

3.7.4 Provisional orders and confirmation hearings

Sections 18 and 19 of the *Divorce Act*, in conjunction with R. 37.1 of the *Rules*, set out the procedure where an applicant seeks to change an order for child or spousal support and the respondent ordinarily resides in a different province and has not accepted the jurisdiction of the court to which the application is made. If the court is satisfied that the issues can be adequately determined by a proceeding under ss. 18 and 19, then the court can make a variation order with or without notice to and in the absence of the respondent. Such order, however, is “provisional” only and has no legal effect until it is “confirmed” in a proceeding under s. 19. Once confirmed, it has legal effect (s. 18(2)).

For unmarried families, s. 44(1) of the *FLA* is similar, but not identical. It provides that a provisional order may be made if

- (i) the respondent fails to appear;
- (ii) it appears to the court that the respondent resides in a locality in Ontario that is more than 150 km away from the place where the court sits; and
- (iii) the court is of the opinion, in the circumstances of the case, that the issues can be adequately determined by proceeding under this section.

Under *Divorce Act* cases, once a court in a province makes a provisional order, it shall send copies of the order, a certified or sworn document setting out or summarizing the evidence given to the court, and a statement giving any available information respecting the identification, location, income, and assets of the respondent to the Attorney General for the applicant's province (s. 18(3)). The Attorney General must then forward the documents to the Attorney General for the province in which the respondent ordinarily resides (s. 18(4)). In *FLA* cases, the documents are sent to the court in the Ontario locality in which the respondent resides (*FLA*, s. 44(3)).

Once received by the second Attorney General, the court must serve the documents on the respondent with a notice of a “confirmation hearing.” At the hearing, which proceeds in the absence of the applicant, the respondent may raise any matter not raised before the court that made the provisional order (*Divorce Act*, s. 19(5)). At the conclusion of the hearing, the court shall make an order confirming the provisional order without variation, confirming the provisional order with variation, or refusing confirmation of the provisional order (s. 19(7)). The court also has the option of remitting the matter back to the court that made the provisional matter for further evidence if necessary (s. 19(8)). The order is then returned back to the Attorney General for the province of

the court that made the provisional order (s. 19(12)). Similar procedure exists for *FLA* cases, with necessary modifications (*FLA*, ss. 44(3)–(9)).

3.8 The settlement conference and trial management conference

Sometimes after the motion, the parties will be able to settle all of the issues in the case without further judicial involvement. For those cases where settlement remains elusive, the next step is usually a settlement conference. This is sometimes combined with the trial management conference.

Usually held at least a month after the motion, the settlement conference is presided over by the case management judge, not the trial judge (although some courts do not have case management judges and thus a different judge presides). A trial may be scheduled before the conference is held (r. 17(10)), but most of the time trial dates will not be provided until a settlement conference has been completed, the goals of which include

- exploring the chances of settling the case;
- settling or narrowing the issues that are in dispute;
- ensuring that all relevant evidence has been or will be disclosed;
- noting any admissions that may simplify the case;
- if possible, obtaining the judge's view of how a trial judge might decide the case;
- considering any other matter that may help in a quick and just resolution;
- identifying the witnesses and other evidence to be presented at trial, including estimating the time such testimony will take; and
- organizing a trial management conference or holding one, if appropriate (r. 17(5)).

By far the most important of the above is the judge's view of how a trial judge might decide the case and his or her ability to explore settlement with the parties. Providing guidance and suggestions is the most common way a judge can turn what may seem like an unbreakable impasse into a quick and final settlement. It allows the parties to honestly assess their case in objective terms, see the other side's position in new ways, and think about finding solutions instead of things that need to be done to prove the other side wrong.

A trial management conference is usually held a month or less before the trial starts. Sometimes it is conducted by the case management judge, sometimes by the trial judge, and sometimes by a judge the parties have never appeared before—the difference depends on the particular idiosyncrasies of each court. Designed to

ensure the trial runs efficiently with as few surprises as possible, its purposes can be described as

- exploring the chances of settling the case;
- arranging to see if evidence should be received by written report, an agreed statement of facts, affidavit, or another method;
- deciding how the trial will proceed;
- ensuring the parties know what witnesses will testify and what other evidence will be presented at the trial;
- estimating the time required for the trial; and
- setting the trial date, if this has not already been done (r. 17(6)).

At the judge's direction, part or all of the settlement conference may be combined with a trial management conference (r. 17(7)). As with a case conference, a judge at a settlement conference or trial management conference may, if he or she deems it appropriate, make an order for document disclosure, questioning, or filing of summaries of argument; set the times for events in the case or give direction for next steps; order that a witness give evidence at trial by affidavit; make a temporary or final order if notice has been served; make an unopposed or consent order; or provided the parties agree, refer any issue for alternative dispute resolution (r. 17(8)). Briefs are required for both conferences (r. 17(13)), time service requirements are the same as for case conferences (r. 17(13.1)), and the parties must attend with their lawyers (r. 17(15)). Trial management conference briefs form part of the continuing record, but settlement conference briefs do not. They are returned to counsel at the end of the session because they contain offers to settle, which could prejudice the trial judge (r. 17(22.2)). No statement made at a settlement conference can be disclosed to another judge except if the statement is in a court order or an agreement is reached at a settlement conference (r. 17(23)).

3.8.1 Document disclosure, request to admit, and questioning

If a party believes that another party's financial statement does not contain enough information for a full understanding of that party's financial circumstances, the requesting party must first ask for the additional information (r. 13(11)(a)). This can be done by letter although it is better to use a Form 20 (Request for Information), the original of which should be filed in the continuing record with proof of service. If the information is not provided, the requesting party can bring a motion and ask for an order requiring the other party to provide it (r. 13(11)(b)). In the event the order is not complied with, the court may dismiss the other party's case, strike out any document filed by that party,

make a contempt order, or order that any information that should have appeared on the financial statement not be used at a motion or trial or any other appropriate order (r. 13(17)).

A party may be questioned under oath on his or her financial statement prior to trial. Often both parties agree to be questioned. In the event a person fails to consent to the questioning, the court may order that person (whether a party or not) be questioned or disclose information by affidavit or another method about any issue in the case if all of the following conditions are met (r. 20(5)):

- In the event the questions pertain to a financial statement, a request for information has been made (r. 13(13)).
- It would be unfair to the party who wants the questioning or disclosure to carry on the case without it.
- The information is not easily available by any other method.
- The questioning or disclosure will not cause unacceptable delay or undue expense.

A request to admit is a form in which a party asks the other to admit, for purposes of the case only, that a fact is true or that a document is genuine (r. 22(2)). A copy of any document mentioned in the request must be attached to it, unless the other party already has a copy or it is impractical to attach a copy (r. 22(3)). Unless the party who receives such a request serves a response (Form 22A) within 20 days denying that a particular fact is true or that a particular document is genuine, or refusing to admit that a particular fact is true or that a document is genuine and giving reasons for each refusal, the party will be deemed to have admitted that the fact is true or that the document is genuine (r. 22(4)). It is an invaluable tool that reduces trial time and offers obvious tactical advantages.

Finally, if a trial is looming, counsel almost always exchange affidavits of documents. Although it may be requested at any time, in practice only where a trial appears likely or imminent do counsel seek it. An affidavit of documents contains a list of every document that is relevant to any issue in the case and is in the party's control or available to the party on request (r. 19(1)). If a party later finds a document that is not in the affidavit of documents after it has been served, he or she must immediately serve a fresh affidavit listing the correct information (r. 19(8)). Any document in an affidavit of documents may be examined by and produced to the opposing party (r. 19(2)). The significance of full production is critical. If an affidavit of documents is not produced, the court may dismiss the

party's case or strike out his or her pleadings (r. 19(10)4). If a document is disclosed for the first time at trial and was never listed in an affidavit, such document may not be used without the trial judge's permission (r. 19(10)2).

3.8.2 Medical reports, business records, and expert evidence

Particular attention should be paid to experts and expert reports. Expert witnesses may be required to provide opinions as to the value of a spouse's business, home, pension, or jewellery.

The *Rules* provide that if a party wishes an expert to testify, a copy of the expert's report, signed by the expert and setting out his or her name, address, and qualifications, must be served on the other side at least 90 days before the trial. The rule used to be 14 days but was recently changed. If the case is a child protection case, the deadline is 30 days before trial (r. 23(23)).

A party who wants to call an expert witness to respond to the expert witness of the other party must serve a report at least 60 days before trial. If the case is a child protection case, the deadline is 14 days (r. 23(24)).

The first party may then, if he or she chooses, file a supplementary expert report provided this is done at least 30 days before trial (r. 23(26)).

An expert report must contain the substance of the expert's proposed evidence; detail the expert's qualifications, employment, and educational experiences in his or her area of expertise; and specify his or her name and address (r. 23(25)).

A party who fails to follow this rule may not call the expert unless the trial judge allows otherwise (r. 23(27)).

Medical reports may be received into evidence without being proved by having the medical practitioner attend the trial, provided a special notice filed under Ontario's *Evidence Act* is served on the other side at least 10 days before the trial. Similarly, where a party wishes to introduce documents made in the "usual and ordinary course of business" into evidence, this may be done provided the party gives at least seven days' notice to the other party of his or her intention to file such records into evidence (s. 35(2)).

If a document is in the control of or only available to a non-party, the requesting party should first ask the other party to obtain it from the non-party. Alternatively or in addition, the requesting party may ask the non-party for the document. If these efforts do not resolve the issue, if the document is not protected by privilege and it would be unfair for the requesting party to proceed without it, that party may bring a motion to examine the document

or to have the non-party provide, at the legal aid rate, a copy, which may be used for all purposes of the case instead of the original. The motion must be brought with notice, served on every party, and served on the non-party by special service (r. 19(11)).

3.9 Offers to settle

One way of ensuring that each case is dealt with justly is to reduce the legal costs of the parties, which eventually will be paid from shared family property.

This objective is achieved by the exchange of offers to settle as early in the case as possible. According to R. 18, an "offer" means an offer to settle one or more claims in a case, motion, appeal, or enforcement and includes a counter-offer (r. 18(1)). The rule also applies to an offer made even before the case is started (r. 18(2)).

All offers to settle must be made in writing and personally signed by the party making it and his or her lawyer, if any (r. 18(4)). A notice of withdrawal may be served by the party who made the offer before its acceptance (r. 18(5)).

The only way of accepting an offer is by serving an acceptance in writing on the party who made the offer before it is withdrawn or before the court begins to give a decision that disposes of a claim dealt with in the offer (r. 18(9)). An offer that is not accepted by the set deadline will be considered to have been withdrawn (r. 18(6)).

A party may accept an offer even if he or she has previously rejected it or made a counter-offer (r. 18(10)).

If an offer to settle that was accepted does not deal with the issue of costs, either party may ask the court to grant them. Under r. 18(14), the party making an offer is entitled to costs to the date the offer was served and full recovery of costs from that date if all of the following criteria are met:

- Where the offer relates to a motion, the offer is made at least one day before the motion is heard.
- Where the offer relates to a trial or a step other than a motion, the offer is made at least seven days before the date of the trial or hearing.
- The offer has no deadline for acceptance and is not withdrawn.
- The offer is not accepted.
- The party who made the offer obtains an order that is as favourable as or more favourable than the offer.

In exercising its discretion to award costs, the court can take into account any written offer to settle, the date it

was made, and its terms and conditions, even though r. 18(14) does not apply (r. 18(16)).

Section 131 of the *Courts of Justice Act (CJA)* continues to apply with regard to the court's discretion to award costs.

Where an offer has been accepted and one party does not carry out the terms of the offer, the other party may bring a motion to have the parts of the offer within the court's jurisdiction made into an order or continue the case as if the offer had never been accepted (r. 18(13)).

If an offer is accepted right before trial, the lawyers, or one of them, should immediately inform the court that the trial will not proceed and prepare a consent, which can then be filed with the court so that an order may be obtained. The consent will contain all of the terms agreed upon and form the basis of a consent order to be made by the court. Sometimes, the settlement is that the entire case is dismissed and a domestic contract is executed without a judicial endorsement. This can occur when the parties agree to things that a court typically has no jurisdiction to order (e.g., releases and waivers).

3.10 The trial

Assuming attempts at settlement of some or all of the issues have failed, a trial before a judge will inevitably occur. At the outset, the judge will have the applicant's trial record. Due 30 days before the start of the trial, it must contain the following:

- the application, answer, and reply;
- any agreed statement of facts and updated financial statements and net family property statements;
- any assessment reports or orders relating to the trial;
- the relevant parts of any transcript on which a party intends to rely at trial; and
- any expert reports (r. 23(1)).

In some courts, trial judges seek counsel's opening statements prior to the trial. Rule 23 contains specific provisions for witnesses who must be compelled to testify, along with sanctions for failing to attend (rr. 23(3)–(10)), reading into evidence, and using and rebutting an opposing party or other person's previously given answers to a questioning (rr. 23(13)–(17)).

A family law trial generally proceeds as follows:

Step #1 – Opening statement: The applicant's lawyer presents his or her opening statement, informing the trial judge of the issues to be litigated, the relief sought, and a summary of the theory of the case.

Step #2 – The applicant's witnesses: The applicant's lawyer calls the first witness and conducts a

direct examination, known as the "examination-in-chief." Once this has been completed, the respondent's lawyer can question or "cross-examine" the witness. The cross-examination must be relevant to an issue in the proceeding, relevance being up to the trial judge. The applicant's lawyer may then re-question or "re-examine" the witness on any new matter introduced in the cross-examination that was not dealt with in examination-in-chief. This is repeated until all of the applicant's witnesses have testified. There is no property in a witness, meaning the respondent's counsel is free to contact the applicant's witnesses prior to the trial to discuss the case and their testimony.

Step #3 – Reading into evidence: The applicant's lawyer may then read into evidence any part of any previously held questioning of the respondent. He or she should not abstain from doing so in the hopes that such information will be elicited in cross-examination since there is always a chance the respondent will argue that the applicant has not proved his or her case and move for summary judgment prior to presenting the case.

Step #4 – The respondent's case: The respondent's lawyer then delivers his or her opening statement and calls the witnesses. The applicant's lawyer cross-examines, and the respondent's lawyer re-examines. The respondent's lawyer may also read into evidence any testimony from a previous questioning of the applicant. As noted above, there is no property in a witness.

Step #5 – Rebuttal evidence: Where the respondent raises new matters which the applicant had no chance to deal with and could not have reasonably foreseen, he or she will be allowed to call rebuttal evidence.

Step #6 – Closing arguments: Each lawyer presents his or her closing arguments, referring to the evidence provided and showing how such evidence supports his or her view of the law. If not already filed, counsel will file briefs containing supporting case law. Sometimes the trial judge will seek closing arguments in writing.

3.11 Costs

The primary objective of the *Rules* is to promote the expeditious and just settlement of family law disputes. The *Rules* encourage the parties to meet their obligation to fully disclose everything relating to the case as soon as possible and make every effort to reach a settlement. Any party who does not act in good faith in pursuing these basic objectives can expect to be penalized by costs awards in favour of the opposing party.

The *Rules* create a very important presumption with respect to costs. Under r. 24(1), it is presumed that the

successful party is entitled to the costs of a motion, enforcement, case, or appeal.

This presumption does not apply to child protection cases or parties that are government agencies (r. 24(2)). The court has discretion to award costs to or against a party that is a government agency, whether the agency is successful or unsuccessful (r. 24(3)).

Subrule 24(4) specifically allows the court to set this presumption aside where the behaviour of the successful party in a case is felt to be unreasonable. This party may then be deprived of all or part of its own costs or ordered to pay all or part of the other party's costs.

Under r. 24(5), the reasonable or unreasonable behaviour of a party in a case is determined by examining

- the party's behaviour regarding the issues from the time they were raised, including whether an offer to settle was made;
- whether the offer was reasonable; and
- any offer the party has withdrawn or not accepted.

If a party has acted in bad faith, the court sets the amount of the other party's costs on a full recovery basis and orders that these be paid immediately (r. 24(8)).

The *Rules* require the court to make a summary determination as to who is entitled to costs promptly after each step in the case and to set the amount (r. 24(10)). It is very important for clients that counsel be able to make the necessary observations with the relevant supporting documentation, in order for the presiding judge to decide immediately the issue of costs.

If a party does not appear at a step in the case or appears but is not properly prepared to deal with the issues at that step, the court shall award costs against the party unless the court orders otherwise in the interests of justice (r. 24(7)).

If a party withdraws all or part of an application, answer, or reply, the party shall pay the costs of every other party in relation to the withdrawn application, answer, or reply or part, up to the date of withdrawal, unless the court orders or the parties agree otherwise (r. 12(3)).

Counsel will be well advised to properly prepare their submissions with respect to fees and disbursements at each step in the case so as to be able to speak to the issue of costs on their client's behalf. The factors taken into account by the judge in setting costs are

- the importance, complexity, or difficulty of the issues;
- the reasonableness or unreasonableness of the behaviour of each party in the case;
- the lawyer's rates;

- the time properly spent on the case, including conversations between the lawyer and the party or witnesses, drafting documents and correspondence, attempts to settle, preparation, hearing of the case and argument, and preparation and signature of the order;
- expenses properly paid or payable; and
- other relevant matters.

The courts not only consider the reasonableness of the amount of the costs sought in the circumstances and the reasonable expectation of the costs that a losing litigant could anticipate, but also a party's ability to fund (or pay for) a costs order and whether that obligation would affect the care, maintenance, or interests of the children (*Murray v. Murray*).

3.12 Appeals

Appeals are governed by R. 38. If a final order is made in the Ontario Court of Justice, the appellant must serve a notice of appeal on the opposing side within 30 days of the order or decision being appealed from and file it in the Superior Court of Justice within 10 days (r. 38(5)). If a temporary order is being appealed from the Ontario Court of Justice, the notice of appeal must be served and filed in the Superior Court of Justice within seven days after the date of the temporary order (r. 38(6)). If the order is made under the *Child and Family Services Act*, the notice of appeal shall be served within 30 days after the date of the temporary order (r. 38(7)). Permission of the court is not required to appeal either a temporary or final order made in the Ontario Court of Justice. All appeals from this court are heard by a single judge of the Superior Court of Justice.

Appeals from the Superior Court of Justice are heard either by the Court of Appeal or the Divisional Court, depending on whether the order appealed from is final or temporary (r. 2(1)) and the amount in issue. Any appeals or motions for permission or "leave" to appeal to either of these courts are governed by RR. 61–63 of the *Rules of Civil Procedure*. If an order is final and the amount in issue exceeds \$50,000, the appeal is heard by the Court of Appeal, and no leave is required. If the order is final and the amount in issue is less than \$50,000, the appeal is to the Divisional Court without leave. (*CJA*, s. 19(1)(a)). If the order is temporary, the appeal is heard by the Divisional Court although leave must first be obtained (*Rules of Civil Procedure*, r. 62.02(1)). Leave to appeal is not easily obtained and will not be granted unless (1) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or (2) there appears to the motions judge good

reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted (r. 62.02(4)). If the order is final, the appellant has 30 days to file a notice of appeal from the making of the order appealed from (r. 62.04(1)); if the order is temporary, the appellant has only seven days (r. 62.02(2)).

Once the notice of appeal has been filed, the appellant must “perfect” the appeal within 30 days. This means they must serve on every other party two documents: an appeal record and a factum. The appeal record contains the notice of appeal, the order appealed from, the reasons for the order, a transcript of the oral evidence, and any other material that was before the court appealed from necessary for the appeal (*Rules*, r. 38(17)). The factum contains an overview of the case, the issues on appeal, a summary of the facts, the law and authorities as they relate to each issue, a copy of all relevant statutory and legislative provisions, and the order sought (r. 38(18)). The respondent must then serve a respondent’s factum and, if applicable, a respondent’s appeal record (rr. 38(19)–(20)). Once all the materials have been filed or the time for filing has expired, the clerk of the court will schedule a hearing for the appeal (r. 38(23)).

If a transcript is required, the appellant’s appeal record and factum must be served on the respondent and any other person entitled to be heard in the appeal and filed within 60 days from the date of receiving notice that evidence has been transcribed. If no transcript is required, the appellant’s materials must be served and filed within 30 days of filing of the notice of appeal. The

respondent’s appeal record and factum shall then be served on the appellant and any other person entitled to be heard on the appeal and filed within 60 days from being served with the appellant’s materials (r. 38(21)).

Family law appeals in the Court of Appeal must be heard “expeditiously” (*Rules of Civil Procedure*, R. 61; Practice Direction Concerning Civil Appeals in the Court of Appeal (Court of Appeal Practice Direction), para. 11.2); usually this means within three months. In addition, the court offers a voluntary pre-hearing conference. Its purpose is to attempt to resolve family law appeals at an earlier stage in order to reduce costs for litigants. The court will hold this conference only if all parties believe that a judge’s assistance may assist them in resolving or narrowing the issues on appeal (R. 61; Court of Appeal Practice Direction, para. 8.1).

A temporary or final order may be frozen or “stayed” on any conditions the court considers appropriate (r. 38(35)). The “court” includes the court that made the order or the Superior Court of Justice (r. 38(35)). A stay granted expires if the notice of appeal is not served in time (r. 38(36)). Service of a notice of appeal, however, does not stay a support order or an order enforcing support (r. 38(33)). A stay will only be made on the clearest of evidence and in the most unusual situations. Usually an order for support will not be stayed pending appeal. It has been held that where a trial court has heard all of the evidence and made a decision, the support recipient and children should not be deprived of support pending appeal unless exceptional circumstances suggest otherwise (*Armstrong v. Armstrong*).

The law of divorce

1. Applicability

In 2003, the Ontario Court of Appeal held that the common-law definition of marriage as a voluntary union of one man and one woman violated s.15 of the *Canadian Charter of Rights and Freedoms (Charter)* and was not saved under s. 1 (*Halpern v. Toronto (City)*). In June 2003, the Government of Canada announced it would not appeal the decision of the Court of Appeal and those of courts in seven other jurisdictions in Canada that had ruled similarly on the definition of marriage. Instead, a proposal extending civil marriage access to same-sex couples would be drafted and sent as a reference to the Supreme Court of Canada.

In December 2004, the court ruled that the proposal to define marriage as a lawful union of two persons to the exclusion of all others was within the exclusive legislative authority of the Parliament of Canada while the proposal to allow religious groups to abstain from marrying same-sex couples was not. It further recognized that s. 91(26) of the *Constitution Act, 1867* confers exclusive authority on Parliament to legislate in respect of the capacity to marry whereas s. 92(12) confers authority on the provinces in respect of the performance or solemnization of marriage once that capacity has been recognized. It ruled that the government's proposal to extend the ability to marry to same-sex couples was consistent with the *Charter* and that the freedom of religion, guaranteed by s. 2(a), protects religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs. Finally, the court declined to exercise its discretion to answer the question of whether the opposite-sex requirement for marriage, as established by the common law and set out for Quebec in s. 5 of the *Federal Law—Civil Law Harmonization Act, No.1* was consistent with the *Charter*.

In the case of *M.(M.) v. H.(J.)*, Justice Ruth Mesbur of the Ontario Superior Court of Justice ruled that the heterosexual definition of spouse in the *Divorce Act* was unconstitutional, having infringed the equality guarantee in s. 15(1) of the *Charter* and could not be saved pursuant to s. 1. The court ruled that the appropriate and simplest remedy was to redefine the word “spouse” to mean two persons who are married to each other and to “read in” that definition into the *Divorce Act*.

1.1 Civil Marriage Act

The *Civil Marriage Act* came into effect with Royal Assent on July 20, 2005. The *Act* extends the legal capacity for marriage for civil purposes to same-sex couples in order to reflect the values of tolerance, respect, and equality consistent with the *Charter*. It also makes consequential amendments to other Acts to ensure equal access for same-sex couples to the civil effects of marriage and divorce.

Specifically, s. 2 of the *Civil Marriage Act* confirms that marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others. In order to safeguard the guarantee of freedom of conscience and religion, it is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs (s. 3). No person or organization can be sanctioned or deprived of any benefit for believing or expressing the belief that marriage is the union of a man and woman to the exclusion of all others (s. 3.1).

The most obvious consequential amendment to family law legislation is that the opposite-sex definition of “spouse” in the *Divorce Act* is replaced with a gender-neutral reference to “two persons” who are married to each other (*Divorce Act*, s. 8.1).

2. Types of proceedings

There are three different types of proceedings under the *Divorce Act*:

- divorce proceedings;
- corollary relief proceedings; and
- variation proceedings.

A divorce proceeding is one in which either or both spouses seek a divorce alone or together with a child support order, spousal support order, or custody order. A corollary relief proceeding is one in which either or both former spouses seek a child support order, spousal support order, or a custody order. This allows the parties to divorce at an earlier stage and deal with corollary issues at a later date. A variation proceeding is one in which either or both former spouses seek a variation order (s. 2(1)). A variation order varies, rescinds, or suspends, prospectively or retroactively, a support order or a custody order or any provision thereof (s. 17(1)).

Other claims may be made in a proceeding for divorce whether they derive from the federal statute as claims for support or custody, from provincial legislation as claims with respect to property and division of property, or from the common law for any other relief.

A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding (s. 3(1)). A court in a province has jurisdiction to hear and determine a corollary relief proceeding if either former spouse is ordinarily resident in the province at the commencement of the proceeding or both former spouses accept the jurisdiction of the court (s. 4(1)). A court in a province has jurisdiction to hear and determine a variation proceeding if either former spouse is ordinarily resident in the province at the commencement of the proceeding or both former spouses accept the jurisdiction of the court (s. 5(1)).

The interplay between the status of the parties as “spouses” or “former spouse” is important. The Ontario Court of Appeal has confirmed the following (*Okmyansky v. Okmyansky*):

- An Ontario court does not have jurisdiction to hear and determine a corollary relief proceeding under the *Divorce Act* following a valid divorce in a foreign jurisdiction.
- An Ontario court does not have jurisdiction under the *Family Law Act (FLA)* to hear and determine a support claim made by a former spouse of a foreign divorce.
- An Ontario court does have jurisdiction under the *FLA* to hear and determine an equalization claim following a valid divorce in a foreign jurisdiction.

3. Breakdown of marriage

The only ground for divorce in Canada is “breakdown of the marriage” (s. 8(1)). A breakdown of the marriage can only be established once the spouses have lived separate and apart for at least one year immediately before the divorce proceeding is determined and are still living separate and apart at the commencement of the proceeding, or the spouse against whom the divorce proceeding is brought has, since the marriage was celebrated, committed adultery or treated the other spouse with such physical or mental cruelty as to render intolerable the continued cohabitation of the spouses (s. 8(2)).

In an application for divorce where adultery is pleaded, the other person with whom the spouse committed adultery does not need to be named; if named, however, that person must be served with the application and has

all the rights of a respondent in the case (*Family Law Rules (Rules)*, r. 36(3)).

4. Bars to divorce

The *Divorce Act* contains three obstacles or “bars” to divorce. First, if the court finds there has been collusion, the court must dismiss the application. Collusion is defined as an agreement or conspiracy to which an applicant is either directly or indirectly a party for the purpose of subverting the administration of justice and includes any agreement, understanding, or arrangement to fabricate or suppress evidence or to deceive the court (s. 11(4)). Courts have interpreted collusion in divorce applications to include the dissolution of marriages that are part of an immigration scheme.

Second, if the court finds that reasonable arrangements for the support of the children have not been made, the granting of the divorce must be stayed until such arrangements have been made. Ideally, these arrangements are reduced to writing in a court order or separation agreement. The absence of any written arrangement or any support arrangement at all does not necessarily preclude the divorce from being granted.

Third, where the divorce is proceeding on a breakdown of the marriage based on adultery and the applicant has condoned or connived in the act or conduct complained of, the application must be dismissed unless in the opinion of the court the public interest would be better served by granting the divorce (s. 11(1)). Although there is no definition of “connivance” in the *Divorce Act*, case law has defined it as the “corrupt intention by a spouse of promoting or encouraging either the initiation or the continuance of the adultery of the other spouse.”

5. Lawyer’s duties

Every lawyer who undertakes to act on behalf of a spouse in a divorce proceeding must draw to his or her attention the provisions of the *Divorce Act* that have as their object the reconciliation of spouses and discuss with the spouses the possibility of reconciliation before the application is signed, including the availability of marriage counselling or guidance facilities that might be able to assist the spouses in achieving reconciliation. The lawyer does not have to comply with this section where the circumstances of the case are of “such a nature” that it would clearly not be appropriate to do so (s. 9(1)).

The lawyer must also discuss with the spouse the advisability of negotiating matters that may be the subject of a support or custody order and to inform the spouse of the mediation facilities known to the lawyer that might be able to assist the spouses in negotiating these matters (s. 9(2)). This clearly indicates Parliament’s

intention to promote negotiated settlement of all matters corollary to a divorce and suggests that more must be shown than mere deviation from what a trial judge would have awarded before it is appropriate for a court to disregard or set aside a separation agreement (*Miglin v. Miglin*).

6. Splitting of divorce

The *Rules* allow for the splitting of the divorce claim from all other claims in the case if neither spouse will be disadvantaged by the order and reasonable arrangements have been made for the support of the children (*Rules*, r. 12(6); *Divorce Act*, s. 11(1)(b)). A spouse may be disadvantaged if his or her entitlement to health benefits under an employment benefit plan ceases, which typically occurs once the parties are no longer spouses. Furthermore, since the granting of an order for exclusive possession can only be made in favour of a “spouse,” the granting of a divorce order may disentitle a person to relief at trial by denying them the special protections accorded to a matrimonial home under Part II of the *FLA*. It may also affect the limitation period for a claim to an equalization payment (*FLA*, s. 7(3)).

As the granting of a request to split the divorce is essentially a motion for final relief in the middle of a case, it is correctly brought by a motion for summary judgment under R. 16 of the *Rules*. Once the order to split the divorce has been made, the moving party can proceed with the paperwork for a divorce order. The order confirming the splitting of the divorce should also include a clause confirming that the balance of the issues shall continue as a corollary relief proceeding.

7. Barriers to religious marriage

If a spouse or former spouse files an affidavit confirming that there are barriers within the spouse’s religion that are in the other spouse’s control and the other spouse fails to remove such barriers despite requests, the first spouse may file a motion in court for an order dismissing the other spouse’s application or strike out any other pleading or affidavit filed by the spouse (*Divorce Act*, ss. 21.1(2)–(3)). The section does not apply where the power to remove the barrier to religious remarriage lies with a religious body or official (s. 21.1(6)).

One of the most common barriers to remarriage is a “get” in the Jewish faith. A get is a divorce granted by a rabbinical court and constitutes a release from the religious bonds of marriage. It must be granted before a Jewish spouse can remarry according to Jewish law. Since a rabbinical court may only grant the get with the consent of both parties, where one party requests it but the other refuses to consent, the party requesting may resort to the civil courts. In 2007, the Supreme Court of

Canada upheld the decision of a Quebec trial court that awarded damages to a wife whose husband agreed as part of their divorce settlement to give the get but then refused to actually grant it for 15 years (*Marcovitz v. Bruker*).

Recent case law has held that where a spouse’s pleadings have been dismissed as a result of a failure to cooperate with removal of religious barriers, once the conduct that caused the action to be dismissed has been cured, that party is entitled to seek to have his or her original claims adjudicated.

8. Motion for divorce order

Unless an order splitting the divorce from all other claims has been made, in a contested court case the parties usually wait until the case has been finally resolved before moving for the divorce order. The proper procedure is that one of the parties, usually the respondent, serves the applicant and files with the court a notice of withdrawal (Form 12) of his or her answer. The applicant then files an affidavit, copies of the draft divorce order, and a stamped envelope addressed to each party (*Rules*, r. 36(6)). The draft divorce order may incorporate certain provisions of the parties’ final agreement or simply state that the parties are divorced with no other relief. The affidavit (Form 36) must state that all information in the application is correct; contain sufficient details required to prove the marriage if no marriage certificate has been filed; contain proof of any previous divorce or death of a party’s previous spouse, unless the marriage took place in Canada; contain the information about the arrangements for the support of the children; and contain any other information necessary for the court to grant the divorce (*Rules*, r. 36(5)).

If all of the documents are in order and there are no bars to the divorce, the draft divorce order will be signed and mailed out to the parties in the stamped envelopes. The amount of time it takes to receive the divorce order depends on how busy the court is: estimates range from two weeks to three months, depending on the jurisdiction. Once a divorce “takes effect,” it has legal effect throughout Canada (*Divorce Act*, s. 13). Unless special circumstances exist and a court orders otherwise, a divorce takes effect on the 31st day after the day on which the order granting the divorce is rendered (ss. 12(1)–(2)). Once the divorce takes effect and provided no appeal has been filed, either party can obtain a divorce certificate (Form 36B) for a small fee. Parties can obtain this document on a same-day basis in most courts and will need this certificate in order to remarry.

9. Stay of proceedings

When the federal government entered the fields of divorce and corollary relief by passing the *Divorce Act* in 1967, insofar as any provincial legislation in that field dealt with the same subject matter as the federal legislation, it ceased to be effective. Since the federal legislation “occupies the field,” powers granted under the *Divorce Act* are paramount to and supersede powers granted under corresponding provincial law. Otherwise, it would create the mischief of allowing the issue to be raised coincidentally in both jurisdictions with the potential for dramatically opposite results (*Rules*, r. 36(8); *Divorce Act*, s. 12(7)).

In order to reflect the doctrine of “paramountcy,” unless the court orders otherwise, a freezing or “stay of proceedings” operates when a divorce proceeding is commenced and an outstanding application for support under s. 36(1) of the *FLA* or custody or access under s. 27 of the *Children’s Law Reform Act* has not been “adjudicated.” While the law is not clear, “adjudicated” generally means determined on a final basis. While the Ontario Court of Appeal has held that a final order made under provincial legislation does not preclude the making of a temporary order under the *Divorce Act* even when the application for divorce is filed, the automatic stay has been lifted in other cases under the doctrine of “express contradiction.” This doctrine holds that the provincial law can be invoked so long as it does not directly contradict or conflict with the operation of federal law.

1. Meaning of the terms: custody and access

Custody refers to the right and responsibility of a parent to make major decisions for his or her child. There is no statutory definition of this term. A non-parent may make a custody application; “parent” shall be used throughout this chapter to refer to possible applicants for custody/access. Major decisions are generally accepted to include those concerning education, religion, and non-emergency health care.

Sole custody means that one parent makes all major decisions for the minor child.

Joint custody means that both parents make major decisions for the minor child jointly. Joint custody arrangements vary tremendously, from ones in which the children divide their time equally between two parents’ homes, to ones in which the children maintain a primary residence with one parent.

Access means the time the non-custodial parent has the child in his or her care. Access includes the right to make inquiries about the child and to be given information about the child’s health, education, and welfare (*Divorce Act*, s. 16(5); *Children’s Law Reform Act (CLRA)*, s. 20(5)). Day-to-day decisions are made by the parent in whose care the child is, according to the residential schedule.

In an intact relationship, both parents have custodial decision-making authority. After separation, if one parent moves out of the home without the child or acquiesces to the other parent relocating with the child, the parent in whose care the child remains has *de facto* custody under s. 20(4) of the *CLRA*, and the other parent is entitled to access.

2. Jurisdiction

2.1 Governing legislation

In Ontario, the rights and responsibilities of custody and access are governed by two statutes: the federal *Divorce Act* and the provincial *CLRA*.

2.1.1 Divorce Act

The *Divorce Act* has comprehensive provisions governing custody and access, which apply if the parents are married and seeking a divorce or if a divorce has already been granted.

A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding (s. 3(1)). A court in a province has jurisdiction to hear and determine a corollary relief proceeding if either former spouse is ordinarily resident in the province at the commencement of the proceeding or if both former spouses accept the jurisdiction of the court (s. 4(1)). If the child of the marriage is most substantially connected to another province, the proceeding may be transferred on application (s. 6).

2.1.2 Children’s Law Reform Act

The *CLRA* also has comprehensive custody and access provisions, which apply to non-married parents or those who are not seeking a divorce.

An Ontario court has jurisdiction under the *CLRA* in either of the situations below:

- A child is habitually resident in Ontario (s. 22(1)(a)).
- A child is not habitually resident but
 - the child is physically in Ontario at the commencement of the application;
 - substantial evidence concerning the best interests of the child is available in Ontario;
 - no application for custody or access is pending before a court in another jurisdiction where the child is resident;
 - no extra-provincial order has been recognized by an Ontario court;
 - the child has a real and substantial connection to Ontario; and
 - on the balance of convenience it is appropriate to exercise jurisdiction in Ontario (s. 22(1)(b)).

A court has the discretionary authority to decline to exercise jurisdiction if it is of the opinion that it is more appropriate for jurisdiction to be exercised outside Ontario (s. 25).

2.2 Where to apply

Under R. 5 of the *Family Law Rules (Rules)*, a party shall start a custody or access application in the municipality in which the child resides with limited exceptions. The exceptions are the following:

- The court has taken jurisdiction pursuant to s. 22(1)(b) of the *CLRA* (r. 5(1)(b)(i)).
- The parties have chosen another municipality, after receiving the court's permission in advance (r. 5(1)(c)).
- There is immediate danger to a child or a party, in which case the party may start the case in any municipality but she or he must transfer it to the municipality in which the child resides after the initial motion (r. 5(2)).

2.3 The Hague Convention

Canada is a signatory to the *Convention on the Civil Aspect to International Child Abduction (Hague Convention)*. The *Hague Convention* provides that custody and access determinations occur in the jurisdiction in which a child is habitually resident. Under the terms of the *Hague Convention*, an Ontario court shall return a child to the jurisdiction in which he or she is habitually resident. The only exception is if there is a grave risk of physical or psychological harm (*CLRA*, s. 46 and Schedule).

2.4 Who may apply

Not only biological and adoptive parents but also a step-parent, grandparent, or other third party may wish to seek an order for custody of or access to a child.

2.4.1 Divorce Act

A spouse or former spouse may apply under the *Divorce Act* for a custody or access determination as of right. Another person may make an application for a custody or access order with leave of the court (s. 16(3)).

2.4.2 Children's Law Reform Act

A parent of a child or any other person may apply to a court as of right for a custody or access determination (s. 21).

3. The best interests of the child test

3.1 Factors the court will consider

Courts resolve custody and access applications on the basis of what is in the best interests of the child. This test applies under both the *Divorce Act* (s. 16(8)) and the *CLRA* (s. 24). The statutory provisions in the *CLRA* have far greater detail than the general statement of the test found in the *Divorce Act*. The test under both statutes is the same. Among other factors, a court will consider

- a child's physical well being;
- a child's emotional well being and security;
- the applicant's plan for the child's education and maintenance;

- the child's financial needs;
- the child's religious and ethical upbringing;
- the parent's understanding of the child's needs
- the child's wishes (this factor increases in importance with the child's age);
- the benefit of keeping siblings together; and
- the bonding between a child and his caregivers.

The application of this test is fact driven and focused on the child's needs rather than the parents' rights.

3.2 Maximum contact principle

A child should have as much contact with each parent as his or her best interests require. The failure of a parent to foster such contact is a consideration in any custody or access determination. The *Divorce Act* expresses this principle in s. 16(10). While the *CLRA* does not have a comparable principle encapsulated in the statute, courts also take this factor into consideration under the *CLRA*.

3.3 Parental conduct

A parent's conduct or misconduct is only relevant to custody or access if it affects the child or that parent's ability to care appropriately for the child (*Divorce Act*, s. 16(9); *CLRA*, s. 24(3)). Examples of such conduct include alcohol or drug abuse. In assessing parenting ability, a court shall consider violence or abuse against the parent's spouse, the other parent, a household member, or any other child (*CLRA*, s. 24(4)). Acts of self-defence or to protect another person are not violence or abuse (*CLRA*, s. 24(5)).

3.4 When is joint custody appropriate?

The Ontario Court of Appeal will sanction joint custody where the parties agree but will generally not impose it over the objections of one of the parents. It has, however, done so. (For a more detailed review of that issue, see *Ladisa v. Ladisa* and *Kaplanis v. Kaplanis*.) Where parties have a bad relationship or an inability to work together, joint custody may exacerbate conflict, which is not in the child's best interest and may result in deadlock on major decisions.

3.5 Supervised access

If a child is at risk in a parent's care because that parent may be violent, suffers from alcohol or drug addiction, or has health problems impeding his or her ability to care for the child, access may be permitted only in a supervised setting. Supervised orders are rare and made only if in the child's best interests. The parent seeking to impose supervision of access has the burden of proof that supervision is appropriate.

3.6 Mobility

Some of the most difficult parenting disputes arise when one parent wishes to relocate with a child to a new home, thereby impeding the other parent's relationship with the child. As with all custody and access issues, the best interests test applies. The leading case is *Gordon v. Goertz*, which arose as an application to vary an existing access plan by a custodial parent seeking to move outside of Canada. The principles enunciated by the Supreme Court of Canada in that case also apply to mobility disputes that arise at first instance. These principles are the following:

- If the case is a variation of an existing order, the court must first find a material change of circumstances.
- If so, the court conducts a fresh inquiry based on the best interests of the child and considers the following factors:
 - the existing custody arrangement and relationship between the child and the custodial parent;
 - the existing access arrangement and the relationship between the child and the access parent;
 - the desirability of maximizing contact between the child and both parents;
 - the views of the child (this factor increases in weight with a child's age);
 - the custodial parent's reason for moving only in the exceptional case where it is relevant to the parent's ability to meet the child's needs (for example, if a parent chose to move with the goal of undermining the relationship of the child and the other parent, that would militate against the court permitting the move);
 - the disruption to the child of a change in custody;
 - the disruption to the child consequent on removal from family, schools, and community;
 - the custodial parent's views, but that is not determinative.

These factors are applied on a case-by-case basis. A court will resolve a mobility dispute based on the factual circumstances at the time of the proposed move. Restrictive covenants providing that a child may only be moved with the consent of both parents contained in prior agreements are not determinative.

4. Custody and access resolutions

4.1 Assessing client goals

The role of a lawyer in resolving custody and access disputes is to advise the client of his or her rights and

responsibilities as a parent, to understand the parent's goals, and to assist that parent in implementing them. At all times, the lawyer must act only on the client's express instructions. This process starts with the initial interview in which the lawyer has the dual task of eliciting from the parent what arrangement the parent believes will best meet the child's needs while explaining to that parent the legal framework of custody and access and the available options.

4.2 Negotiation of a parenting plan

Many parents will agree on a parenting plan that allocates decision-making between them and creates a residential schedule. If the parties are able to work out a voluntary parenting plan together, it will minimize conflict between them to the child's benefit. The lawyers may assist in negotiating the terms of the parenting plan by holding a meeting of both parents and lawyers (known colloquially as a "four-way meeting") to reach a consensus on parenting terms.

A parenting plan may be incorporated into a valid separation agreement under Part IV of the *Family Law Act (FLA)*. It becomes a binding contract. Accordingly, if one parent breaches the agreement, the other parent may take steps to enforce the agreement. Such steps may include commencing an application or bringing an emergency motion to maintain or restore compliance with the agreement. A court may disregard any term of a separation agreement that deals with custody or access of a child if the court finds that to do so is in the child's best interests, pursuant to s. 56 of the *FLA*.

An effective parenting plan will include a mechanism for adjustment as the children grow and their needs change.

4.3 Mediation

The parties may consider retaining a mediator to assist them in negotiating a parenting plan. The parents may benefit from a mediator with specialized expertise in children's issues, such as a psychologist or social worker. A mediator cannot impose a resolution on the parties but may be able to facilitate a mutually acceptable plan.

Parties may choose open or closed mediation. In open mediation, the mediator may report to the court if the mediation fails. In closed mediation, the discussions between the parties and the mediator remain confidential, other than the terms of any settlement reached.

Parties may hire a parenting co-ordinator to assist them on an ongoing basis in implementing their parenting plan and, in prescribed circumstances, in arbitrating disputes that arise. The assistance of a parenting co-ordinator may make a joint custody arrangement

workable with parents who could not otherwise communicate and co-operate effectively.

Mediation is not appropriate if a significant power imbalance exists between two parties, unless that issue can be satisfactorily addressed by the mediator or by the involvement of counsel. In cases of domestic violence, whether physical assault or emotional bullying, mediation is a poor alternative.

4.4 Litigation

If no resolution of a custody or access dispute is possible, the parties may turn to the courts to impose a solution. The *Rules* expressly promote the case management and settlement of litigated cases. The *Rules* mandate the court to encourage and facilitate alternatives to the court process and help the parties settle all or part of their case. Despite the commencement of litigation, many disputes are diverted into alternate dispute resolution, particularly custody and access claims. Family mediation services are provided in all areas in which the Family Court of the Superior Court of Justice has been created.

Either party may seek an interim determination of custody and access in the course of an application. The *status quo* care arrangement for the child will inevitably be of great weight for a judge hearing a motion for a temporary order. A parent with *de facto* custody is likely to succeed on a motion. Similarly, the parent who has temporary custody and access has an advantage at the trial of the matter. The final determination of a custody or access application occurs after a trial with *viva voce* evidence called by the parties, which may include the parents, other close relatives, caregivers, teachers, neighbours, friends, and any expert witnesses.

4.5 Variation

Even a final order for custody or access is subject to change if a material change of circumstances has occurred. The variation provisions are found in s. 17 of the *Divorce Act* and in s. 29 of the *CLRA*. On a motion for change, a court will vary an existing final order only if the applicant can demonstrate both of the following:

- (a) A material change of circumstance has occurred that was not reasonably foreseeable at the time of the original order.
- (b) A change in the custody or access provisions is in the child's best interests.

4.6 Evidentiary issues

A custody and access application presents particular evidentiary concerns including how to determine a child's wishes and whether the court will need the assistance of expert evidence.

4.6.1 Child as witness

A parent may take an affidavit from a child for a motion or call a child to give *viva voce* evidence. The practice is rare because it may harm the child, thereby undermining the ostensible purpose of custody and access litigation, which is to obtain a result in the child's best interest.

Another option is for the trial judge to have an interview with the child. This practice is increasing in frequency. The practice facilitates the child's voice being heard. Considerations include the concern that the child may not be responsive or open to a judge and there may be little opportunity to explore the independence or authenticity of the views expressed by the child. Procedural questions will need to be addressed if an interview is to take place including where the interview should be conducted, whether the interview should be transcribed for the record, and whether the parties and/or counsel should also be present.

4.6.2 Assessment

A court may order an assessment of the needs of the child and the ability and willingness of the parents to meet those needs. An assessment may be ordered under s. 30 of the *CLRA* and is also available in a proceeding under the *Divorce Act*. The purpose of an assessment is for an expert with professional skill, usually a psychologist, psychiatrist, or social worker, to provide information to the court not otherwise available. Generally, courts will only order an assessment where there are clinical issues. Parties also may consent to an assessment. Counsel may only release a client's confidential information to any third party, including an expert witness, after obtaining express written instructions.

The assessor cannot usurp the decision-making role of the trial judge. The assessor's role is to provide expert evidence to assist the trial judge in his or her decision.

4.7 The children's lawyer

The Office of the Children's Lawyer (OCL) may assist the parties and the court in a litigated case. A lawyer should never meet with a child who is not his or her client since it raises conflict-of-interest and evidentiary issues. The OCL may become involved in one of two ways:

- A court may order the appointment of the OCL under s. 89(3.1) of the *Courts of Justice Act (CJA)*. If appointed, the OCL has the role of representing the child's views and providing the court with some context for those views. The appointment of the OCL is not automatic even if court ordered. The OCL decides whether to become involved in a particular case after each parent has completed an intake questionnaire.

- Under s. 112 of the *CJA*, a court may also order that the OCL perform an investigation, report, and make recommendations to the court on the child's needs. The OCL have in-house social workers to perform the investigation. The OCL retains the authority to decide whether to accept the appointment.

4.8 Enforcement of custody and access orders

Numerous enforcement options are available, as follows.

4.8.1 Contempt

Breach of a temporary or final order for custody or access constitutes contempt. The court may impose a fine or imprison a party found in contempt. Contempt proceedings are quasi-criminal in nature. A motion for contempt, whether under s. 38(1) of the *CLRA* or R. 31 of the *Rules*, must be served personally on the respondent. That party may ask for a *viva voce* hearing. To establish contempt, the applicant must demonstrate beyond a reasonable doubt the breach of the order and that the breach was wilful. This is a difficult standard to meet in a custody and access dispute. Contempt proceedings should be approached with caution since they may inflame the dispute without providing any effective resolution.

4.8.2 If a child is withheld or abducted

The following are enforcement options when a child is withheld or abducted:

- Abduction of a child under the age of 14 by a parent or guardian in contravention of a custody order is a criminal offence pursuant to ss. 282–283 of the *Criminal Code*. The Attorney General must consent to commence proceedings under s. 283.
- Abduction of a child is an extraditable offence under the *Extradition Act*.
- Under the *Family Orders and Agreements Enforcement Assistance Act*, a federal government agency assists in tracing an abducted child or abducting access parent. The Family Orders and Agreements Enforcement Unit uses federal data banks. Either a police force or a custodial parent under a court order or an agreement may seek assistance from this unit. If the applicant is a custodial parent, court authority is required.
- If a child has been abducted to a state that is signatory to the *Hague Convention*, the custodial parent may contact the Central Authority in this jurisdiction, which will in turn contact the Central Authority in the receiving jurisdiction to take steps for the recovery of the child.
- Under the *CLRA*, the court has authority to make orders directing the appropriate police force to locate and apprehend a child, including search and entry orders.

Matrimonial property

1. Matrimonial property

Matrimonial property rights in Ontario are set out in Part I of in the *Family Law Act (FLA)*. Only married or formerly married spouses are granted rights under this part and Part II (matrimonial home). This includes same-sex couples who have legally married. Prior to a marriage breakdown (which includes the death of one spouse, separation with no reasonable prospect of reconciliation, and divorce), property is governed by the normal rules applicable to strangers, that is, by title where that is determinable or other proof of ownership of a particular asset. It is only when marriage breakdown has occurred (or an application under s. 7 of the *FLA* by one party to equalize property, an extremely rare event in the absence of marital breakdown) does Part I of the *FLA* come into play to equalize values. Also, note that for purposes of Parts I and II, the Ontario Court of Justice is not included in the definition of “court” and has no jurisdiction to deal with property.

2. Calculation of net family property and equalization

The *FLA* sets out a regime for the division of property upon the breakdown of marriage. The formula is designed to calculate the growth of each spouse’s net worth from the date of the marriage to the date that they separate (referred to as the “valuation date” or “V-day”) and equalize the difference between them.

To determine the difference, each spouse calculates his or her net worth on the date of marriage and on the valuation date. The increase is known as the net family property. Net family property is calculated by determining the spouse’s valuation date value (the value of all the spouse’s property on the valuation date minus all debts and liabilities on the valuation date) as well as the spouse’s date of marriage value (the value of all the spouse’s property at the date of marriage minus all debts and liabilities at the date of marriage). The date of marriage value is subtracted from the valuation date value to arrive at a spouse’s net family property. If a spouse comes into the marriage with a home that is also the matrimonial home at the valuation date, neither the home nor any debts or liabilities directly related to the acquisition of or significant improvement to the home owing at the date of marriage are included in the calculation of the date of marriage value. The treatment of the matrimonial home at the date of marriage is unique in the *Family Law Act*. The practical application

of this scheme means that the value of a matrimonial home is equalized without any credit to the spouse bringing the home into the marriage.

Once a net family property value has been determined for each spouse, the spouse with the greater net family property pays the spouse with the lesser net family property an equalization payment that is one-half the difference between their respective net family properties. If the spouse’s net family property is less than zero, it is deemed to be zero for the purposes of calculating the equalization payment. If both parties have zero as their net family property, then neither will owe the other an equalization since there is nothing to equalize. This usually only happens when the properties’ values have declined during the marriage.

All property is included in the net family property calculation regardless of its nature. This means that not only assets such as a house, car, and joint bank accounts, but also business assets, interests in trusts, pensions, RRSPs, etc., are included as well. Contingent interests must also be valued, although that is sometimes quite challenging (s. 4(1)).

There are three steps in determining what is included in net family property:

- (1) The property must meet the definition of property under s. 4(1) of the *FLA*.
- (2) A value must be assigned to the property on the valuation date and/or the date of marriage.
- (3) The ownership of the property must be ascertained. Only the property that the spouse owns is included in his or her net family property. For example, if the matrimonial home is registered in one spouse’s name, only that spouse should include it in his or her net family property. It is included in both spouse’s net family properties only if it registered in joint names. In 2010, the Superior Court of Justice in *Murray v. Murray* confirmed that any property that is largely paid for by one spouse but held jointly on title is deemed to be a gift of 50% of the value of the property, absent significant evidence to the contrary.

There are major exceptions to what is included in calculating net family property, which are referred to as exclusions. This means that although the value of the property is included in listing the spouse’s assets, its full value is later subtracted and therefore has no net effect on the final net family property figure. These exceptions include the value of property other than a matrimonial

home that was received as a gift or inheritance from a third person after the date of marriage and before the valuation date. The value of property that was gifted from one spouse to the other during or before the marriage is not excluded and is included in the net family property of the spouse who received the gift.

If the gifted or inherited property can be identified and traced into property that exists at marriage breakdown (other than a matrimonial home), it is excluded. If the donor or testator expressly stated that income from a gift or a bequest is to be excluded, it will also be excluded if it can be identified and traced. It is important to note that where the gift or inheritance becomes the matrimonial home or can be traced into the matrimonial home, it is no longer excluded. This is the case when the gift or inheritance is used to buy, renovate, maintain, or pay down encumbrances on the home. The deduction is from the party's net worth at the date of separation. The value of a gift received after the date of marriage is added into net family property (part of the net worth at separation) but then deducted so that it has no impact on net family property.

The difference in the result between a gift or inheritance received before the marriage as opposed to one received after the marriage is whether the increase in the value of the gift or inheritance is excluded from the net family property. Where a gift or inheritance is received before the marriage, the value of the gift or inheritance on the date of marriage is deducted in the net family property calculation (i.e., the gift or inheritance forms part of the assets at the date of marriage, which is later deducted in the net family property calculation). Where the gift or inheritance is received during the marriage, its entire value at the date of separation (including any increase in value from the time the gift or inheritance was received) is excluded. The other spouse does not share any of its value, no matter how great the increase.

There are a number of other types of exclusions (insurance proceeds and general damages for personal injury), but gifts or inheritances are by far the most common (s. 4(2)). If an exclusion cannot be traced to property that exists at marriage breakdown (other than the matrimonial home), the value of the excluded property is lost in the calculation of net family property, even if it can clearly be established as having been received during the marriage.

While the definition of "property" in the *FLA* is exceedingly broad, there are some limits. In *Lowe v. Lowe*, the Ontario Court of Appeal held that WSIB pensions are not "property" and therefore not included in the calculation of net family property. While as a general rule pensions are included as part of net family property,

this does not apply to WSIB pensions according to the case law.

2.1 Valuation issues

2.1.1 Pensions

Pensions are included as property in the net family property statement. A lawyer is not expected to value these. If provided with the requisite information, there are valuers (usually actuaries) who, for less than \$1,000, can produce a reliable valuation. A pension is property, and even if it is pension in pay or unvested, it still has an after-tax value, which must be included in net family property.

If a spouse has a pension at the date of marriage and at the date of separation, two values should be obtained, the former being treated as a deduction from the latter in the calculation of net family property. While no particular valuation method is statutorily mandated, the Supreme Court of Canada in *Boston v. Boston* indicated that the usual approach should be *pro rata*, that is, the number of years of membership in or contribution to a pension fund issued as denominator of a fraction, and the years of the marriage during which this was so as the numerator. For example, if Ms. A joined a plan in 1980, married in 1990, and the marriage broke down in 2000, half the value of the pension would be included in her net family property.

Often the pension is the largest asset the family owns aside from their home. This causes problems regarding payment since it is not usually accessible until retirement. The parties sometimes trade off equity in the home for the pension, but this creates the risk of "double-dipping" later on. This can happen when the pension has been included in the equalization payment but support is also claimed later, when the pension is in pay and is the main or even the only source of income of the spouse from whom the support is sought. *Boston v. Boston* holds that in such a case, the court should focus on the portion of the pension acquired after separation, not the portion already equalized, although the court may still permit double-dipping if the need is extreme.

Parties occasionally agree to "if and when" the pension, that is, to take it out of net family property and divide it when it is received. This has the potential to create problems if the particular pension or pension legislation prohibits this.

With respect to valuation issues, the main variables are the assumed tax rates applying to future payments and the actual retirement date that will trigger the commencement of payments. The former is usually resolved by using present rates, and the latter is a matter

of evidence. The question to be asked is: when is the pensioner likely to stop working and start collecting?

As of January 1, 2012, there is a new legislative regime in effect for pensions, which affects both how the value of pensions is determined and how equalization payments may be settled (where one or both of the parties has a pension that factors into an equalization payment).

These changes apply to all spouses except for those who have settled a pension issue by agreement, order, or arbitration award before January 1, 2012.

The biggest problems with the old system were the following:

- (1) It was very difficult to accurately determine the value of a pension at any given time (since it is an asset that cannot be converted into cash and is only eventually received in the future for an indeterminate period of time).
- (2) Even if a value for the pension could be agreed upon, it was difficult for the pension owner to come up with the cash to “equalize” the value of the pension. Often, a pension owner would set off their equity in the matrimonial home to account for half the value of the pension, which seems unfair given that a spouse in that position is giving up a tangible asset for an unrealizable and intangible asset.

The biggest changes are as follows:

- (1) There are new general rules for determining the value of all pensions:
 - (a) Individual differences such as age of retirement, future indexation, and shortened life expectancy will play less of a role, or none at all, in determining the value of a pension.
 - (b) Mortality tables used to determine life expectancy will now be the same for both men and women.
 - (c) The value of a spouse’s survivor benefit will now be taken into account as part of the determination of the value of a pension.
- (2) There are new rules for determining the value of a defined benefit plan.
- (3) The value will generally be assigned by the pension plan administrator, upon request by a spouse.
- (4) There are new, discretionary rules for determining how a pension that has not begun paying out will be equalized:
 - (a) A payment can be made in cash, in cash instalments, or for other consideration (such as a transfer of property).
 - (b) A lump-sum transfer may be made directly out of the pension owner’s pension and can be made into a prescribed investment fund in the name of the owner’s spouse.

- (c) Some combination of the two options above may be used.
- (d) A pension income stream can be divided (this option is only available for pensions that are already being paid out).

The discretion is to be exercised with regard to what assets are available to the parties at the time that the pension is to be equalized, what proportion of the pension owner’s net family property is attributable to the value of the pension, the liquidity of any lump sum to be transferred to the pension owner’s spouse, any contingent tax liabilities that would result from a lump-sum transfer, what resources are available to each spouse to meet their retirement needs, and whether it is desirable to maintain those resources (i.e., whether it is desirable to keep retirement resources illiquid).

- (5) Where a pension has begun being paid out before the spouses’ date of separation, the pension itself may be divided, such that both spouses can directly receive a share of the income that the pension yields.
- (6) Unmarried spouses may consent to a pension transfer or division.
- (7) For married spouses, a period of cohabitation preceding the marriage may be taken into account in determining the pension’s value for equalization purposes.
- (8) “If and when” agreements and orders in effect before January 1, 2012, may still be varied and amended after January 1, 2012, to “facilitate and effect” a pension division.

2.1.2 Stock options

Along with other forms of deferred income, these have become common elements of executive compensation and, if earned prior to marriage breakdown, are considered property. Valuing stock options is trickier than valuing a deferred bonus (which, although it is clearly treated as income under the *Income Tax Act* and support purposes, is also considered an account receivable and, therefore, property under the *FLA*). In *Ross v. Ross*, the Ontario Court of Appeal endorsed the Black-Scholes method of valuing “out of the money” stock options in preference to an “if and when” valuation approach.

An expert should be retained to perform this calculation unless everyone agrees that the intrinsic value is to be used, which is simply the difference between the strike price (the price at which the holder can purchase the share) and the trading value in the marketplace for the share on that same day. Taxes will have to be deducted as well as other costs of disposition (such as brokers’ fees). This is the simplest method, and it generally produces the lowest value. If the options are not yet vested, there is

an additional level of discounting that requires an expert's opinion to quantify accurately.

2.1.3 Trust interests in property

These refer to an interest in an *inter vivos* or testamentary trust. These can range from a fixed interest in the income and capital of the trust to a totally discretionary interest. However it may be structured, there is some monetary value to the interest (although it is arguable that a totally discretionary interest in a trust where there are other beneficiaries who can ultimately receive all the distributions of income and capital may be zero). Another form of trust is the offshore trust, which is often created by one of the spouses (sometimes, even jointly) in order to defer taxes (and sometimes for less admirable purposes). These trusts purport that the property that forms the *corpus* of the trust has been given away irrevocably by the donor spouse, even though that spouse may be a beneficiary. The spouse no longer has the legal right to call upon the return of the capital or even a payment of income but must request it from the trustee. Often, these are professional trustees who reside in tax havens and perform the service of appearing as if they are the true legal owners. The lawyer must look at the reality of the situation. Who really controls the trust and the trustees? Has a request for funds ever been turned down? What is the ultimate expectation of the spouse who set up the trust with respect to the purpose of it? These issues have not yet been fully explored in our courts, but it is hoped that judges would see through a charade and find that the entire value is still to be included in the net family property of the spouse who set up the trust and retains practical power over it.

2.1.4 Costs of disposition

Although assets are rarely sold on the very day of marital breakdown, they will eventually be sold even if it is only a deemed disposition on death. Capital assets owned at the date of marriage breakdown may have inherent contingent capital gains (or even recapture of depreciation deducted for accounting and tax purposes over the years) that will be triggered by their eventual sale. There are commissions relating to the sale of some assets, such as the matrimonial home. The courts have indicated that it is the onus of the owner of a taxable asset to establish when it is likely to be disposed of and, thus, when the costs of disposition will be incurred. A calculation is done using current taxation rates (since any others would be entirely speculative), and a present value calculation back to the date of marital breakdown is performed.

Other contingent liabilities, such as guarantees of loans or mortgages, or outstanding lawsuits against a spouse,

must also be valued when determining net family property. Despite obvious valuation difficulties, the Ontario Court of Appeal has confirmed as recently as 2010, in *Greenglass v. Greenglass*, that contingent liabilities are to be taken into account as long as they are reasonably foreseeable on the valuation date.

These are often highly subjective analyses unless one uses hindsight (assuming the situation has been resolved before settlement). Fortunately, the *FLA* talks about "value" and not fair market value, so hindsight is sometimes permitted by the courts with respect to contingent assets and liabilities in particular.

2.2 Constructive and resulting trusts

Net family property is determined by ownership. If a property is held jointly (often the case for a matrimonial home or a family's main bank account), half its value is included in the net family property of each spouse. If the property is in one spouse's name only, it is only included in his or her net family property. However, early on in the life of the *FLA*, the courts were faced with rapidly escalating real estate values that had the effect of depriving the non-owning spouse of any share of these very significant increases in value. Despite the fact that the *FLA* had been presented by the drafters as a complete property code for married spouses, the courts permitted spouses to argue constructive and resulting trust principles, namely, that there had been an unjust enrichment on the facts in favour of the owning spouse that ought to be shared through a declaration that the property was equitably owned equally by both spouses.

There has been considerable litigation relating to this issue. Presently these claims arise between married spouses in relation to property put in the name of one spouse by the other who had purchased or otherwise paid for the property but "gave" it away to ensure that his or her creditors (actual or potential) could not seize the property in case of bankruptcy or other financial catastrophe. While the case law is conflicting, on balance, it appears that spouses are not permitted to assert one thing for one purpose and another for family law purposes; e.g., if a spouse has told creditors that he or she does not own the property, when it comes time to determine ownership on marriage breakdown, the spouse cannot claim it back as his or her property. Of course, its value at marriage breakdown still forms part of the owner's net family property.

2.3 Equalization payment terms

The court has the power to allow a spouse who owes an equalization payment up to 10 years to satisfy the obligation. The spouses can extend this period by agreement. Often, the payment is made in a much

shorter time. The court also has discretion with respect to whether the equalization payment bears interest (the presumption is that interest will be paid).

2.4 Unconscionability

There are very limited circumstances under which the equalization payment can be other than as described above. When such an order is made it is called an “unequal” equalization. To obtain such an order, the result of the normal calculation must be “unconscionable,” that is, it must shock the conscience of the court in relation to certain specific conditions that are set out in s. 5(6) of the *FLA*. The primary ones are the following:

- a marriage that has lasted less than five years (and in this instance only, the period is calculated by including cohabitation before marriage);
- a contract other than a domestic contract (that is, an agreement between the spouses not to share or to equalize but in an unenforceable form);
- improvident depletion of net family property (such as gambling debts); and
- gross misconduct during the marriage (this must be extreme, not just a failure to shoulder more or less one-half of the overall burdens of the marriage—it must amount to a virtual repudiation of the marital partnership).

The finding of unconscionability and, thus, an order for unequal division of the parties’ net family property are extremely rare. When such an order is justified, the court can order more or less than the difference between net family properties to be paid by one party to the other. The Ontario Court of Appeal in *von Czeslik v. Ayuso* held that “more” is not limited to the mathematical difference between the parties’ net family properties and awarded the wife 100% of the husband’s net family property. The same principle would apply to the interpretation of “less.” For example, if the court is shocked by gambling losses, which constitute improvident depletion, and the offending spouse has nothing left, the court can allow the innocent spouse to refrain from paying an equalization; the court cannot get the losses back for the spouse.

Events occurring after the valuation date can be considered in determining whether the test in s. 5(6) has been met, though such cases are rare and usually involve very bad and financially destructive conduct on the part of one spouse. Severe decreases in the payor’s net worth after V-day has not been found to fall within s. 5(6). However, the *Serra v. Serra* decision of the Court of Appeal in 2009 found such a decrease to be unconscionable within the meaning of s. 5(6)(h) when it was beyond the control of the owner and not merely a

general market decline; as a consequence, the court decreased the equalization owed. *Serra* was successfully applied in the Superior Court of Justice decision *Kean v. Clausi* in 2010, suggesting that the courts may be moving towards taking into account decreases in a payor’s net worth after the valuation date in some circumstances.

2.5 Limitations on proceedings

Absent an order for an extension of time, a claim for equalization cannot be brought after the earliest of six years after separation, two years after a divorce is granted, or six months after the first spouse’s death.

3. Matrimonial home

Although matrimonial homes are clearly included in net family property under Part I, they also have their own special part of the *FLA* (Part II), which sets out several rights unique to matrimonial homes within the province. It is important to note that a married couple may have more than one matrimonial home: their main residence, cottages, chalets, condominiums, etc., can all qualify simultaneously. The dwelling must be used at the time of marriage breakdown as a matrimonial home, and its use need not be full-time but must be consistent with the normal use of such property, such as summer long weekends for a cottage, winter weekends for a ski chalet, and so on.

Spouses with more than one matrimonial home may designate one of them as a matrimonial home by signing and filing a designation to which Part II rights attach, freeing the other(s) to be dealt with according to ownership.

A matrimonial home cannot be sold or encumbered without the written consent of the other spouse, regardless of how title may be held. Without written consent, the sale or mortgaging may be set aside by a court.

The court has the power to award exclusive possession of a matrimonial home, both on a temporary and permanent basis, to either spouse, including a non-owning spouse. Even if one spouse moves out, until an order for exclusive possession is granted, the spouse remaining in the matrimonial home cannot exercise the rights of exclusive possession, such as changing the locks. Generally, it requires proof that the best interests of the children require a period of exclusive possession.

When the matrimonial home is owned by only one of the spouses, the other spouse’s right of possession ends when the parties cease to be spouses, unless a court order or separation states otherwise.

If a matrimonial home is jointly owned but used exclusively by one party, the other can claim occupation rent. This is rarely granted since it is usually offset by the occupant bearing most of the expenses of the home, or if the occupant is in receipt of support and using those funds to pay for the home, occupation rent is considered just another form of support and not payable. Note that s. 28(1) of the *FLA* states that Part II (matrimonial home) applies to matrimonial homes that are situated in Ontario. For example, if one of the parties has an interest in a Florida condominium that was ordinarily occupied by the spouses as their family residence at the time of the parties' separation, the rights and obligations respecting the matrimonial home in Part II are not applicable.

The court will look through a corporate veil if a company controlled by one spouse owns a matrimonial home or has funds that can be accessed to meet that spouse's obligations.

4. Preservation of property

A court may order that any property owned by either spouse to be preserved during the course of litigation. It is important that the order specify exactly what is intended, since "preservation" can have several different meanings. It can be limited to the preservation of the value of property, which permits the owner to continue to treat the property in its usual fashion (such as buying and selling shares, running a company, or even selling or encumbering it) so long as the value remains intact in some form or other, pending final determination or settlement. The court can also order preservation of a specific property, forbidding it to be sold or encumbered in any way. Finally, the court can freeze assets such as bank accounts or stock trading accounts so that no one can deal with them until further court order.

The material before the court must be very specific and must set out what type of preservation order is required (as well as the reasons why it is necessary). The resulting order must be appropriately drafted since in some instances it will be served upon third parties (such as banks) who need clear instructions from the court to ensure they comply with the order appropriately.

Another option to preserve real property is for a spouse to bring a motion for a certificate of pending litigation on an application within a matrimonial proceeding. The effect of a certificate of pending litigation is that, once registered against the title to a property, it warns all persons that the title to the property is in litigation and prevents dealings with respect to the property.

Under R. 42 of the *Rules of Civil Procedure*, a party who is seeking certificate of pending litigation must include a claim for it in the originating process or pleading that commences the proceeding (i.e., the application), together with a description of the land in question sufficient for registration. This motion may be made without notice, but a party who obtains an order must serve it forthwith, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion, on all parties against whom an interest in land is claimed in the proceeding.

5. Miscellaneous

From the Supreme Court of Canada down through all courts, the last 10 years has seen a series of decisions that have extended spousal rights to common-law couples and to same-sex couples. The major limitation remains the Supreme Court of Canada's decision in *Walsh v. Bona*, which at least for the foreseeable future, means that common-law couples of whatever sexual orientation will not have statutory property rights nor equitably obtained similar results.

1. Child support guidelines

Federal and provincial *Child Support Guidelines* (*Guidelines*) are regulations that prescribe the quantum of child support based on the number of children and the payor's income. The stated objectives of the *Guidelines* are

- to set a fair standard of support so that children benefit from the parents' financial means after separation;
- to reduce conflict between parents by making the calculation of child support more objective;
- to improve efficiency and encourage settlement by giving courts and parents guidance in establishing child support;
- to ensure consistency in treatment of parents and children in similar circumstances (*Federal Child Support Guidelines*, s. 1; *Ontario Child Support Guidelines*, s. 1).

The federal and provincial *Guidelines* are identical regulations, and throughout this chapter *Guidelines* will be used interchangeably.

2. Jurisdiction

2.1 The federal guidelines

If the parents are divorcing or have divorced, a child support application is determined under s. 15.1 of the *Divorce Act* by applying the *Guidelines*, which are regulations to that *Act*. A parent may seek child support in a province in which he or she has resided for one year as part of a divorce proceeding (s. 3(1)). A former spouse may make a child support application in a province in which he or she is ordinarily resident at the start of the proceeding or if both spouses accept the court's jurisdiction (s. 4(1)(b)).

2.2 The provincial guidelines

If the parents are not divorcing or were not married, a child support application is determined under s. 33 of the *Family Law Act* (*FLA*) by applying the *Guidelines*, which are regulations to that *Act*.

3. Calculating guideline support

3.1 Standing

3.1.1 The claimant

Under the *Divorce Act*, only a parent who is a married spouse or former married spouse may make a child support claim (ss. 15.1(1) and 17).

Under the *FLA*, a parent or dependent child may apply for child support (s. 33(2)). Also, a government agency providing benefits for a child or in receipt of an application to provide benefits for a child may apply for a child support order (s. 33(3)). The government agencies are the Ministry of Community and Social Services, a municipality, a district social services administration board, or a delivery agent under the *Ontario Works Act*, 1997.

3.1.2 The child

The *Divorce Act* restricts eligibility for child support to a "child of the marriage" (s. 2(1)). A child of the marriage means a child who is under the age of majority and has not withdrawn from the parents' charge, or is over the age of majority but unable because of illness, disability, or other cause to withdraw from their charge. The *FLA* restricts eligibility for child support to an unmarried child who is a minor or is enrolled in full-time education and, if over the age of 16, has not withdrawn from parental control (s. 31). Generally the obligation to maintain a child extends through the completion of a first post-secondary degree (*Whitton v. Whitton*). Nothing in either *Act* limits the obligation to one degree, and in an appropriate case, the court may extend support after consideration of relevant factors including the financial circumstances of both parents and the child, the child's academic performance, and family education expectations (*Oates v. Oates*).

Subsection 2(2) of the *Divorce Act* states that for the purposes of the definition of a child of the marriage, a spouse or former spouse who stands in the place of a parent may also be included. To determine a non-biological parent's financial responsibility for a child, the court must weigh a number of factors on an objective test, including

- whether the child participates in the extended family in the same way as would a biological child;
- whether the person provides financially for the child;

- whether the person disciplines the child as a parent;
- whether the person represents to the child, the family, or the community that he or she is responsible as a parent;
- the nature or existence of the child's relationship with the absent biological parent.

Once a parent-child relationship is established, it cannot be unilaterally terminated by the parent (*Chartier v. Chartier*).

The *FLA* definition of "child" includes a person to whom a parent has shown a settled intention to treat as a child of his or her family. A settled intention is determined on an objective test based on conduct, including consideration of the same factors as under the *Divorce Act*.

Subsection 10(1) of the *Children's Law Reform Act* provides for blood tests if paternity is questioned. Section 8 of the same *Act* establishes presumptions of paternity of a male person in any of the following situations:

- He is married to the mother of the child at the time of the birth.
- He is married to the mother of the child by a marriage terminated by death, nullity, or divorce within 300 days before the birth.
- He marries the mother of the child after the birth and acknowledges he is the father.
- He was cohabiting with the mother in a relationship of some permanence at the time of the birth or the child was born within 300 days after ceasing to cohabit.
- He has certified that he is the father under the relevant statute.
- He has been found in his lifetime to be the father by a court.

3.2 The residential arrangement

3.2.1 Primary residence

If a child resides primarily in one parent's home for at least 60 percent of the time, the other parent must pay *Guidelines* support based on the Child Support Table (Table).

3.2.2 Shared custody

If a child divides his or her time between the parents' homes to spend more than 40 percent of the time in one and less than 60 percent of the time in the other, the court has the discretion to depart from the Table amount, pursuant to s. 9 of the *Guidelines*. There is no presumption in favour of either the Table amount or a reduction of the Table amount. The court's discretion is determined by three statutory factors:

- the set off between the amount each parent would pay applying the Table amount;
- the increased costs of the parenting arrangement; and
- the condition, means, needs, and circumstances of each parent and child.

The court will also consider the importance of ensuring the children do not experience significant variation in standards of living between the two households. In a variation application of an existing parenting arrangement, the court will consider a parent's reliance on receiving the Table amount of support in establishing his or her household (*Contino v. Leonelli-Contino*).

3.2.3 Split custody

If custody of the children is divided, with one or more residing primarily in each parent's home, child support is calculated as the set-off between the amount each parent would pay for the child or children in the other parent's care applying the Table (s. 8).

3.3 The number of children

The Table sets the quantum of support based on the number of children. The amount payable is not per child but a global amount for all the children in the household.

3.4 The ages of the children

The court has discretion to depart from the presumptive Table amount for eligible children over the age of majority if the court finds that amount inappropriate, having consideration to the financial means, needs, and condition of the child and the parents (s. 3(2)). Relevant considerations are

- the child's ability to earn income;
- the availability of loans, scholarships, and bursaries if the child is enrolled at a post-secondary institution;
- the child's performance at school or in a post-secondary institution;
- the child's full-time attendance at school or the reason for part-time attendance;
- the child's budget.

3.5 The payor's income

The *Guidelines* prescribe a method to determine a payor's income. The starting point is the payor's total income shown on his or her income tax return as adjusted in accordance with Schedule III of the *Guidelines* (s. 16). Either party may ask the court to find that the payor's income differs from that calculated under s. 16. The parent asking a court to find a different income bears the onus of proof. A court may find a

different income if the amount calculated under s. 16 is not the fairest determination in light of income fluctuations over the preceding three years or non-recurring income or losses (s. 17). A court may include in a parent's income all or part of pre-tax income of a corporation in which he or she is shareholder, director, or officer and may adjust that pre-tax corporate income to add back amounts paid in salaries, wages, or management fees to non-arm's length parties (s. 18). The court may also impute income to a parent (s. 19(1)) in a number of situations including, but not limited to

- intentional under-employment;
- exemption from payment of income tax;
- payment of tax at an effective rate lower than that in Canada;
- diversion of income;
- the parent's failure to reasonably utilize property to generate income;
- the parent's failure to make proper financial disclosure;
- a situation in which a significant portion of income is paid from dividends or capital gains; or
- the parent's unreasonable deduction of expenses from income, reasonableness not being solely governed by the standard applied in the *Income Tax Act* (*Guidelines*, s. 19(2)).

If income is imputed, the court may adjust the amount by increasing it to take into account income tax since the Table is based on gross taxable income.

3.6 Financial disclosure

Each parent has an obligation to make financial disclosure under s. 21 to permit the determination of income for *Guidelines* purposes. The disclosure is for the three preceding years and includes income tax returns, notices of assessment and re-assessment, and statements of earnings for employees. Where a parent is self-employed, it also includes financial statements of the parent's business or practice; a breakdown of salaries, wages, and management fees to non-arm's length parties; and financial statements of a corporation controlled by a parent and of any trust of which the parent is a beneficiary.

3.7 Income over \$150,000

If the parent has income of over \$150,000 per year, the court has the discretion to depart from the presumptive Table amount if the court finds that amount inappropriate (s. 4). The parent seeking an order that deviates from the Table amount bears the onus. However, the court will not easily depart from the presumptive Table amount. Income must greatly exceed

the \$150,000 threshold before a court will adjust the Table amount (*Francis v. Baker*). Courts have ordered Table support as high as \$11,173 per month for a four-year-old child (*Tauber v. Tauber*).

3.8 The Table amount

The Table amounts reflect average costs for children's expenses. The recipient does not pay tax on the child support received. Each province and territory has a separate Table. The applicable Table is the one for the province in which the payor is ordinarily resident at the time of the application or at the time of determination if the payor has moved. If the payor resides outside of Canada, the applicable Table is the one for the province in which the recipient parent ordinarily resides (s. 2(1)). The Ontario Table is attached as an Appendix to this chapter.

3.9 Special or extraordinary expenses

In addition to the Table amount, a court may order the payment of all or a portion of an itemized list of special and extraordinary expenses, including child care costs incurred as a result of the parent's employment, illness, disability, or education or training for employment; extraordinary extra-curricular expenses; and extraordinary primary or secondary education costs. The guiding principle is that the court will apportion the expenses between the parents on a *pro rata* basis after taking into account the contribution if any from the child and any related subsidies or tax deductions (s. 7). Extraordinary expenses are defined in s. 7(1.1) of the *Guidelines*. These are expenses that exceed the amount the requesting spouse can reasonably cover, taking into account that spouse's income and the monthly child support payable, or expenses that a court considers extraordinary in light of the amount of the expense related to the requesting spouse's income, including the monthly child support payable, the nature and number of the educational or extracurricular program, any special needs and talents of the child, the overall costs, and any other similar factor the court considers relevant.

3.10 Undue hardship

A court has the discretion to award an amount different from the Table amount if the court finds that a parent or child would otherwise suffer undue hardship (s. 10). The *Guidelines* identifies a non-exhaustive list of circumstances that may cause undue hardship. These include a parent with unusually high access costs, a parent with a legal duty to support any other person, and a parent with unusually high debts reasonably incurred to support the family before the separation or to earn a living. Before exercising its discretion to depart from the

Table amount, the court must make a finding of undue hardship, and the applicant must demonstrate that his or her household would otherwise have a lower standard of living than the other parent's household. The *Guidelines* provide a standard of living test in Schedule II. Commercial software is available to perform the calculation.

3.11 Special provisions in past orders or agreements

The court has the discretion to award child support that departs from the Table amount if a pre-existing order or separation agreement contains special provisions concerning the parties' respective financial obligations or the division of property that directly or indirectly benefit the child, but only if the application of the *Guidelines* would result in an inequitable award (*Divorce Act*, s. 15.1(5); *FLA*, s. 33(12)).

Under s. 56(1.1) of the *FLA*, a court may disregard any provision of a domestic contract for child support if the amount is unreasonable in light of the *Guidelines*.

3.12 Reasonable arrangements

The court may award an amount that differs from the *Guidelines* if the parents have consented to it and the court finds that reasonable arrangements have been made for the child's support (*Divorce Act*, ss. 15.1(7)–(8); *FLA*, ss. 33(14)–(15)).

3.13 The form of the order

Under the *Guidelines*, the court usually awards periodic support. A court may order lump-sum support, secured support, or another form that is reasonable in a particular case. Subsection 15.1(4) of the *Divorce Act* permits the imposition of terms, conditions, or restrictions concerning the award. Under this provision, a court may order that child support binds the payor's estate. Subsection 34(4) of the *FLA* provides that orders under that statute are binding on the payor's estate.

A child support order must include the name and birth date of each child, the income of any parent whose income is used to calculate the support, the amount of support, the particulars of any s. 7 expenses, and the date or dates of payment (*Guidelines*, s. 13). It should include standard terms providing for enforcement by the Director of the Family Responsibility Office. It should also provide for annual financial disclosure pursuant to s. 24.1 of the *Guidelines*.

4. Retroactivity

A court may order child support payable for a period preceding the commencement of the application. The parents' obligation to support their children in

accordance with their incomes is a right of the children independent of any statute or order. To decide if a retroactive award is appropriate, a court will balance fairness to the child, flexibility, and the parents' interest in certainty. The court will consider such factors as

- the reason for the delay in making the application;
- the conduct of the payor;
- a child's present and past circumstances, including need at the time that the change occurred; and
- whether the retroactive award will cause hardship.

If the court finds that a retroactive award is appropriate, the general rule is that the new order should be retroactive to the date that the requesting spouse gave effective notice to the payor spouse by raising the issue. The retroactive award will be limited to three years past unless the court finds blameworthy conduct by the payor spouse (*D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*).

5. Variation

A final order under either the *Divorce Act* or the *FLA* may be varied if either parent can demonstrate a material change in circumstance that, if known at the time, would have likely resulted in a different order (*Willick v. Willick*). The variation must be sought in the court that granted the original order.

The coming into force of the *Guidelines* constitutes a change in circumstances sufficient to ground a variation application pursuant to s. 17 of the *Divorce Act* or s. 37 of the *FLA*.

If a support order or agreement has been assigned to a person or an agency, the parties are required to serve the assignee as if the assignee were also a party. To determine if an order has been assigned, either party or their lawyers may complete and send a Confirmation of Assignment form to the Confirmation of Assignment Unit of the Ontario Ministry of Community and Social Services.

6. Ongoing financial disclosure

Under the *Guidelines*, upon written request, a parent must make ongoing financial disclosure annually after the granting of a child support order (s. 25).

7. Interjurisdictional Support Orders Act, 2002

The *Interjurisdictional Support Orders Act, 2002 (ISOA)* provides a regime for an applicant for child support to obtain orders against a payor parent in a reciprocating foreign jurisdiction. The list of reciprocating jurisdictions is found in the regulations to the *ISOA*. Each

reciprocating jurisdiction has a designated authority to process these applications. In most cases, a support applicant within Ontario sends the application to the designated authority in this province who forwards it to the designated authority in the reciprocating jurisdiction. Some reciprocating jurisdictions require the applicant first to obtain a provisional order from the Ontario Court of Justice, which is then forwarded to the foreign jurisdiction for confirmation. A support applicant who resides in a reciprocating jurisdiction outside Ontario may forward an application to the designated authority in his or her jurisdiction who will send it to the authority here. The authority in Ontario first verifies the respondent's residency in this province and then sends the application to the Ontario Court of Justice with notice to the respondent who has the right to attend and contest the application. The Ontario Court of Justice shall apply the law of the jurisdiction in which the child resides to determine entitlement to child support, and if

the child has no entitlement under that law, the court applies Ontario law to entitlement. The quantum is determined under Ontario law, and thus the *Guidelines* apply.

The *ISOA* does not constitute an exclusive code for interjurisdictional support proceedings. A parent may choose to proceed under domestic legislation where otherwise applicable.

8. Ontario Disability Support Program Act, 1997

An adult child who has a disability, as defined within the scope of this legislation, may be eligible for income support from the provincial government. Any child support arrangement, particularly lump sums, should be considered in light of the availability of income support in a particular case and the restrictions under the legislation and its regulations.

Appendix

Family Law Act, Child Support Guidelines, Schedule I

CHILD SUPPORT TABLE FOR ONTARIO (Subsection 2 (1))

Notes:

1. The child support table for Ontario sets out the amount of monthly child support payments for Ontario on the basis of the annual income of the parent or spouse ordered to pay child support (the “support payor”) and the number of children for whom a table amount is payable. Refer to these guidelines to determine whether special measures apply.
2. There is a threshold level of income below which no amount of child support is payable. Child support amounts are specified for incomes up to \$150,000 per year. Refer to section 4 of this Regulation to determine the amount of child support payments for support payors with annual incomes over \$150,000.
- ...
4. The amounts in the tables are based on economic studies of average spending on children in families at different income levels in Canada. They are calculated on the basis that child support payments are no longer taxable in the hands of the receiving parent and no longer deductible by the paying parent. They are calculated using a mathematical formula and generated by a computer program.
5. The formula referred to in note 3 sets support amounts to reflect average expenditures on children by a parent or spouse with a particular number of children and level of income. The calculation is based on the support payor’s income. The formula uses the basic personal amount for non-refundable tax credits to recognize personal expenses, and takes other federal and provincial income taxes and credits into account. Federal Child Tax benefits and Goods and Services Tax credits for children are excluded from the calculation. At lower income levels, the formula sets the amounts to take into account the combined impact of taxes and child support payments on the support payor’s limited disposable income.

CHILD SUPPORT TABLE FOR ONTARIO, 1 to 4 CHILDREN

Income / Revenu (\$)	Monthly Award / Paiement mensuel (\$)				Income / Revenu (\$)	Monthly Award / Paiement mensuel (\$)				Income / Revenu (\$)	Monthly Award / Paiement mensuel (\$)			
	No. of Children / Nbre d'enfants					No. of Children / Nbre d'enfants					No. of Children / Nbre d'enfants			
	1	2	3	4		1	2	3	4		1	2	3	4
8000	0	0	0	0	13400	93	198	213	229	18800	163	292	395	468
8100	1	2	2	2	13500	95	202	217	233	18900	163	293	397	472
8200	2	3	4	4	13600	97	206	221	237	19000	164	294	399	477
8300	3	5	6	6	13700	98	209	225	241	19100	165	296	400	480
8400	4	7	8	8	13800	100	213	229	246	19200	166	297	402	483
8500	5	9	9	10	13900	102	216	233	250	19300	167	299	404	486
8600	6	10	11	12	14000	104	220	237	254	19400	168	300	406	489
8700	7	12	13	14	14100	106	222	241	258	19500	168	301	408	492
8800	8	14	15	16	14200	108	225	245	262	19600	169	303	410	495
8900	9	16	17	18	14300	110	227	249	267	19700	170	304	412	497
9000	9	17	19	20	14400	112	229	253	271	19800	171	306	413	500
9100	11	22	23	25	14500	114	231	257	275	19900	172	307	415	503
9200	13	26	28	30	14600	116	233	261	279	20000	172	308	417	506
9300	15	30	33	35	14700	117	236	264	283	20100	173	310	419	508
9400	17	35	38	40	14800	119	238	268	287	20200	174	311	421	510
9500	19	39	42	45	14900	121	240	272	292	20300	175	312	423	513
9600	21	44	47	50	15000	123	242	276	296	20400	175	314	424	515
9700	23	48	52	55	15100	125	243	280	300	20500	176	315	426	517
9800	25	52	56	60	15200	126	244	285	305	20600	177	316	428	519
9900	27	57	61	65	15300	128	245	289	309	20700	178	318	430	521
10000	28	61	66	70	15400	130	246	293	314	20800	179	319	431	523
10100	30	65	70	75	15500	132	247	297	318	20900	179	320	433	525
10200	32	70	75	80	15600	133	248	301	323	21000	180	322	435	528
10300	34	74	80	85	15700	135	250	306	327	21100	181	323	437	530
10400	36	78	84	90	15800	137	251	310	332	21200	182	324	438	532
10500	38	83	89	95	15900	138	252	314	336	21300	182	326	440	534
10600	40	87	94	100	16000	140	253	318	341	21400	183	327	442	536
10700	42	91	98	105	16100	141	254	322	345	21500	184	328	444	538
10800	44	96	103	110	16200	142	255	327	350	21600	185	330	446	540
10900	45	100	108	115	16300	142	257	331	355	21700	185	331	447	543
11000	47	104	112	120	16400	143	258	335	359	21800	186	332	449	545
11100	49	109	117	125	16500	144	260	339	364	21900	187	334	451	547
11200	51	113	121	130	16600	145	261	344	368	22000	188	335	453	549
11300	53	117	126	135	16700	146	262	348	373	22100	189	336	454	551
11400	55	121	130	140	16800	146	264	352	377	22200	189	338	456	553
11500	57	125	135	145	16900	147	265	356	382	22300	190	339	458	555
11600	59	129	139	149	17000	148	267	361	386	22400	191	340	460	558
11700	61	134	144	154	17100	149	268	362	391	22500	192	342	462	560
11800	63	138	148	159	17200	150	269	364	395	22600	192	343	463	562
11900	64	142	153	164	17300	150	271	366	400	22700	193	344	465	564
12000	66	146	158	169	17400	151	272	368	404	22800	194	346	467	566
12100	68	150	162	173	17500	152	274	370	409	22900	195	347	469	568
12200	70	154	166	177	17600	153	275	372	414	23000	195	348	470	570
12300	72	157	170	182	17700	154	276	374	418	23100	196	350	472	573
12400	74	161	174	186	17800	155	278	376	423	23200	197	351	474	575
12500	76	165	178	190	17900	155	279	378	427	23300	198	352	476	577
12600	78	169	182	195	18000	156	281	380	432	23400	199	354	478	579
12700	80	172	186	199	18100	157	282	382	436	23500	199	355	479	581
12800	81	176	190	203	18200	158	283	384	441	23600	200	356	481	583
12900	83	180	194	208	18300	159	285	386	445	23700	201	358	483	585
13000	85	184	198	212	18400	159	286	387	450	23800	202	359	485	588
13100	87	187	202	216	18500	160	287	389	454	23900	202	360	486	590
13200	89	191	206	220	18600	161	289	391	459	24000	203	362	488	592
13300	91	195	210	225	18700	162	290	393	463	24100	204	363	490	594

CHILD SUPPORT TABLE FOR ONTARIO, 1 to 4 CHILDREN continued

Income / Revenu (\$)	Monthly Award / Paiement mensuel (\$)				Income / Revenu (\$)	Monthly Award / Paiement mensuel (\$)				Income / Revenu (\$)	Monthly Award / Paiement mensuel (\$)			
	No. of Children / Nbre d'enfants					No. of Children / Nbre d'enfants					No. of Children / Nbre d'enfants			
	1	2	3	4		1	2	3	4		1	2	3	4
24200	205	364	492	596	29600	265	439	591	716	35000	325	521	681	825
24300	206	366	494	598	29700	266	440	593	718	35100	326	523	683	827
24400	206	367	495	600	29800	268	441	594	720	35200	327	525	684	828
24500	207	368	497	603	29900	269	442	596	722	35300	327	526	685	830
24600	208	370	499	605	30000	270	444	598	724	35400	328	528	687	832
24700	209	371	501	607	30100	271	445	600	726	35500	329	529	688	834
24800	209	372	502	609	30200	272	446	601	728	35600	330	531	690	835
24900	210	373	504	611	30300	273	448	603	730	35700	331	532	691	837
25000	211	375	506	613	30400	274	449	605	732	35800	332	534	692	839
25100	212	376	508	615	30500	276	450	607	735	35900	332	535	694	840
25200	213	378	510	618	30600	277	452	608	737	36000	333	537	695	842
25300	214	379	512	620	30700	278	453	610	739	36100	334	538	697	844
25400	215	380	513	622	30800	279	454	612	741	36200	335	540	699	846
25500	217	382	515	624	30900	280	455	614	743	36300	336	541	701	847
25600	218	383	517	627	31000	281	457	615	745	36400	336	543	703	849
25700	219	385	519	629	31100	282	458	617	747	36500	337	545	705	851
25800	220	386	521	631	31200	283	460	619	749	36600	338	546	707	852
25900	221	387	523	633	31300	285	461	620	751	36700	339	548	708	854
26000	222	389	525	636	31400	286	463	622	753	36800	340	549	710	856
26100	223	390	526	638	31500	287	464	624	755	36900	341	551	712	858
26200	225	392	528	640	31600	288	466	626	757	37000	341	552	714	859
26300	226	393	530	642	31700	289	467	627	759	37100	342	554	716	861
26400	227	394	532	645	31800	290	469	629	762	37200	343	555	718	863
26500	228	396	534	647	31900	291	470	631	764	37300	344	557	720	865
26600	229	397	536	649	32000	293	472	632	766	37400	345	559	722	866
26700	231	399	538	651	32100	294	474	634	768	37500	346	560	724	868
26800	232	400	539	654	32200	295	475	636	770	37600	346	562	726	870
26900	233	401	541	656	32300	296	477	638	772	37700	347	563	728	872
27000	234	403	543	658	32400	297	479	639	774	37800	348	565	730	873
27100	235	404	545	660	32500	298	480	641	776	37900	349	566	731	875
27200	237	405	547	663	32600	299	482	643	778	38000	350	568	733	877
27300	238	407	549	665	32700	300	483	644	780	38100	351	570	735	879
27400	239	408	551	667	32800	302	485	646	782	38200	352	571	737	881
27500	240	410	552	669	32900	303	487	648	784	38300	352	573	739	882
27600	241	411	554	671	33000	304	488	650	786	38400	353	574	741	884
27700	243	412	556	674	33100	305	490	651	788	38500	354	576	743	886
27800	244	414	558	676	33200	306	492	653	790	38600	355	578	745	888
27900	245	415	560	678	33300	307	493	654	792	38700	356	579	747	890
28000	246	417	562	680	33400	309	495	656	794	38800	357	581	749	891
28100	247	418	564	683	33500	310	497	658	796	38900	358	583	751	893
28200	249	419	565	685	33600	311	498	659	798	39000	358	584	753	895
28300	250	421	567	687	33700	312	500	661	800	39100	359	586	755	897
28400	251	422	569	689	33800	313	502	663	802	39200	360	587	757	899
28500	252	424	571	692	33900	314	503	664	804	39300	361	589	759	901
28600	253	425	573	694	34000	316	505	666	806	39400	362	591	761	903
28700	255	426	575	696	34100	317	507	667	808	39500	363	593	763	905
28800	256	428	577	698	34200	318	508	669	810	39600	364	594	765	907
28900	257	429	578	701	34300	318	510	670	812	39700	365	596	767	909
29000	258	431	580	703	34400	319	512	672	814	39800	366	598	769	911
29100	259	432	582	705	34500	320	513	673	816	39900	367	599	771	913
29200	261	433	584	707	34600	321	515	675	817	40000	367	601	773	915
29300	262	435	586	709	34700	322	517	677	819	40100	368	603	776	917
29400	263	436	587	711	34800	323	518	678	821	40200	369	604	778	920
29500	264	437	589	714	34900	324	520	680	823	40300	370	606	780	922

CHILD SUPPORT TABLE FOR ONTARIO, 1 to 4 CHILDREN continued

Income / Revenu (\$)	Monthly Award / Paiement mensuel (\$)				Income / Revenu (\$)	Monthly Award / Paiement mensuel (\$)				Income / Revenu (\$)	Monthly Award / Paiement mensuel (\$)			
	No. of Children / Nbre d'enfants					No. of Children / Nbre d'enfants					No. of Children / Nbre d'enfants			
	1	2	3	4		1	2	3	4		1	2	3	4
40400	371	608	782	924	45800	423	692	899	1059	51200	473	771	1009	1191
40500	372	610	784	927	45900	424	694	901	1061	51300	474	772	1011	1193
40600	373	611	786	929	46000	425	695	903	1064	51400	475	774	1013	1196
40700	374	613	788	932	46100	425	697	905	1066	51500	476	775	1015	1198
40800	375	615	790	934	46200	426	698	907	1068	51600	477	777	1017	1201
40900	376	616	792	937	46300	427	700	909	1071	51700	478	778	1019	1203
41000	377	618	795	939	46400	428	701	912	1073	51800	479	780	1020	1206
41100	378	620	797	941	46500	429	703	914	1076	51900	480	781	1022	1208
41200	379	622	799	944	46600	430	704	916	1078	52000	481	783	1024	1211
41300	380	623	801	946	46700	431	706	918	1081	52100	482	784	1026	1213
41400	381	625	803	949	46800	432	707	920	1083	52200	483	786	1028	1216
41500	381	627	805	951	46900	433	709	922	1086	52300	484	787	1030	1218
41600	382	629	808	954	47000	434	710	925	1088	52400	485	789	1032	1220
41700	383	630	810	956	47100	435	711	927	1091	52500	486	790	1034	1223
41800	384	632	812	959	47200	436	713	929	1093	52600	487	792	1036	1225
41900	385	634	814	961	47300	437	714	931	1096	52700	488	793	1038	1228
42000	386	636	816	964	47400	438	716	933	1098	52800	489	795	1040	1230
42100	387	637	818	966	47500	439	717	935	1101	52900	489	796	1041	1233
42200	388	639	821	969	47600	440	719	938	1103	53000	490	798	1043	1235
42300	389	640	823	971	47700	441	720	940	1106	53100	491	799	1045	1238
42400	390	642	825	974	47800	442	722	942	1108	53200	492	801	1047	1240
42500	391	643	827	976	47900	443	723	944	1111	53300	493	802	1049	1243
42600	392	645	829	979	48000	444	725	946	1113	53400	494	804	1051	1245
42700	393	646	831	981	48100	444	726	948	1116	53500	495	805	1053	1248
42800	394	648	834	984	48200	445	728	950	1118	53600	496	807	1055	1250
42900	395	649	836	986	48300	446	729	952	1120	53700	497	808	1057	1253
43000	396	651	838	989	48400	447	730	954	1122	53800	498	810	1059	1255
43100	397	652	840	991	48500	448	732	956	1125	53900	499	811	1061	1258
43200	398	653	842	994	48600	449	733	958	1127	54000	500	813	1063	1260
43300	399	655	844	996	48700	450	734	960	1129	54100	501	814	1064	1263
43400	400	656	847	999	48800	450	735	962	1131	54200	502	815	1066	1265
43500	401	658	849	1001	48900	451	737	964	1134	54300	503	817	1068	1268
43600	402	659	851	1004	49000	452	738	966	1136	54400	504	818	1070	1270
43700	403	661	853	1006	49100	453	740	968	1138	54500	505	820	1072	1273
43800	403	662	855	1009	49200	454	741	970	1141	54600	506	821	1074	1275
43900	404	664	857	1011	49300	455	743	972	1143	54700	507	823	1076	1278
44000	405	665	860	1014	49400	456	744	974	1146	54800	508	824	1078	1280
44100	406	667	862	1016	49500	457	746	976	1148	54900	509	826	1080	1283
44200	407	668	864	1019	49600	458	747	978	1151	55000	510	827	1082	1285
44300	408	670	866	1021	49700	459	749	980	1153	55100	510	829	1084	1288
44400	409	671	868	1024	49800	460	750	982	1156	55200	511	830	1085	1290
44500	410	673	870	1026	49900	461	752	984	1158	55300	512	832	1087	1293
44600	411	674	873	1029	50000	462	753	986	1161	55400	513	833	1089	1295
44700	412	676	875	1031	50100	463	754	988	1163	55500	514	835	1091	1298
44800	413	677	877	1034	50200	464	756	990	1166	55600	515	836	1093	1300
44900	414	679	879	1036	50300	465	757	992	1168	55700	516	838	1095	1303
45000	415	680	881	1039	50400	466	759	994	1171	55800	517	839	1097	1305
45100	416	682	883	1041	50500	467	760	996	1173	55900	518	841	1099	1308
45200	417	683	886	1044	50600	467	762	998	1176	56000	519	842	1101	1310
45300	418	685	888	1046	50700	468	763	999	1178	56100	520	844	1103	1313
45400	419	686	890	1049	50800	469	765	1001	1181	56200	521	845	1105	1315
45500	420	688	892	1051	50900	470	766	1003	1183	56300	522	847	1107	1318
45600	421	689	894	1054	51000	471	768	1005	1186	56400	523	848	1108	1320
45700	422	691	896	1056	51100	472	769	1007	1188	56500	524	850	1110	1323

CHILD SUPPORT TABLE FOR ONTARIO, 1 to 4 CHILDREN continued

Income / Revenu (\$)	Monthly Award / Paiement mensuel (\$)				Income / Revenu (\$)	Monthly Award / Paiement mensuel (\$)				Income / Revenu (\$)	Monthly Award / Paiement mensuel (\$)			
	No. of Children / Nbre d'enfants					No. of Children / Nbre d'enfants					No. of Children / Nbre d'enfants			
	1	2	3	4		1	2	3	4		1	2	3	4
56600	525	851	1112	1325	62000	575	930	1214	1446	67400	623	1006	1313	1563
56700	526	853	1114	1327	62100	576	931	1216	1448	67500	624	1008	1314	1565
56800	527	854	1116	1330	62200	577	933	1218	1451	67600	625	1009	1316	1567
56900	528	856	1118	1332	62300	578	934	1219	1453	67700	626	1010	1318	1570
57000	529	857	1120	1335	62400	579	936	1221	1455	67800	627	1012	1320	1572
57100	530	859	1122	1337	62500	579	937	1223	1457	67900	628	1013	1322	1574
57200	531	860	1124	1339	62600	580	938	1225	1459	68000	629	1015	1323	1576
57300	532	862	1126	1342	62700	581	940	1227	1461	68100	630	1016	1325	1578
57400	532	863	1128	1344	62800	582	941	1228	1464	68200	630	1017	1327	1580
57500	533	865	1129	1346	62900	583	943	1230	1466	68300	631	1019	1329	1582
57600	534	866	1131	1348	63000	584	944	1232	1468	68400	632	1020	1331	1584
57700	535	868	1133	1351	63100	585	945	1234	1470	68500	633	1022	1332	1587
57800	536	869	1135	1353	63200	586	947	1236	1472	68600	634	1023	1334	1589
57900	537	871	1137	1355	63300	586	948	1238	1474	68700	635	1024	1336	1591
58000	538	872	1139	1358	63400	587	950	1239	1476	68800	636	1026	1338	1593
58100	539	873	1141	1360	63500	588	951	1241	1479	68900	637	1027	1339	1595
58200	540	875	1143	1362	63600	589	952	1243	1481	69000	638	1029	1341	1597
58300	541	876	1145	1364	63700	590	954	1245	1483	69100	639	1030	1343	1599
58400	542	878	1147	1367	63800	591	955	1247	1485	69200	639	1031	1345	1601
58500	543	879	1149	1369	63900	592	956	1248	1487	69300	640	1033	1347	1604
58600	544	881	1151	1371	64000	592	958	1250	1489	69400	641	1034	1348	1606
58700	545	882	1152	1373	64100	593	959	1252	1492	69500	642	1036	1350	1608
58800	546	884	1154	1376	64200	594	961	1254	1494	69600	643	1037	1352	1610
58900	547	885	1156	1378	64300	595	962	1256	1496	69700	644	1038	1354	1612
59000	548	887	1158	1380	64400	596	963	1257	1498	69800	645	1040	1356	1614
59100	549	888	1160	1382	64500	597	965	1259	1500	69900	646	1041	1357	1616
59200	550	890	1162	1385	64600	598	966	1261	1502	70000	647	1043	1359	1618
59300	551	891	1164	1387	64700	599	968	1263	1504	70100	647	1044	1361	1620
59400	552	893	1166	1389	64800	599	969	1265	1507	70200	648	1045	1362	1622
59500	553	894	1168	1391	64900	600	970	1267	1509	70300	649	1046	1364	1624
59600	554	896	1170	1394	65000	601	972	1268	1511	70400	650	1047	1366	1626
59700	554	897	1172	1396	65100	602	973	1270	1513	70500	650	1049	1367	1628
59800	555	899	1173	1398	65200	603	975	1272	1515	70600	651	1050	1369	1630
59900	556	900	1175	1400	65300	604	976	1274	1518	70700	652	1051	1370	1632
60000	557	902	1177	1403	65400	605	978	1276	1520	70800	653	1052	1372	1634
60100	558	903	1179	1405	65500	606	979	1278	1522	70900	654	1054	1374	1636
60200	559	905	1181	1407	65600	607	980	1279	1524	71000	654	1055	1375	1637
60300	560	906	1183	1409	65700	608	982	1281	1526	71100	655	1056	1377	1639
60400	561	908	1185	1412	65800	609	983	1283	1529	71200	656	1057	1378	1641
60500	562	909	1187	1414	65900	610	985	1285	1531	71300	656	1058	1380	1643
60600	563	910	1188	1416	66000	610	986	1287	1533	71400	657	1059	1381	1644
60700	564	912	1190	1418	66100	611	988	1289	1535	71500	658	1060	1383	1646
60800	565	913	1192	1420	66200	612	989	1291	1537	71600	658	1061	1384	1648
60900	566	915	1194	1423	66300	613	991	1292	1539	71700	659	1063	1386	1650
61000	566	916	1196	1425	66400	614	992	1294	1542	71800	660	1064	1387	1651
61100	567	918	1198	1427	66500	615	993	1296	1544	71900	660	1065	1388	1653
61200	568	919	1200	1429	66600	616	995	1298	1546	72000	661	1066	1390	1655
61300	569	920	1201	1431	66700	617	996	1300	1548	72100	661	1067	1391	1657
61400	570	922	1203	1433	66800	618	998	1302	1550	72200	662	1068	1392	1658
61500	571	923	1205	1436	66900	619	999	1304	1553	72300	662	1069	1394	1660
61600	572	924	1207	1438	67000	620	1001	1305	1555	72400	663	1070	1395	1661
61700	573	926	1209	1440	67100	621	1002	1307	1557	72500	664	1071	1396	1663
61800	573	927	1210	1442	67200	621	1003	1309	1559	72600	664	1071	1397	1664
61900	574	929	1212	1444	67300	622	1005	1311	1561	72700	665	1072	1399	1666

CHILD SUPPORT TABLE FOR ONTARIO, 1 to 4 CHILDREN continued

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	1	2	3	4		1	2	3	4		1	2	3	4
72800	665	1073	1400	1667	78200	705	1137	1483	1765	83600	748	1203	1568	1866
72900	666	1074	1401	1669	78300	706	1138	1484	1767	83700	748	1204	1569	1868
73000	666	1075	1402	1670	78400	707	1140	1486	1769	83800	749	1206	1571	1869
73100	667	1076	1404	1672	78500	708	1141	1487	1771	83900	750	1207	1572	1871
73200	668	1077	1405	1674	78600	708	1142	1489	1773	84000	751	1208	1574	1873
73300	668	1079	1407	1675	78700	709	1143	1490	1775	84100	752	1209	1575	1875
73400	669	1080	1408	1677	78800	710	1144	1492	1776	84200	752	1210	1577	1877
73500	669	1081	1410	1679	78900	711	1146	1494	1778	84300	753	1212	1579	1879
73600	670	1082	1411	1681	79000	712	1147	1495	1780	84400	754	1213	1580	1881
73700	671	1083	1413	1682	79100	712	1148	1497	1782	84500	755	1214	1582	1882
73800	671	1084	1414	1684	79200	713	1149	1498	1784	84600	756	1215	1583	1884
73900	672	1085	1416	1686	79300	714	1151	1500	1786	84700	756	1217	1585	1886
74000	673	1086	1417	1688	79400	715	1152	1502	1788	84800	757	1218	1586	1888
74100	673	1087	1419	1689	79500	715	1153	1503	1789	84900	758	1219	1588	1890
74200	674	1089	1420	1691	79600	716	1154	1505	1791	85000	759	1220	1590	1892
74300	675	1090	1422	1693	79700	717	1155	1506	1793	85100	759	1221	1591	1894
74400	676	1091	1423	1695	79800	718	1157	1508	1795	85200	760	1223	1593	1895
74500	676	1092	1425	1697	79900	719	1158	1509	1797	85300	761	1224	1594	1897
74600	677	1093	1426	1699	80000	719	1159	1511	1799	85400	762	1225	1596	1899
74700	678	1094	1428	1700	80100	720	1160	1513	1801	85500	763	1226	1597	1901
74800	679	1096	1429	1702	80200	721	1162	1514	1802	85600	763	1228	1599	1903
74900	679	1097	1431	1704	80300	722	1163	1516	1804	85700	764	1229	1601	1905
75000	680	1098	1432	1706	80400	723	1164	1517	1806	85800	765	1230	1602	1907
75100	681	1099	1434	1708	80500	723	1165	1519	1808	85900	766	1231	1604	1908
75200	682	1100	1435	1710	80600	724	1166	1520	1810	86000	767	1232	1605	1910
75300	682	1102	1437	1711	80700	725	1168	1522	1812	86100	767	1234	1607	1912
75400	683	1103	1439	1713	80800	726	1169	1524	1814	86200	768	1235	1608	1914
75500	684	1104	1440	1715	80900	726	1170	1525	1815	86300	769	1236	1610	1916
75600	685	1105	1442	1717	81000	727	1171	1527	1817	86400	770	1237	1612	1918
75700	686	1107	1443	1719	81100	728	1173	1528	1819	86500	770	1239	1613	1920
75800	686	1108	1445	1721	81200	729	1174	1530	1821	86600	771	1240	1615	1921
75900	687	1109	1446	1723	81300	730	1175	1531	1823	86700	772	1241	1616	1923
76000	688	1110	1448	1724	81400	730	1176	1533	1825	86800	773	1242	1618	1925
76100	689	1111	1450	1726	81500	731	1177	1535	1827	86900	774	1243	1619	1927
76200	689	1113	1451	1728	81600	732	1179	1536	1829	87000	774	1245	1621	1929
76300	690	1114	1453	1730	81700	733	1180	1538	1830	87100	775	1246	1623	1931
76400	691	1115	1454	1732	81800	734	1181	1539	1832	87200	776	1247	1624	1933
76500	692	1116	1456	1734	81900	734	1182	1541	1834	87300	777	1248	1626	1934
76600	693	1118	1457	1736	82000	735	1184	1542	1836	87400	778	1250	1627	1936
76700	693	1119	1459	1737	82100	736	1185	1544	1838	87500	778	1251	1629	1938
76800	694	1120	1461	1739	82200	737	1186	1546	1840	87600	779	1252	1630	1940
76900	695	1121	1462	1741	82300	737	1187	1547	1842	87700	780	1253	1632	1942
77000	696	1122	1464	1743	82400	738	1188	1549	1843	87800	781	1254	1634	1944
77100	697	1124	1465	1745	82500	739	1190	1550	1845	87900	781	1256	1635	1946
77200	697	1125	1467	1747	82600	740	1191	1552	1847	88000	782	1257	1637	1947
77300	698	1126	1468	1749	82700	741	1192	1553	1849	88100	783	1258	1638	1949
77400	699	1127	1470	1750	82800	741	1193	1555	1851	88200	784	1259	1640	1951
77500	700	1129	1472	1752	82900	742	1195	1557	1853	88300	785	1261	1641	1953
77600	700	1130	1473	1754	83000	743	1196	1558	1855	88400	785	1262	1643	1955
77700	701	1131	1475	1756	83100	744	1197	1560	1856	88500	786	1263	1645	1957
77800	702	1132	1476	1758	83200	745	1198	1561	1858	88600	787	1264	1646	1959
77900	703	1133	1478	1760	83300	745	1199	1563	1860	88700	788	1265	1648	1960
78000	704	1135	1479	1762	83400	746	1201	1564	1862	88800	789	1267	1649	1962
78100	704	1136	1481	1763	83500	747	1202	1566	1864	88900	789	1268	1651	1964

CHILD SUPPORT TABLE FOR ONTARIO, 1 to 4 CHILDREN continued

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	1	2	3	4		1	2	3	4		1	2	3	4
89000	790	1269	1652	1966	94400	833	1335	1737	2066	99800	875	1401	1822	2167
89100	791	1270	1654	1968	94500	833	1336	1739	2068	99900	876	1402	1824	2168
89200	792	1272	1656	1970	94600	834	1338	1740	2070	100000	877	1404	1825	2170
89300	792	1273	1657	1972	94700	835	1339	1742	2072	100100	877	1405	1827	2172
89400	793	1274	1659	1973	94800	836	1340	1744	2074	100200	878	1406	1828	2174
89500	794	1275	1660	1975	94900	836	1341	1745	2076	100300	879	1407	1830	2176
89600	795	1276	1662	1977	95000	837	1343	1747	2077	100400	880	1409	1832	2178
89700	796	1278	1663	1979	95100	838	1344	1748	2079	100500	880	1410	1833	2180
89800	796	1279	1665	1981	95200	839	1345	1750	2081	100600	881	1411	1835	2181
89900	797	1280	1667	1983	95300	840	1346	1751	2083	100700	882	1412	1836	2183
90000	798	1281	1668	1985	95400	840	1347	1753	2085	100800	883	1413	1838	2185
90100	799	1283	1670	1986	95500	841	1349	1755	2087	100900	884	1415	1839	2187
90200	800	1284	1671	1988	95600	842	1350	1756	2089	101000	884	1416	1841	2189
90300	800	1285	1673	1990	95700	843	1351	1758	2090	101100	885	1417	1843	2191
90400	801	1286	1674	1992	95800	844	1352	1759	2092	101200	886	1418	1844	2193
90500	802	1287	1676	1994	95900	844	1354	1761	2094	101300	887	1420	1846	2194
90600	803	1289	1678	1996	96000	845	1355	1762	2096	101400	888	1421	1847	2196
90700	803	1290	1679	1998	96100	846	1356	1764	2098	101500	888	1422	1849	2198
90800	804	1291	1681	1999	96200	847	1357	1766	2100	101600	889	1423	1850	2200
90900	805	1292	1682	2001	96300	847	1358	1767	2102	101700	890	1424	1852	2202
91000	806	1294	1684	2003	96400	848	1360	1769	2103	101800	891	1426	1854	2204
91100	807	1295	1685	2005	96500	849	1361	1770	2105	101900	891	1427	1855	2206
91200	807	1296	1687	2007	96600	850	1362	1772	2107	102000	892	1428	1857	2207
91300	808	1297	1689	2009	96700	851	1363	1773	2109	102100	893	1429	1858	2209
91400	809	1299	1690	2011	96800	851	1365	1775	2111	102200	894	1431	1860	2211
91500	810	1300	1692	2012	96900	852	1366	1777	2113	102300	895	1432	1861	2213
91600	811	1301	1693	2014	97000	853	1367	1778	2115	102400	895	1433	1863	2215
91700	811	1302	1695	2016	97100	854	1368	1780	2116	102500	896	1434	1865	2217
91800	812	1303	1696	2018	97200	855	1369	1781	2118	102600	897	1435	1866	2219
91900	813	1305	1698	2020	97300	855	1371	1783	2120	102700	898	1437	1868	2220
92000	814	1306	1700	2022	97400	856	1372	1784	2122	102800	899	1438	1869	2222
92100	814	1307	1701	2024	97500	857	1373	1786	2124	102900	899	1439	1871	2224
92200	815	1308	1703	2025	97600	858	1374	1788	2126	103000	900	1440	1872	2226
92300	816	1310	1704	2027	97700	858	1376	1789	2128	103100	901	1442	1874	2228
92400	817	1311	1706	2029	97800	859	1377	1791	2129	103200	902	1443	1876	2230
92500	818	1312	1707	2031	97900	860	1378	1792	2131	103300	902	1444	1877	2232
92600	818	1313	1709	2033	98000	861	1379	1794	2133	103400	903	1445	1879	2233
92700	819	1314	1711	2035	98100	862	1380	1795	2135	103500	904	1446	1880	2235
92800	820	1316	1712	2037	98200	862	1382	1797	2137	103600	905	1448	1882	2237
92900	821	1317	1714	2038	98300	863	1383	1799	2139	103700	906	1449	1883	2239
93000	822	1318	1715	2040	98400	864	1384	1800	2141	103800	906	1450	1885	2241
93100	822	1319	1717	2042	98500	865	1385	1802	2142	103900	907	1451	1887	2243
93200	823	1321	1718	2044	98600	866	1387	1803	2144	104000	908	1453	1888	2245
93300	824	1322	1720	2046	98700	866	1388	1805	2146	104100	909	1454	1890	2246
93400	825	1323	1722	2048	98800	867	1389	1806	2148	104200	910	1455	1891	2248
93500	825	1324	1723	2050	98900	868	1390	1808	2150	104300	910	1456	1893	2250
93600	826	1325	1725	2051	99000	869	1391	1810	2152	104400	911	1457	1894	2252
93700	827	1327	1726	2053	99100	869	1393	1811	2154	104500	912	1459	1896	2254
93800	828	1328	1728	2055	99200	870	1394	1813	2155	104600	913	1460	1898	2256
93900	829	1329	1729	2057	99300	871	1395	1814	2157	104700	913	1461	1899	2258
94000	829	1330	1731	2059	99400	872	1396	1816	2159	104800	914	1462	1901	2260
94100	830	1332	1733	2061	99500	873	1398	1817	2161	104900	915	1464	1902	2261
94200	831	1333	1734	2063	99600	873	1399	1819	2163	105000	916	1465	1904	2263
94300	832	1334	1736	2064	99700	874	1400	1821	2165	105100	917	1466	1905	2265

CHILD SUPPORT TABLE FOR ONTARIO, 1 to 4 CHILDREN continued

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	1	2	3	4		1	2	3	4		1	2	3	4
105200	917	1467	1907	2267	110600	960	1533	1992	2367	116000	1001	1598	2075	2465
105300	918	1468	1909	2269	110700	961	1534	1994	2369	116100	1002	1599	2076	2467
105400	919	1470	1910	2271	110800	961	1536	1995	2371	116200	1003	1600	2078	2469
105500	920	1471	1912	2273	110900	962	1537	1997	2373	116300	1004	1601	2079	2471
105600	921	1472	1913	2274	111000	963	1538	1998	2375	116400	1004	1602	2081	2472
105700	921	1473	1915	2276	111100	964	1539	2000	2377	116500	1005	1604	2082	2474
105800	922	1475	1916	2278	111200	965	1541	2001	2378	116600	1006	1605	2084	2476
105900	923	1476	1918	2280	111300	965	1542	2003	2380	116700	1007	1606	2085	2478
106000	924	1477	1920	2282	111400	966	1543	2005	2382	116800	1007	1607	2087	2479
106100	925	1478	1921	2284	111500	967	1544	2006	2384	116900	1008	1608	2088	2481
106200	925	1479	1923	2286	111600	968	1545	2008	2386	117000	1009	1609	2090	2483
106300	926	1481	1924	2287	111700	969	1547	2009	2388	117100	1010	1611	2091	2485
106400	927	1482	1926	2289	111800	969	1548	2011	2390	117200	1010	1612	2093	2487
106500	928	1483	1928	2291	111900	970	1549	2012	2391	117300	1011	1613	2094	2488
106600	928	1484	1929	2293	112000	971	1550	2014	2393	117400	1012	1614	2096	2490
106700	929	1486	1931	2295	112100	972	1552	2016	2395	117500	1013	1615	2097	2492
106800	930	1487	1932	2297	112200	972	1553	2017	2397	117600	1013	1616	2099	2494
106900	931	1488	1934	2299	112300	973	1554	2019	2399	117700	1014	1618	2100	2495
107000	932	1489	1935	2300	112400	974	1555	2020	2401	117800	1015	1619	2102	2497
107100	932	1490	1937	2302	112500	975	1556	2022	2403	117900	1016	1620	2103	2499
107200	933	1492	1939	2304	112600	976	1558	2023	2404	118000	1016	1621	2105	2501
107300	934	1493	1940	2306	112700	976	1559	2025	2406	118100	1017	1622	2106	2502
107400	935	1494	1942	2308	112800	977	1560	2027	2408	118200	1018	1623	2108	2504
107500	936	1495	1943	2310	112900	978	1561	2028	2410	118300	1019	1624	2109	2506
107600	936	1497	1945	2312	113000	979	1563	2030	2412	118400	1019	1626	2111	2508
107700	937	1498	1946	2313	113100	980	1564	2031	2414	118500	1020	1627	2112	2509
107800	938	1499	1948	2315	113200	980	1565	2033	2416	118600	1021	1628	2114	2511
107900	939	1500	1950	2317	113300	981	1566	2034	2417	118700	1021	1629	2115	2513
108000	939	1501	1951	2319	113400	982	1567	2036	2419	118800	1022	1630	2117	2515
108100	940	1503	1953	2321	113500	983	1569	2037	2421	118900	1023	1631	2118	2516
108200	941	1504	1954	2323	113600	983	1570	2039	2423	119000	1024	1633	2120	2518
108300	942	1505	1956	2325	113700	984	1571	2041	2425	119100	1024	1634	2121	2520
108400	943	1506	1957	2326	113800	985	1572	2042	2427	119200	1025	1635	2123	2522
108500	943	1508	1959	2328	113900	986	1573	2044	2428	119300	1026	1636	2124	2523
108600	944	1509	1961	2330	114000	987	1575	2045	2430	119400	1027	1637	2126	2525
108700	945	1510	1962	2332	114100	987	1576	2047	2432	119500	1027	1638	2127	2527
108800	946	1511	1964	2334	114200	988	1577	2048	2434	119600	1028	1640	2129	2529
108900	947	1512	1965	2336	114300	989	1578	2050	2436	119700	1029	1641	2130	2531
109000	947	1514	1967	2338	114400	989	1579	2051	2437	119800	1030	1642	2132	2532
109100	948	1515	1968	2339	114500	990	1580	2053	2439	119900	1030	1643	2133	2534
109200	949	1516	1970	2341	114600	991	1582	2054	2441	120000	1031	1644	2135	2536
109300	950	1517	1972	2343	114700	992	1583	2056	2443	120100	1032	1645	2136	2538
109400	950	1519	1973	2345	114800	992	1584	2057	2444	120200	1033	1646	2138	2539
109500	951	1520	1975	2347	114900	993	1585	2059	2446	120300	1033	1648	2139	2541
109600	952	1521	1976	2349	115000	994	1586	2060	2448	120400	1034	1649	2141	2543
109700	953	1522	1978	2351	115100	995	1587	2062	2450	120500	1035	1650	2142	2545
109800	954	1523	1979	2352	115200	995	1589	2063	2451	120600	1036	1651	2143	2546
109900	954	1525	1981	2354	115300	996	1590	2065	2453	120700	1036	1652	2145	2548
110000	955	1526	1983	2356	115400	997	1591	2066	2455	120800	1037	1653	2146	2550
110100	956	1527	1984	2358	115500	998	1592	2068	2457	120900	1038	1655	2148	2552
110200	957	1528	1986	2360	115600	998	1593	2069	2458	121000	1039	1656	2149	2553
110300	958	1530	1987	2362	115700	999	1594	2071	2460	121100	1039	1657	2151	2555
110400	958	1531	1989	2364	115800	1000	1596	2072	2462	121200	1040	1658	2152	2557
110500	959	1532	1990	2365	115900	1001	1597	2074	2464	121300	1041	1659	2154	2559

CHILD SUPPORT TABLE FOR ONTARIO, 1 to 4 CHILDREN continued

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	1	2	3	4		1	2	3	4		1	2	3	4
121400	1042	1660	2155	2560	126800	1082	1723	2236	2655	132200	1122	1785	2316	2750
121500	1042	1662	2157	2562	126900	1083	1724	2237	2657	132300	1123	1787	2318	2752
121600	1043	1663	2158	2564	127000	1083	1725	2239	2659	132400	1123	1788	2319	2754
121700	1044	1664	2160	2566	127100	1084	1726	2240	2661	132500	1124	1789	2321	2756
121800	1045	1665	2161	2567	127200	1085	1728	2242	2662	132600	1125	1790	2322	2757
121900	1045	1666	2163	2569	127300	1086	1729	2243	2664	132700	1126	1791	2324	2759
122000	1046	1667	2164	2571	127400	1086	1730	2245	2666	132800	1126	1792	2325	2761
122100	1047	1668	2166	2573	127500	1087	1731	2246	2668	132900	1127	1794	2327	2763
122200	1048	1670	2167	2574	127600	1088	1732	2248	2669	133000	1128	1795	2328	2764
122300	1048	1671	2169	2576	127700	1088	1733	2249	2671	133100	1129	1796	2330	2766
122400	1049	1672	2170	2578	127800	1089	1734	2251	2673	133200	1129	1797	2331	2768
122500	1050	1673	2172	2580	127900	1090	1736	2252	2675	133300	1130	1798	2333	2770
122600	1051	1674	2173	2582	128000	1091	1737	2254	2677	133400	1131	1799	2334	2772
122700	1051	1675	2175	2583	128100	1091	1738	2255	2678	133500	1132	1800	2336	2773
122800	1052	1677	2176	2585	128200	1092	1739	2257	2680	133600	1132	1802	2337	2775
122900	1053	1678	2178	2587	128300	1093	1740	2258	2682	133700	1133	1803	2338	2777
123000	1053	1679	2179	2589	128400	1094	1741	2260	2684	133800	1134	1804	2340	2779
123100	1054	1680	2181	2590	128500	1094	1743	2261	2685	133900	1135	1805	2341	2780
123200	1055	1681	2182	2592	128600	1095	1744	2263	2687	134000	1135	1806	2343	2782
123300	1056	1682	2184	2594	128700	1096	1745	2264	2689	134100	1136	1807	2344	2784
123400	1056	1684	2185	2596	128800	1097	1746	2266	2691	134200	1137	1809	2346	2786
123500	1057	1685	2187	2597	128900	1097	1747	2267	2692	134300	1138	1810	2347	2787
123600	1058	1686	2188	2599	129000	1098	1748	2269	2694	134400	1138	1811	2349	2789
123700	1059	1687	2190	2601	129100	1099	1750	2270	2696	134500	1139	1812	2350	2791
123800	1059	1688	2191	2603	129200	1100	1751	2272	2698	134600	1140	1813	2352	2793
123900	1060	1689	2193	2604	129300	1100	1752	2273	2699	134700	1141	1814	2353	2794
124000	1061	1690	2194	2606	129400	1101	1753	2274	2701	134800	1141	1816	2355	2796
124100	1062	1692	2196	2608	129500	1102	1754	2276	2703	134900	1142	1817	2356	2798
124200	1062	1693	2197	2610	129600	1103	1755	2277	2705	135000	1143	1818	2358	2800
124300	1063	1694	2199	2611	129700	1103	1756	2279	2706	135100	1144	1819	2359	2801
124400	1064	1695	2200	2613	129800	1104	1758	2280	2708	135200	1144	1820	2361	2803
124500	1065	1696	2202	2615	129900	1105	1759	2282	2710	135300	1145	1821	2362	2805
124600	1065	1697	2203	2617	130000	1106	1760	2283	2712	135400	1146	1822	2364	2807
124700	1066	1699	2205	2618	130100	1106	1761	2285	2713	135500	1147	1824	2365	2808
124800	1067	1700	2206	2620	130200	1107	1762	2286	2715	135600	1147	1825	2367	2810
124900	1068	1701	2207	2622	130300	1108	1763	2288	2717	135700	1148	1826	2368	2812
125000	1068	1702	2209	2624	130400	1109	1765	2289	2719	135800	1149	1827	2370	2814
125100	1069	1703	2210	2626	130500	1109	1766	2291	2721	135900	1150	1828	2371	2816
125200	1070	1704	2212	2627	130600	1110	1767	2292	2722	136000	1150	1829	2373	2817
125300	1071	1706	2213	2629	130700	1111	1768	2294	2724	136100	1151	1831	2374	2819
125400	1071	1707	2215	2631	130800	1112	1769	2295	2726	136200	1152	1832	2376	2821
125500	1072	1708	2216	2633	130900	1112	1770	2297	2728	136300	1152	1833	2377	2823
125600	1073	1709	2218	2634	131000	1113	1772	2298	2729	136400	1153	1834	2379	2824
125700	1074	1710	2219	2636	131100	1114	1773	2300	2731	136500	1154	1835	2380	2826
125800	1074	1711	2221	2638	131200	1115	1774	2301	2733	136600	1155	1836	2382	2828
125900	1075	1712	2222	2640	131300	1115	1775	2303	2735	136700	1155	1838	2383	2830
126000	1076	1714	2224	2641	131400	1116	1776	2304	2736	136800	1156	1839	2385	2831
126100	1077	1715	2225	2643	131500	1117	1777	2306	2738	136900	1157	1840	2386	2833
126200	1077	1716	2227	2645	131600	1118	1778	2307	2740	137000	1158	1841	2388	2835
126300	1078	1717	2228	2647	131700	1118	1780	2309	2742	137100	1158	1842	2389	2837
126400	1079	1718	2230	2648	131800	1119	1781	2310	2743	137200	1159	1843	2391	2838
126500	1080	1719	2231	2650	131900	1120	1782	2312	2745	137300	1160	1844	2392	2840
126600	1080	1721	2233	2652	132000	1120	1783	2313	2747	137400	1161	1846	2394	2842
126700	1081	1722	2234	2654	132100	1121	1784	2315	2749	137500	1161	1847	2395	2844

CHILD SUPPORT TABLE FOR ONTARIO, 1 to 4 CHILDREN continued

Income / Revenu (\$)	Monthly Award / Paiement mensuel (\$)				Income / Revenu (\$)	Monthly Award / Paiement mensuel (\$)				Income / Revenu (\$)	Monthly Award / Paiement mensuel (\$)			
	No. of Children / Nbre d'enfants					No. of Children / Nbre d'enfants					No. of Children / Nbre d'enfants			
	1	2	3	4		1	2	3	4		1	2	3	4
137600	1162	1848	2397	2845	141800	1193	1897	2459	2919	146000	1225	1945	2522	2993
137700	1163	1849	2398	2847	141900	1194	1898	2461	2921	146100	1225	1946	2523	2995
137800	1164	1850	2400	2849	142000	1195	1899	2462	2923	146200	1226	1948	2525	2997
137900	1164	1851	2401	2851	142100	1196	1900	2464	2925	146300	1227	1949	2526	2998
138000	1165	1853	2403	2852	142200	1196	1901	2465	2926	146400	1228	1950	2528	3000
138100	1166	1854	2404	2854	142300	1197	1902	2467	2928	146500	1228	1951	2529	3002
138200	1167	1855	2405	2856	142400	1198	1904	2468	2930	146600	1229	1952	2531	3004
138300	1167	1856	2407	2858	142500	1199	1905	2469	2932	146700	1230	1953	2532	3006
138400	1168	1857	2408	2859	142600	1199	1906	2471	2933	146800	1231	1954	2534	3007
138500	1169	1858	2410	2861	142700	1200	1907	2472	2935	146900	1231	1956	2535	3009
138600	1170	1860	2411	2863	142800	1201	1908	2474	2937	147000	1232	1957	2536	3011
138700	1170	1861	2413	2865	142900	1202	1909	2475	2939	147100	1233	1958	2538	3013
138800	1171	1862	2414	2867	143000	1202	1910	2477	2940	147200	1234	1959	2539	3014
138900	1172	1863	2416	2868	143100	1203	1912	2478	2942	147300	1234	1960	2541	3016
139000	1173	1864	2417	2870	143200	1204	1913	2480	2944	147400	1235	1961	2542	3018
139100	1173	1865	2419	2872	143300	1205	1914	2481	2946	147500	1236	1963	2544	3020
139200	1174	1866	2420	2874	143400	1205	1915	2483	2947	147600	1237	1964	2545	3021
139300	1175	1868	2422	2875	143500	1206	1916	2484	2949	147700	1237	1965	2547	3023
139400	1176	1869	2423	2877	143600	1207	1917	2486	2951	147800	1238	1966	2548	3025
139500	1176	1870	2425	2879	143700	1208	1919	2487	2953	147900	1239	1967	2550	3027
139600	1177	1871	2426	2881	143800	1208	1920	2489	2954	148000	1240	1968	2551	3028
139700	1178	1872	2428	2882	143900	1209	1921	2490	2956	148100	1240	1970	2553	3030
139800	1179	1873	2429	2884	144000	1210	1922	2492	2958	148200	1241	1971	2554	3032
139900	1179	1875	2431	2886	144100	1211	1923	2493	2960	148300	1242	1972	2556	3034
140000	1180	1876	2432	2888	144200	1211	1924	2495	2962	148400	1243	1973	2557	3035
140100	1181	1877	2434	2889	144300	1212	1926	2496	2963	148500	1243	1974	2559	3037
140200	1182	1878	2435	2891	144400	1213	1927	2498	2965	148600	1244	1975	2560	3039
140300	1182	1879	2437	2893	144500	1214	1928	2499	2967	148700	1245	1976	2562	3041
140400	1183	1880	2438	2895	144600	1214	1929	2501	2969	148800	1246	1978	2563	3042
140500	1184	1882	2440	2896	144700	1215	1930	2502	2970	148900	1246	1979	2565	3044
140600	1184	1883	2441	2898	144800	1216	1931	2504	2972	149000	1247	1980	2566	3046
140700	1185	1884	2443	2900	144900	1217	1932	2505	2974	149100	1248	1981	2568	3048
140800	1186	1885	2444	2902	145000	1217	1934	2507	2976	149200	1249	1982	2569	3049
140900	1187	1886	2446	2903	145100	1218	1935	2508	2977	149300	1249	1983	2571	3051
141000	1187	1887	2447	2905	145200	1219	1936	2510	2979	149400	1250	1985	2572	3053
141100	1188	1888	2449	2907	145300	1219	1937	2511	2981	149500	1251	1986	2574	3055
141200	1189	1890	2450	2909	145400	1220	1938	2513	2983	149600	1251	1987	2575	3057
141300	1190	1891	2452	2911	145500	1221	1939	2514	2984	149700	1252	1988	2577	3058
141400	1190	1892	2453	2912	145600	1222	1941	2516	2986	149800	1253	1989	2578	3060
141500	1191	1893	2455	2914	145700	1222	1942	2517	2988	149900	1254	1990	2580	3062
141600	1192	1894	2456	2916	145800	1223	1943	2519	2990	150000	1254	1992	2581	3064
141700	1193	1895	2458	2918	145900	1224	1944	2520	2991					

Income / Revenu (\$)	Monthly Award / Paiement mensuel (\$)			
	One Child / Un enfant	Two Children / Deux enfants	Three Children / Trois enfants	Four Children / Quatre enfants
For income over \$150,000	1254 plus 0.74% of income over \$150,000	1992 plus 1.16% of income over \$150,000	2581 plus 1.49% of income over \$150,000	3064 plus 1.76% of income over \$150,000
Pour revenu dépassant 150 000\$	1254 plus 0,74% du revenu dépassant 150 000\$	1992 plus 1,16% du revenu dépassant 150 000\$	2581 plus 1,49% du revenu dépassant 150 000\$	3064 plus 1,76% du revenu dépassant 150 000\$

1. Jurisdiction

1.1 The Divorce Act

A married spouse or a divorced spouse may apply for spousal support under the *Divorce Act*. “Spouse” as defined in s. 2 of the statute means either of two persons who are married to each other. If a divorce has been granted, a support claim by one of the parties must be brought under the *Divorce Act* because of federal paramountcy.

1.2 The Family Law Act

A spouse may apply for spousal support under the *Family Law Act (FLA)*. Under this *Act*, for the purposes of support, “spouse” is defined to include

- either of two persons who are married to each other or have entered into a marriage that is voidable or void in good faith;
- either of two persons who are not married and have cohabited continuously for a period of at least three years in a conjugal relationship; and
- either of two persons who are not married but who are in a relationship of some permanence if they are the natural or adoptive parents of a child.

Once parties are divorced, neither may apply for spousal support under the *FLA*. If one party commences an application for a divorce and claims spousal support under the *Divorce Act* after *FLA* proceedings have commenced and the court has not yet adjudicated on the *FLA* claim, the *FLA* claim is automatically stayed pursuant to s. 36(1) of the *FLA*. A party may seek leave to lift the stay if, for example, the other party commenced the divorce application in bad faith. If spousal support has already been adjudicated under the *FLA*, the order remains in force until superseded by an order under the *Divorce Act*.

If after a *FLA* proceeding has started a party brings an application for a divorce alone without joining a claim for spousal support, both claims may proceed. Federal paramountcy is not engaged if neither party claims support under the *Divorce Act*.

2. Entitlement

2.1 Support principles

Both the *Divorce Act* (in s. 15.2) and the *FLA* (in s. 33(8)) establish broad guiding principles for entitlement. The courts recognize that the task under support legislation is

to provide for the fair redress of the economic consequences of spousal relationships. The length of the relationship, the parties’ financial circumstances, and the roles they fulfilled while together, particularly the raising of children, are all relevant factors. The language differs slightly, but the same principles apply under the federal and provincial support statutes. In *Bracklow v. Bracklow*, the Supreme Court of Canada reviewed the basis for spousal support claims and identified three conceptual models: contractual, compensatory, and non-compensatory or needs-based support.

- **Contractual:** The court will consider any express or implied agreement between the parties to create or limit mutual support obligations.
- **Compensatory:** The court will compensate a spouse who has suffered economic disadvantages as a result of the marriage or has contributed to the economic advantage of the other spouse.
- **Needs-Based:** The court will consider the needs, means, and other circumstances of the spouse to determine if the spouse is able to support himself or herself at the end of the relationship without the assistance of the other party.

2.2 Conduct

Subsection 15.2(5) confirms that under the *Divorce Act*, spousal misconduct relating to the marriage is not a proper consideration in making a spousal support order. The *FLA* provides that a court may consider spousal misconduct but only in the rare case in which conduct is so unconscionable as to constitute an obvious and gross repudiation of the relationship (s. 33(10)).

2.3 New relationship

The fact that a spouse has entered into a new relationship does not disentitle him or her to support, although need may be mitigated by the new partner’s contribution.

2.4 Limitations

There is no limitation period to an application for support under the *Divorce Act* or the *FLA*. The limitations provisions under the latter statute were superseded by s. 16(1)(c) of the *Limitations Act, 2002*.

3. Quantum and duration

3.1 Quantum

Neither the *Divorce Act* nor the *FLA* provides specific direction as to the quantum of spousal support. Both

parties exchange financial disclosure and prepare budgets showing current need and spending patterns during the relationship. The standard of living during the marriage provides the measure of the appropriate level of support. The payor spouse's means may limit the ability to replicate the pre-separation standard of living in each household. A court may impute income to a payor spouse or a recipient spouse based on the evidence. Some courts have used the income calculations in the federal and provincial *Child Support Guidelines* to determine income for spousal support purposes.

3.2 Structure of the order

A final support order may be indefinite, time limited, or subject to review. An indefinite order, subject to variation if a material change of circumstances occurs, will be made in most cases. Courts will not speculate that a recipient spouse will be financially independent within a specific time period. A court may order a time limit after a short-term marriage where there is clear evidence that the spouse receiving support will obtain employment in a known time frame or where there is concern that a spouse is not making reasonable efforts to find employment. Under the *Divorce Act*, a court may order that spousal support be subject to review after a fixed period without the need to prove a material change of circumstances. Review orders are limited to situations in which there is genuine and material uncertainty at the time of the initial decision. Where a review order is made, the issues for future review should be tightly delineated. Courts have expressed some doubt as to whether a review is an available option under the *FLA*.

3.3 Temporary orders and agreements

A spouse may require temporary relief, pending the final determination of a support claim. The payor spouse may be willing to make voluntary payment of spousal support but need tax relief. Only periodic spousal support payable pursuant to an order or written agreement is taxable to the recipient and deductible to the payor. In either case, the parties may wish to obtain a temporary order or enter into an interim agreement. Temporary support is based on need and ability to pay. The standard for temporary support is to permit the dependent spouse to live in reasonable comfort in accordance with the parties' means.

3.4 Lump-sum spousal support

If sufficient resources are available, a lump-sum spousal support award has the advantage of permitting the parties to have a clean break. A lump sum may also be appropriate if a payor spouse presents a high risk of default or after a short-term marriage. Lump-sum

spousal support is not taxable in the recipient's hands or tax deductible to the payor.

4. Retroactivity

A spouse may claim spousal support for a period before commencement of the application. The lack of clear normative standards for spousal support limits the extent to which courts will make retroactive orders. Courts have made retroactive awards in cases in which the applicant did not have the means to bring the claim earlier, the respondent intimidated the applicant, the respondent's income was claimed to be less than ultimately determined, the applicant had to encroach on capital, or the respondent attempted to delay.

5. Variation

A spouse may seek to vary an existing order if a material change of circumstances has occurred which, if known at the time the order was made, would likely have resulted in a different outcome. Section 17 governs variation applications under the *Divorce Act*. Section 37 applies under the *FLA*. A court may vary a time-limited order if the expectations of the parties or the court that a spouse will become self-sufficient in a specific period are not borne out. Under the *Divorce Act*, after a time limit has expired, the standard for review is higher. A recipient spouse must demonstrate both a material change in circumstances and ongoing economic hardship related to the marriage. A court may also vary an order dismissing a previous claim for spousal support.

6. Assignment

A spouse may assign a support order in his or her favour to a government agency if that spouse is receiving social assistance. Under the *Divorce Act*, the spouse may assign the support order to any designated federal Minister and any designated provincial Minister or agency (s. 20.1(1)). Under the *FLA* an agency, which includes the Ministry of Community and Social Services and a municipality, may also initiate a claim for spousal support if that spouse is receiving social assistance (s. 33(3)). Once a support order has been assigned to a government agency, the agency must be served with any motion to change the order or agreement, and the agency may become a respondent to the application to the extent of its financial interest (*Family Law Rules*, rr. 15(11)–(12)). To determine if an order has been assigned, either party or their lawyers may complete and send a Confirmation of Assignment form to the Confirmation of Assignment Unit of the Ontario Ministry of Community and Social Services.

6.1 Ontario Disability Support Program Act, 1997

Modest income support may be available from the provincial government for a spouse who is disabled within the meaning of this *Act*. This is subject to stringent income and asset restrictions pursuant to its regulations including loss of eligibility where there have been recent transfers of assets by the disabled spouse for less than fair market value.

7. Ancillary terms

7.1 Cost of living

A court may make an order indexing the support payable to the Consumer Price Index. The *FLA* provides for this expressly in s. 34(5). Under the *Divorce Act*, the court has the same authority although not expressly stated in that *Act*.

7.2 Life insurance

The *FLA* provides that a court may order a payor spouse who has a policy of life insurance to maintain insurance to secure a support obligation (s. 34(1)(i)).

7.3 Binding on the estate

A spousal support order under the *FLA* binds the payor's estate (s. 34(4)). Under the *Divorce Act*, a court must make an express order that the award binds the estate.

8. Interjurisdictional orders

Spousal support claims may cross jurisdictional boundaries. *The Interjurisdictional Support Orders Act, 2002 (ISOA)* permits spousal support claimants who live in Ontario to obtain orders against payors who reside in other reciprocating jurisdictions. Similarly, support claimants who live in reciprocating jurisdictions may obtain orders against Ontario residents. A list of the reciprocating jurisdictions is found in the regulations to the *ISOA*.

Each reciprocating jurisdiction, including Ontario, has a designated authority, which receives the support application and forwards the application to the corresponding authority in the foreign jurisdiction. Some reciprocating jurisdictions require the applicant first to obtain a provisional order from the Ontario Court of Justice, which is then forwarded to the foreign jurisdiction for confirmation. If a support claimant in a reciprocating jurisdiction forwards a support application to Ontario, the authority here must verify the respondent's residency, forward the application to the Ontario Court of Justice, and provide notice to the respondent, who has the right to attend and contest the hearing. The Ontario Court of Justice will apply Ontario

support law pursuant to the *FLA* unless there is no entitlement to the applicant. If so, the court then applies the law of the jurisdiction in which the parties last shared a common residence.

The *ISOA* is not an exclusive code, and a party may choose to proceed under domestic legislation where applicable.

9. Agreements

Spouses may enter into a domestic contract to resolve a spousal support claim. One of the spouses may subsequently make a claim under either the *Divorce Act* or the *FLA* to set aside the terms of their own agreement.

9.1 The Divorce Act

Under the *Divorce Act*, the court retains a narrow discretion to set aside the spousal support provisions of a domestic contract. A court will take a two-stage approach to exercising that discretion:

- The court will look at the circumstances of the negotiation of the agreement to see if they raise any reason to discount it and to determine whether the terms of the agreement were in substantial compliance with the objectives of the *Divorce Act*. The objectives include finality, autonomy, and certainty.
- The court will also assess the extent to which the agreement still reflects the original intention of the parties and whether the agreement is still in substantial compliance with the objectives of the *Act*.

Where parties have unimpeachably negotiated a comprehensive agreement that is substantially in compliance with the *Divorce Act*, a court will give considerable weight to upholding the contract (*Miglin v. Miglin*).

9.2 The Family Law Act

Under the *FLA*, a court may set aside a waiver of support in a domestic contract if the agreement results in unconscionable circumstances (s. 33(4)(a)). In determining this, a court will consider

- the circumstances surrounding the execution of the agreement;
- the results of the support provision, including any hardship; and
- the parties' circumstances at the time of the hearing.

Either spouse may file a separation agreement with the Ontario Court of Justice under s. 35 of the *FLA*. Once filed, the support terms may be enforced or varied under s. 37. The parties may waive the right to have the agreement varied by the Ontario Court of Justice, but not the right to file for enforcement purposes.

10. Spousal Support Advisory Guidelines

The federal Department of Justice has introduced the Spousal Support Advisory Guidelines (Advisory Guidelines). The federal government has not legislated these Advisory Guidelines. They are intended to be informal. In *Fisher v. Fisher*, the Ontario Court of Appeal approved the use of the Advisory Guidelines. In so doing, the Court of Appeal provided direction as to how the Advisory Guidelines should be used. The Advisory Guidelines apply to cases of first instance. They are not automatically applicable on variations or reviews or where a prior agreement provides for support, although the court may consider them. They do not necessarily apply to payor spouses who earn over \$350,000/year, although they may be considered. The reasonableness of the Advisory Guidelines calculation must be weighed in light of the facts of each case, including the financial circumstances of the family during the relationship and their likely future circumstances. The Advisory Guidelines are akin to a summary of relevant case law on the quantum and duration of support and should be used by counsel as such.

The Advisory Guidelines are intended to reflect and systematize the jurisprudence that has developed under the *Divorce Act* across Canada. The Advisory Guidelines propose three formulas.

10.1 The without child formula

In relationships where the parties either did not have children or the children are no longer dependent, the Advisory Guidelines propose that spousal support ranges should be between 1.5% and 2% of the difference between the spouses' gross incomes for each year of marriage, including years of cohabitation, to a maximum of 50% of the payor's income. The duration of support ranges from 0.5 to 1 year for each year of marriage (including years of cohabitation). Support is to be indefinite for marriages of 20 years or longer or if the marriage is at least five years in length and the age of the support recipient and the

years of the marriage together add to 65 or more ("the rule of 65").

10.2 The with child formula

In relationships in which the spouses have dependent children, the Advisory Guidelines propose that the individual net disposable income of each spouse be determined. The individual net disposable income (INDI) for the payor is the *Federal Child Support Guidelines* income less child support payable, taxes, and deductions. The INDI for the recipient is *Guidelines* income less notional child support, taxes, and deductions, plus government benefits and credits. Then the INDIs are added together. The range of support amounts leaves the lower income recipient spouse with between 40% and 46% of the combined INDI. Initial orders would be indefinite with outside time limits, which are one year of support for every year of marriage (for longer marriages) and the date that the youngest child finishes high school for shorter-term marriages of less than 10 years.

The with child formula is complex and requires commercial software to calculate.

10.3 Spousal support payable by custodial parent

As the title suggests, this formula is used to calculate spousal support payable by a spouse who has custody of children. It is a modification of the without child formula. The payor's income is first adjusted by the grossed-up notional Table amount for child support (plus a gross-up of any contribution to s. 7 expenses). If the recipient spouse is paying child support, the payor's income is further reduced by the grossed-up amount of child support paid (Table amount plus any s. 7 contributions). The adjusted gross income difference between the spouses is then determined, and quantum ranges from 1.5% to 2% for each year of marriage, up to a maximum of 50%. Duration ranges from 0.5 to 1 year of support for each year of marriage, with the same rules for indefinite support as under the without child support formula.

1. Introduction

According to the *Family Law Act (FLA)*, to cohabit is “to live together in a conjugal relationship, whether within or outside marriage.” In Ontario, this includes same-sex couples.

Some of the indicia of whether a couple cohabit in this fashion include the obvious, such as whether they were living and sleeping together, and the less obvious and harder to prove, such as the sharing of household tasks. Usually, it is obvious and almost always admitted.

2. Property rights

Unlike married spouses, common-law spouses have no statutory property rights. This distinction has withstood scrutiny under the *Canadian Charter of Rights and Freedoms* in *Nova Scotia (Attorney General) v. Walsh*. Their claims are restricted to resulting and constructive trust claims (as well as implied trust in narrow circumstances). The usual trust principles apply. There must be

- enrichment of the defendant;
- deprivation suffered by the plaintiff; and
- the absence of a juristic reason for the enrichment.

The bottom line is that there must be an unjust enrichment, and the remedy will be restitutionary in nature (that is, the court will endeavour to repay or reverse the unjust enrichment). The claim can be for a share in property or for money, although in most cases a monetary award will be sufficient (as stated by the Supreme Court of Canada in *Kerr v. Baranow*). The Supreme Court of Canada has indicated that a straightforward economic approach should be used in the analysis, and the “value surviving” approach is the correct one. For example, if the plaintiff put money into an asset owned by the defendant and the value of that asset fell over time, the court would only award restitution to the plaintiff equal to the same proportion of the value surviving in the asset, rather than a dollar-for-dollar monetary award for the amount that the plaintiff had contributed. This could also mean comparing non-monetary contributions to monetary contributions in determining what proportion of the total “value surviving” of the asset a plaintiff is entitled to (such as where maintenance and/or improvements were made by the plaintiff on an asset that was purchased by the defendant).

As noted above, the Supreme Court of Canada released the *Kerr v. Baranow* decision in 2011, which created a “new” test for unjust enrichment. The test is whether the unjust enrichment is best characterized as “an unjust retention of an inappropriately disproportionate share of assets accumulated” during a relationship that is “a joint family venture to which both have contributed.”

Therefore, a common-law spouse will only receive a share of assets that fall under the umbrella of wealth accumulated as a “joint family venture.” The test considers

- (1) to what extent the parties exercised mutual effort to work towards common economic goals (pooling of effort, pooling of resources, and decision to raise children together);
- (2) the degree of economic integration and interdependence between the parties (such as whether the spouses shared expenses and used joint bank accounts);
- (3) whether there is evidence of actual intent to integrate their finances (this may be inferred from conduct); and
- (4) whether the plaintiff has suffered detriment as a result of making the family his or her priority in decision-making (financial or otherwise).

The Ontario Court of Appeal has indicated that courts are to avoid equalizing the parties’ property under the guise of resulting or constructive trust doctrines since the Supreme Court indicated that these statutory rights, such as the right to an equalization payment, are not to be extended to common-law couples.

Where common-law spouses own a home jointly, one spouse may bring an application for partition and sale under the *Partition Act* to have the home sold since common-law spouses do not have property rights under the *FLA*. The case law is conflicting as to whether a common-law spouse can apply for exclusive possession as an incident of support; however, they cannot apply under s. 19 of the *FLA*.

3. Support obligations

Part III of the *FLA* deals with spousal support and child support rights and obligations. While it applies equally to married and unmarried couples, married couples will usually advance their support rights under the *Divorce Act* leaving the bulk of the cases under Part III to common-law spouses. To qualify, the spouses must have

cohabited with each other continuously for at least three years or been in a relationship of some permanence that has resulted in a child (this includes adopted children). If the period of cohabitation has been interrupted, it is a question of fact for the courts to determine whether that terminates the right to claim support.

4. Cohabitation agreements

Part IV of the *FLA* deals with domestic contracts and includes the provision that common-law spouses may enter into cohabitation agreements that set out their support and property rights and obligations. Common-law spouses may also enter into separation agreements at the end of their relationship. They could, for instance, choose to adopt the property scheme from Part I of the *FLA* if they wished.

5. Ontario Disability Support Program Act, 1997

The cohabitation requirements for a person to qualify as a “spouse” of an applicant or recipient of income support under the *Ontario Disability Support Program Act, 1997 (ODSPA)* are far less demanding than under the *FLA*.

Under s. 1(1) of *General*, O. Reg. 222/98, made under the *ODSPA*, two persons are considered spouses if they have resided in the same “dwelling place” for a period of at least three months, as long as the following two conditions are satisfied:

- (1) The extent of the social and familial aspects of the relationship between the two persons is consistent with cohabitation.

- (2) The extent of the financial support provided by one person to the other or the degree of financial interdependence between the two persons is consistent with cohabitation.

General specifically prohibits “sexual factors” from being investigated or considered in determining whether a person is a spouse under the *ODSPA* (s. 1(2)).

If a person is found to be a “spouse” of an applicant for or recipient of income support under the *ODSPA*, the spouse is considered a “dependant” for the purposes of the *ODSPA* (*General*, s. 1(1)). This means that the income and assets of the applicant/recipient’s spouse are considered in determining whether the applicant/recipient is eligible for income support. Under s. 5(1) of the *ODSPA*, the budgetary requirements of the person under a disability and any dependants (which, by definition, automatically includes the spouse) must exceed their combined income, and their combined assets must not exceed certain prescribed limits under the regulations.

Further, under s. 16 of the *ODSPA*, where the Director determines that an overpayment of income support to a recipient exists, the Director may recover any amount of such overpayment directly from that recipient’s spouse (as defined under *General*) as long as the Director has served notice upon the spouse, the time for commencing an appeal has expired, and no appeal has been commenced.

Financial disclosure in family law matters

Prompt and accurate financial disclosure is essential if parties are to achieve fair, cost-effective, and lasting results in family law proceedings. If one or both parties fail to provide accurate disclosure, resolution is delayed and costs escalate. Further, if an agreement is reached and it is later found that one or both of the parties failed to provide accurate disclosure, the agreement may be set aside (*Family Law Act (FLA)*, s. 56(4)(a)). This chapter will address the rules governing financial statements and some issues that commonly arise when completing them.

1. Provisions of R. 13

Rule 13 of the *Family Law Rules (Rules)* contains numerous provisions designed to ensure that parties to a family law proceeding provide comprehensive disclosure early in a proceeding and that they update it regularly. Subrule 13(1) provides that a party making a claim for support, property, or exclusive possession of a matrimonial home must serve and file a financial statement with the document that contains the claim. If the only claim for support is for child support in the base amount specified in the *Child Support Guidelines* Table, then the party making the claim is not required to file a financial statement unless the party is also making a property claim or a claim for exclusive possession of the matrimonial home and its contents. If the claim is only for support, Form 13 is used. For all other claims, Form 13.1 is used. Subrule 13(1) also directs that the party against whom the claim is made must serve and file a financial statement, whether or not the party intends to defend against the claim. Subrule 13(10) prohibits the court clerk from accepting an application, answer, reply, notice of motion, or affidavit in response for filing if the *Rules* require that the document be filed with a financial statement and no financial statement is provided.

Subrule 13(6) mandates that a party who serves a financial statement must make full and frank disclosure of his or her financial situation and must attach all documents to prove income that the financial statement requires. A party is required to attach proof of income to a financial statement, normally income tax returns and notices of assessment for the previous three years. Subrule 13(7) prohibits the court clerk from accepting a party's financial statement for filing unless these documents are attached except where the financial statement contains a sworn statement that the party is

not required to file an income tax return because of the *Indian Act*.

If a party believes that the opposing party's financial statement does not contain sufficient information, the party can seek additional information by asking the opposing party to provide it. Pursuant to r. 13(11), if the additional information is not provided within seven days, the court may, on a motion, order the party to give the information or to serve and file a new financial statement.

To ensure an ongoing exchange of information, r. 13(12) requires every party to update the information in a financial statement before any case conference, motion, settlement conference, or trial, if the information is more than 30 days old. If there have been minor changes, the party may file instead an affidavit with details of the changes. Subrule 13(12.2) specifies the time limits for serving and filing updated financial statements. It is at least seven days for the requesting party or applicant, and four days for the respondent. For the same reason, r. 13(15) requires that as soon as a party discovers that information in his or her financial statement is incorrect or incomplete or there has been a material change in the information provided, the party must immediately serve and file the corrected information together with any documents substantiating it.

If a party does not give information as required under R. 13, the court may dismiss the party's case, strike out any document filed by the party, make a contempt order against the party, or make any other appropriate order (r. 13(17)).

2. Financial statements — general comments

While Forms 13 and 13.1 (Forms) were created to be used in litigation, most lawyers insist that parties exchange sworn financial statements even if the parties wish to settle their dispute without litigation. It is therefore critical to understand how to complete a financial statement properly.

Some lawyers fail to ensure the financial statements they deliver on behalf of clients are properly completed, adding significant cost and delay in many family law matters. The first step is to tell a client to follow the instructions on the financial statement itself. This is an

important but often overlooked step in ensuring that a financial statement is properly completed. The instructions in each part of the financial statement forms may answer many of the questions clients have about how to complete the document. It is critical that clients follow these instructions.

Lawyers should urge their clients to complete the financial statement accurately and should work with them to ensure that the financial statement is as complete as possible before being sworn. If the client has an accountant who is familiar with his or her business affairs, it may be useful to involve the accountant in the preparation of the financial statement.

Lawyers should explain to the client that if values are missing or inaccurate when the financial statement is delivered to the opposing party, the opposing lawyer can and likely will suggest the errors and omissions are deliberate, thereby impugning the client's credibility.

Clients are not restricted to the space provided on the financial statement. They should be encouraged to add notes and schedules whenever necessary to complete or clarify their disclosure. If a client has done a calculation to determine a value, that calculation should be shown in a note or a schedule so that it is clear to the opposing party what assumptions have been made. If some of the information required to complete the financial statement is not available, this should be specifically noted on the financial statement or in notes accompanying it.

It is the client's obligation to prove the value of any asset he or she owns. Clients often do not know or cannot prove the fair market value of some of their assets. These assets will need to be appraised or valued by a professional who is qualified to offer an expert opinion on the value of the asset in question. Real estate, pensions, and shares in privately held corporations are just a few examples of assets that may require a professional valuation. If a client needs to retain a valuator, the client should do so promptly to ensure a timely determination of his or her net family property. However, a client should not delay delivery of his or her first financial statement until all valuation opinions are complete. In the interim, a financial statement should be delivered so that the parties can attempt to resolve other financial issues. The statement should state "Value to be determined" next to any asset for which an appraisal or valuation is being sought.

Appraisals and valuations are often costly. It can cost tens of thousands of dollars to value an interest in an active and successful privately held business. Clients may seek to avoid retaining professional valuers in order to save costs. For instance, if the asset is an interest in a

privately held company, the client might want to ask the company accountant to provide an opinion of value. An accountant is not a professional valuator and is therefore not properly qualified to give an opinion of value. If the opposing party obtains an opinion from a properly qualified valuator, that opinion will likely be preferred at trial. Further, someone with a pre-existing relationship with the client may not give a neutral opinion, and the lawyer should be very wary about relying on such an opinion. If cross-examined, the witness would have to acknowledge his or her relationship to the client and possible pecuniary or other interest in maintaining it. This would not only undermine their credibility on the value of the asset in question, but could also undermine the client's credibility with respect to the whole financial statement. It could also undermine the credibility of the lawyer if the court suspected that the lawyer was privy to putting an inaccurate opinion before the court. For these reasons, unless an asset is of insignificant value, the lawyer should insist that the opinion of a qualified and independent valuator be obtained.

Clients will usually be asked to provide proof of the values shown on their financial statement. They should be told to assemble all relevant documents while preparing the draft financial statement. They will need documents to prove their income (at a minimum, income tax returns and notices of assessment for the last three tax years in addition to pay stubs confirming current income), their expenses (receipts, cancelled cheques, cheque books, bills, etc.), the value of their assets (bank account statements, RRSP statements, property valuations, etc.), and the amount of their liabilities (credit card statements, loan documentation, etc.). Disclosure can involve hundreds of documents, so both the client and lawyer must be organized.

Once the client has assembled the documents supporting his or her financial statement, the documents should be reviewed by the lawyer. By reviewing the documents before the client swears the financial statement, the lawyer can correct any obvious errors and attempt to ensure that the financial statement is accurate. The documents relating to the client's income, assets, and liabilities should be copied and bound into a disclosure brief to be given to the opposing lawyer.

Ideally, as much disclosure as possible should be delivered along with the client's initial financial statement. Delivering a comprehensive disclosure brief with the first financial statement can facilitate meaningful negotiations by showing the opposing party that care has been taken in filling out the financial statement in a thorough and candid manner.

Documents supporting a client's expense claims are not normally produced in a disclosure brief unless the expenses are challenged. The documents must, however, be assembled by the client so that they are available to be inspected by the opposing party upon request.

The client's disclosure obligation does not end with the initial financial statement, so the client must continue to collect all relevant financial documents relating to income, expenses, assets, and liabilities until the family law proceeding is settled.

What follows is a discussion of Form 13.1 (where applicable, references to Form 13 are also given).

2.1 Part 1 – Income

Part 1 of the financial statement lists myriad sources of income. If a client earns income from any of these sources, he or she must fill in the current income from that source. If the client's income fluctuates from year to year, it may not be possible to state a current income. In that case, the client should insert the previous year's income, and a note should be included with the financial statement indicating that this has been done.

The list of income sources in Part 1 is not exhaustive. If the client has a source of income that is not delineated, it should be listed on Schedule A. Every source of income the client receives should be listed including, but not limited to, severance payments, Ontario Disability Support Program payments, lottery winnings, RRSP or pension withdrawals, unemployment insurance, and income from the exercise of stock options.

If a client is aware that income is going to be earned from a particular source in the next 12-month period but does not know the quantum, an estimate should be included. A note should be included with the financial statement indicating how the estimate was calculated. As noted above, r. 13(15) requires ongoing disclosure, so once the client obtains the actual figures for that income source, it should be disclosed to the other side without delay.

Parties who are self-employed often enter their net income figure, after business expenses have been deducted, rather than providing their gross income figure because they do not want to invite close scrutiny of their business expenses. This leads to delay and expense for both parties particularly if a motion has to be brought to compel production of the gross income and expense figures. If a party with self-employment income wishes to list a net income figure, he or she should attach a schedule to the financial statement showing the gross income figure and a list of the business expenses deducted. A similar schedule should be prepared if a

party lists net rental income or any other income net of deductible expenses.

If a financial statement is received without gross income and expense information, the information should be requested pursuant to r. 13(11) because some expenses that are legitimately deducted for tax purposes can be added back or imputed into income for family law purposes if the expense confers some personal benefit on the taxpayer. The authority for adding such benefits back into income is found in the *Child Support Guidelines*. If the business expenses deducted significantly reduce a party's taxable income, an accountant or valuator with experience in family law matters should be retained to review the expenses claimed and determine income for the purpose of the family law proceeding.

2.1.1 Other benefits

Part 1 of the financial statement also requires a list of any benefits received and a yearly market value for them. Many people receive benefits through employment such as the use of a car or cellphone, medical and dental plans, or a sports club membership. These benefits have a cash value and are a form of income. Sometimes the value of a benefit can be determined from a T4. In other cases, the value must be calculated either by the employer's payroll department or by an accountant.

2.2 Part 2 – Expenses

Part 2 requires a list of living expenses for a 12-month period. This is one of the most confusing parts of the financial statement for many people, particularly if the separation of the parties occurred in the immediately preceding 12 months and resulted in the family being fragmented or a change in the normal standard of living, or both. The best way to avoid confusion is to make all assumptions perfectly clear in notes to the financial statement. The financial statement should indicate the period to which the expenses relate and should indicate how many people were living in the household in that period. If a client's current expenses do not reflect the client's standard of living during the marriage, the client can complete both a current budget and a proposed budget.

If a claim is being made for s. 7 expenses over and above base *Guidelines* child support, those expenses must be carefully detailed. Scheduled B to the financial statement is provided to facilitate a detailed breakdown.

2.3 Part 3 – Other income earners in the home

Part 3 in Form 13.1 (Schedule B in Form 13) is completed if there is a claim for undue hardship or spousal support. The party must disclose whether he or she is married to

or cohabiting with another person. If that is the case, particulars of that person's employment, income, and other dependants must be provided. If another adult resides in the home, regardless of whether that person is a spouse or partner, his or her monetary contribution toward the household expenses must be disclosed. This information is relevant to a determination of the actual net disposable household income and a comparison of household standards of living. In some cases, further disclosure, including tax returns, may be sought on notice to the third party.

2.4 Part 4 — Assets in and out of Ontario

One of the first pieces of information requested in Part 4 of Form 13.1 (Part 3 in Form 13) and one of the first issues to be discussed with the client is the valuation date. In some cases, the valuation date is obvious. In other cases, parties can differ significantly on the appropriate valuation date. The lawyer should discuss the definition of the valuation date with their client, explain the implications of the valuation date in the equalization calculation, and discuss the appropriate date. It is important to do this as early as possible because the client cannot assemble the documents needed to determine the value of various assets if they are working with the wrong valuation date. Once the valuation date has been determined, it should be clearly stated on the financial statement. The date is a critical piece of information for the opposing party to have when they review the financial statement.

Clients are asked to fill in three values for each asset they list on the financial statement—date of marriage value, valuation date value, and present value. If a client did not own a particular asset on one of these dates, then no value needs to be listed. If the financial statement is being completed shortly after separation, the client should be told to ignore the column for present value unless a value has changed significantly since the valuation date.

All values are to be market value, not purchase price or replacement value or any other value. If market value is not available and some other value is used by the client, this should be explained in a note to the financial statement.

The equalization calculation should be thoroughly explained to the client so that he or she understands the relevance of date of marriage assets and liabilities. Often the client no longer has documents relating to date of marriage assets and liabilities. Banking institutions seldom retain personal account records for more than seven years. The client should be told to make efforts to obtain proof of date of marriage assets and liabilities,

even if that involves expense. For instance, financial institutions may charge a fee for retrieving older records. Unless an asset is of nominal value, the client will benefit from spending the money to prove marriage date assets, since they reduce the client's net family property. If the client's efforts to obtain proof of date of marriage assets and liabilities are unsuccessful, the assets and/or liabilities should still be listed, with the client's best recollection of the value or amount owing. Sometimes it may be possible to establish values indirectly. For example, a client may not be able to produce a statement from his or her RRSP account at date of marriage but may be able to show five years of contributions with no withdrawals in the years prior to the marriage. The opposing party may concede the issue or, if the matter is litigated, the judge may accept the client's recollection.

2.4.1 Part 4(a) — Land

Any real property in which the client has an interest—including properties outside Ontario—must be listed.

The assets listed are only what the client actually owns or in which he or she claims an equitable interest. For instance, investment properties held in the client's name should be listed in this part, but if the client owns an investment property indirectly through a corporation, the asset to be listed in the financial statement is the shares of the corporation, not the property. The shares would be listed in Part 4(c) of the financial statement. Similarly, if the client only owns a partial interest in a property, that should be noted on the financial statement. In that case, the value listed is the market value of the client's interest, not the value of the whole property, with an explanation.

If the client intends to seek an exclusion for the property, the property still needs to be listed in this part and listed again in Part 7 to indicate the client is seeking an exclusion.

Clients should not deduct liabilities associated with the property (e.g., mortgages) from the value listed in this part. All liabilities are listed in Part 5 of the financial statement.

2.4.2 Part 4(b) — General household items and vehicles

The financial statement does not provide sufficient room for parties to list all of their household goods and furniture. The household goods and each item of furniture can be listed on a schedule attached to the financial statement, but in most cases this is not worth the effort involved as most used furniture is not valuable. Further, if a piece of furniture was purchased with joint funds during the marriage, each party can only claim to own half of it. To avoid these problems many parties

work out some method of dividing the furniture to their satisfaction and agree to leave this section of the financial statement blank or state that the contents “are to be divided.” If that is not possible, the furniture can be professionally appraised and divided by the parties in kind, purchased by one or the other, or some combination thereof.

The value of most cars and other vehicles can often be determined from industry books. These books are published monthly and show the approximate value of all standard models of cars and vehicles as of the date of publication. An opinion from a qualified dealer is likely necessary to establish the value of a boat.

Many clients list the insurance value of their jewellery on their financial statements. This is not accurate as insurance values are often two or three times higher than market value. To establish the market value of jewellery, obtain an appraisal certificate from a reputable jeweller.

If a client owns valuable art, a wine or stamp collection, or any other collection of value, it will need to be appraised. If the collection was started before the marriage and continued throughout the marriage, the client will need to advise the appraiser of what part of the collection was brought into the marriage and what was accumulated during the marriage so that the value of the collection can be determined for both the date of marriage and the valuation date. The appraiser must also be told if any part of the collection was sold or lost during the marriage since this will affect the date of marriage value.

2.4.3 Part 4(c) — Bank accounts, savings, securities, and pensions

The value of bank accounts, RRSPs, and other investments can often be easily determined by obtaining a statement from the financial institution where the asset is held. However, the value of pensions, stock options, and shares in a privately held corporation normally cannot be determined without a professional valuation. Defined benefit pension plans will require valuation by an actuary.

Upon receipt of a valuation report, the opposing lawyer should consider retaining their own valuator to review the report. Lawyers are not professional valuers and should not attempt to provide an opinion outside their area of expertise. While lawyers may understand the conclusions in a valuation report received, most lawyers are not knowledgeable enough about valuation practice to effectively critique a report. A critique of a valuation report by another qualified valuator can often be done at a fraction of the price of the original valuation, and it may result in a significant change in the value of the asset.

2.4.4 Part 4(d) — Life and disability insurance

The information in this section is relevant for both property issues and support. Insurance policies that have a cash surrender value or vanishing premiums have value that must be determined and included when calculating net family property. All other policies must also be listed. Even if they have no bearing on net family property, they may be used to secure future support payments.

Insurance policies vary considerably, so a copy of the policy should be obtained. It is prudent to obtain a professional opinion as to the sufficiency of the security being provided.

2.4.5 Part 4(e) — Business interests

This section is for listing interests in any unincorporated businesses. These include sole proprietorships, partnership interests, and professional practices. Like shares in a privately held corporation, unincorporated businesses are difficult to value, and a business valuator may need to be retained. Whether in the context of litigation or in negotiating a domestic contract, it is essential that the disclosure being provided is meaningful and complete. The underlying rationale and assumptions applied in arriving at the proposed value to be attached to an asset should be clearly identified.

2.4.6 Part 4(f) — Money owed to you

If the client has an enforceable claim for moneys owed at the date of separation, then that should be disclosed as forming part of his or her net family property. Consideration will have to be given as to the appropriate value to be attributed depending upon the nature of the moneys owed. If the likelihood of repayment is doubtful or will require legal enforcement, the value will be discounted. If the moneys owed are employment related (i.e., commissions/bonuses earned but not yet received), care must be taken not to duplicate the value. If the commission will be reflected in the calculation of the client's income for support purposes, then it should not also be treated as an asset for property purposes.

2.4.7 Part 4(g) — Other property

Anything with value that is owned by a client and not listed elsewhere should be listed here. Air miles accumulated by a client are an asset that can be listed here. Some clients are entitled to be paid accumulated sick leave or accumulated vacation pay. If applicable, those assets can be listed here.

2.5 Part 5 — Debts and other liabilities

All debts and liabilities, including contingent and future liabilities, should be listed in Part 5 (Part 4 in Form 13).

However, since debts reduce a client's net family property, the lawyer must take care to ensure they are not overstated. For instance, a client should not simply list the full amount of a contingent liability such as a guarantee or exposure in litigation. The risk involved in a contingent liability must be evaluated and, if appropriate, the value of the liability reduced. Estimating the risk involved in a contingent liability is speculative, but an effort must be made to do so. If the parties cannot agree on the value of a contingent liability they could agree to share the liability if and when it occurs. If this is done, the lawyer for the client with the contingent liability should obtain security to ensure the other party will pay his or her share of the liability if and when it is owed.

Clients should not list the full amount of a debt for which they are jointly and severally liable with others unless the client is likely to be liable for the whole debt without recourse to the other debtors. Rather, they should list their respective portion of the debt.

A future liability can be deducted as a valuation date debt if it is discounted to its present value. An example is the deferred personal taxes on RRSPs. Any client who owns an RRSP will owe income tax on the RRSP at some point in the future so the market value of the RRSP is not its real value to the client. The real value to the client is the market value minus the present value of the future debt obligation. The present value of that future liability must be determined and included as a debt in this part. The whole debt cannot be deducted because it may not be due for years, but if the present value of the future debt is not included, the financial statement will overstate the actual value of the RRSP to the client. Other future liabilities may include the costs of disposition of capital assets and capital gains taxes.

Many clients will claim at the end of a marriage that they owe money to family members or friends. These debts should be listed, but if a client cannot produce loan documentation and provide satisfactory proof that the debt is enforceable and payments have been made or were genuinely expected to be received, the court may deem that money received from a friend or relative was a gift rather than a loan.

2.6 Part 6 — Property, debts, and other liabilities on date of marriage

This part summarizes the date of marriage values listed earlier in the financial statement for ease of reference.

2.7 Part 7 — Excluded property

Before a client completes a financial statement, the lawyer should review the concept of "excluded property" with the client to determine if any property owned by the client on the valuation date can be excluded from net family property pursuant to s. 4(2) of the *FLA*. It is important that the client fully understand the concept because excluded property can significantly reduce the client's net family property.

If a client claims that certain property should be excluded from his or her net family property, the client must produce all documents necessary to prove the claim. For instance, if a client claims that money in a bank account is from an inheritance, the client must produce

- a testamentary document proving he or she was the beneficiary of an inheritance; and
- a document or documents proving that the money from the inheritance went into the bank account in question.

If the inherited money was first used for another purpose, such as buying a car, and only deposited into the bank account after the car was sold, the client will need to produce documents tracing the inherited funds and proving the funds were used to buy the car as well as documents proving that the proceeds of the sale of the car went into the subsequent bank account.

All documents necessary to prove that property is excluded should be provided to the opposing party in an organized disclosure brief.

2.8 Part 8 — Disposed of property

Parties are required to disclose whether they have disposed of property within two years prior to the valuation date. The purpose of this inquiry is to determine whether a party has been depleting assets with a view to reducing his or her net family property in contemplation of separation. Non-arm's length transactions (i.e., transfer of assets to a family member at below market value) will attract scrutiny and may provide the basis for a successful claim for an unequal division of net family property. It will therefore be prudent to provide complete disclosure to evidence a legitimate purpose for the transaction and a tracing of the funds or other benefits received.

Enforcement of support orders

1. Family Responsibility Office

The Family Responsibility Office (FRO) is a provincial agency authorized to assist support recipients in the collection of spousal and child support orders in Ontario, including costs of a support order. All support orders, whether temporary or final, that are made in this province are automatically registered for enforcement by the FRO, subject to the right of the parties to withdraw on consent. Any domestic contract for the provision of support may also be filed with the Ontario Court of Justice for enforcement by the FRO pursuant to s. 35 of the *Family Law Act (FLA)*. The FRO enforcement powers are exclusive. The support recipient may not take independent enforcement action while the support order or agreement is with the FRO (s. 6(7)). The FRO has no authority to deal with other orders, such as an order for an equalization payment.

2. Governing legislation

2.1 Family Responsibility and Support Arrears Enforcement Act, 1996

The *Family Responsibility and Support Arrears Enforcement Act, 1996 (FRSAEA)* empowers the Director of the FRO to employ any enforcement method necessary to collect outstanding support orders, whether detailed in the *FRSAEA* or in other statutes. The Director does not have the authority to compromise a support recipient's claim but may exercise discretion in the timing and means of enforcement (s. 6). A Director may refuse to enforce a support order at his or her discretion in a number of circumstances, including the following (s. 7):

- The amount of support is nominal.
- The amount cannot be determined from the face of the order because it is expressed as a percentage of income.
- The order is unclear or ambiguous.

The Director will not enforce cost of living clauses unless calculated in accordance with s. 34(5) of the *FLA*, that is, in accordance with the Consumer Price Index for Canada for prices of all items, as prepared by Statistics Canada (s. 7(4)). The Director stops enforcement when a support obligation has terminated. If there is a dispute about the termination, the parties must obtain a court order to resolve the dispute (s. 8).

2.2 Support deduction order

When a court grants a support award, the judge at the same time causes a support deduction order (SDO) to issue. An SDO permits the Director to require an income source to remit funds owing to the support payor to the FRO on account of the support obligation. An income source is an employer or other individual that owes payments to the support payor including salary, commissions, bonuses, contractual payments, pensions, annuities, shareholder loans or dividends, and income tax refunds. The deduction is limited to 50 percent of the support payor's net receipt from the income source after the deduction of income tax, Canada Pension Plan, employment insurance, and union dues (s. 23). Under s. 23 of the *FRSAEA*, up to 100% of certain payments, including income tax refunds or other lump-sum payments attachable under federal enforcement legislation, may be deducted and paid to the Director. Until the income source begins making deductions, the support payor must directly remit the support payments owing to the Director (s. 22(3)). The income source must remit funds to the Director within 14 days. The income source may be liable to pay any amounts that it failed to deduct from the support payor's pay (s. 26(7)).

A court may determine any dispute by the support payor about the SDO concerning the quantum of funds being deducted or whether the support payor is in arrears on a motion. The support payor must join the Director as a party on the motion (s. 27).

2.3 Opt in/opt out

The parties may consent to opt out of enforcement by the Director by filing a notice of withdrawal executed by both parties with the FRO. A recipient may later choose to opt back into enforcement by the Director (s. 16). A previous decision holding that arrears accumulated during the withdrawal period cannot be enforced after a recipient opts back in has been cured by legislative amendment. A recipient may opt out of enforcement by the Director unilaterally if the payor is in default. Some of the enforcement options available under the *FRSAEA* to the Director are not available to a recipient seeking to enforce a support order personally.

2.4 Suspension of a support deduction order

A court may suspend the operation of an SDO on limited grounds only if it would be unconscionable having regard

to all the circumstances for the support to be paid by the SDO or the parties agree that they do not want the SDO to apply and the support payor posts adequate security (s. 28). Suspension of an SDO does not affect the support order (s. 28(3)).

3. Enforcement options of the Director

3.1 Garnishment

Rule 29 of the *Family Law Rules (Rules)* sets out the procedure for obtaining a garnishment of debts owing to the support payor. This permits the seizure of wages, pensions, bank accounts, rents, and moneys owing by the federal government to the payor; to that extent, it overlaps with the SDO regime. A notice of garnishment is issued by the court on filing of a request for garnishment. On receipt of this notice, the garnishee must send the funds to court.

The Director may garnish 50 percent of joint accounts under s. 45 of the *FRSAEA*.

3.2 Information disclosure

The Director may request production of a financial statement from a payor who is in default of a support order (s. 40). The Director may also demand from any person or public body information concerning a support payor's employer, place of employment, wages, salary, other income, assets, liabilities, address, or location (s. 54).

3.3 Writ of seizure and sale

A writ of seizure and sale may be obtained pursuant to the procedure set out in R. 28 of the *Rules*. Once issued by the court, the Director may file the writ in any jurisdiction in which the support payor may have assets.

3.4 Charge against land

The Director may register a support order against land owned by the support payor. The support obligation becomes a charge against the property, which may be enforced by sale of the property in the same manner as a mortgage (s. 42). A court may order the postponement or discharge of the charge on such security terms as the court considers just (s. 42(3)).

3.5 Personal Property Security Act registration

The Director may register arrears under any support order with the registrar under the *Personal Property Security Act (PPSA)* on notice claiming a lien and charge under s. 43 of the *FRSAEA*. This lien will have priority over any subsequent perfected security interest or subsequently registered encumbrance, with the exception

of a perfected purchase-money security interest in collateral or its proceeds.

3.6 Lottery winnings

The Director may collect arrears from a single monetary prize of at least \$1,000 or non-monetary prize of the same value payable by a lottery scheme in Ontario (s. 46).

3.7 Default hearing

If a support payor falls into default on the support order, the Director may invoke a default hearing. The Director may require delivery of a financial statement by the support payor. The Director may ask the court to order a person financially connected to the support payor to also file a financial statement, and if there is some evidence that a third party has frustrated the collection of support by sheltering assets or income of the support payor, the court may add that person as a party and/or require any relevant documentary disclosure (ss. 41(3)–(4)). At a default hearing, the support payor is presumed to have the ability to pay. The court may on the hearing make orders requiring the support payor to

- pay all or part of the arrears by periodic payments;
- discharge the arrears;
- provide security; or
- be imprisoned continuously or intermittently (s. 41(10)).

The court may also make similar orders against a third party found to have sheltered assets or income of the support payor, with the exception of an order for imprisonment (s. 41(12)).

3.8 Restraining order

A court may make a restraining order to prevent the disposal or wasting of an asset (s. 48).

3.9 Arrest of absconding debtor

A court may issue a warrant for a support payor's arrest if the court is satisfied that the support payor is about to leave the province and there are reasonable grounds to believe that the payor intends to evade his or her obligations (s. 49). A court may also issue a warrant for the arrest of a support payor who fails to file a financial statement or appear at a default hearing.

3.10 Credit bureau report

A Director may report default of a support order to a credit bureau (consumer reporting agency) (s. 47).

3.11 Suspension of driver's licence

The Director may suspend a support payor's driver's licence on 30 days' notice. The driver's licence will be suspended unless the support payor brings the support arrears into good standing or obtains a refraining order from the Superior Court of Justice in an application to vary the support order or on the undertaking to commence an application to vary. The court may grant a refraining order, which shall terminate on the earlier of the date the application to vary (or motion to change) is determined, the withdrawal of the support order, and six months (s. 35(10)). The order must be obtained before the date specified for the suspension. The court cannot grant an extension.

3.12 Suspension of passport

The Director may apply under federal enforcement legislation that federal licences, including but not limited to a Canadian passport, be suspended (*FRSAEA*).

4. Interjurisdictional Support Orders Act, 2002

The *Interjurisdictional Support Orders Act, 2002 (ISOA)* provides a comprehensive procedure for support claimants to obtain provisional support orders against respondents in reciprocating jurisdictions (both within Canada and internationally) and for a claimant in a

reciprocating jurisdiction to obtain an order against a respondent in Ontario. Part III of that *Act* provides for the registration and enforcement of support orders made outside Ontario. The reciprocating jurisdictions are listed in the regulations to the *Act*. To register an order, the support recipient or the appropriate authority in his or her jurisdiction must send a certified copy of the order to the clerk of the Ontario court nearest to where the respondent is believed to reside. The clerk must register the order, which then has the same force as an Ontario order and can be enforced by the FRO. The clerk of the court must give notice of the registration to the support payor. The support payor may bring a motion to seek an order setting aside the registration on the basis that he or she did not have proper notice or a reasonable opportunity to be heard in the proceeding in which the original order was made, the original order is contrary to public policy in Ontario, or the court making the original order lacked jurisdiction (s. 20). The *Act* also provides for variation of registered orders.

The *ISOA* is not an exclusive code for interjurisdictional support proceedings. As an alternative, domestic legislation may be utilized in Ontario or in reciprocating jurisdictions where applicable.

The tax principles of family law

1. Introduction

Income tax laws are extremely complex and their application to separation and divorce is not readily understood. Our intention here is not to duplicate detailed interpretive material available elsewhere but to provide a practical and simple guide focusing on fundamental issues and practical solutions. (See the loose-leaf service by A. Freedman *et al*, *Financial Principles of Family Law*.) It is not a substitute for the use of the *Income Tax Act (ITA)* or consultation with a specialist.

A financial expert should at least review and make an oral report with regard to each family law case involving other than the most routine of financial matters, particularly if there are significant assets or novel settlement arrangements. The expert's input at the commencement of a matter will provide clearer financial perspectives and a more direct route to a mutually acceptable settlement than if it is obtained in the late stages of negotiation or prior to trial.

This chapter is based on the tax laws as at January 1, 2011.

The philosophy of the various provincial family law statutes recognizes that marriage is a form of economic partnership. When the partnership breaks up (upon separation or divorce), a unique set of family law, economic, financial, and income tax problems arises.

The parties will often have different views as to how property and income are to be shared. The income tax implications of income and property sharing on marital breakup are discussed in this guide.

Since the *ITA* is a federal statute, the tax principles in this guide apply to all provinces and territories.

2. Support payments

2.1 What are they?

Support payments are amounts paid to a spouse, a former spouse, or the natural parent of the payor's child. There are two types: spousal support and child support. The tax rules with respect to each are different and must be carefully considered.

The Canada Revenue Agency (CRA) has issued an interpretation bulletin on support payments (IT-530R, dated July 17, 2003), which provides further technical

information regarding the income tax rules relating to support payments.

The *ITA*'s definition of spouse and common-law partners is set out later in the chapter. Since January 1, 2001, the definition of spouse has applied to same-sex partners.

2.2 Features required to be a support payment

To be considered a support amount, a payment must have the following features:

- The parties must be living separate and apart at the time the payment is made.
- The payments must be considered an allowance payable on a periodic basis.
- The payments were made for the maintenance of the recipient (spousal support) or children of the marriage (child support) or both, and the recipient has discretion as to how the support amount is used.
- The payments are made directly to the recipient spouse or are considered third-party payments.
- Where payments are made to a spouse or former spouse,
 - the parties must be living separate and apart by reason of the breakdown of their marriage; and
 - the payment must be made pursuant to an order of a competent tribunal or a written agreement.

3. Spousal support

3.1 Tax treatment

Payments made in a particular calendar year will be deductible in determining the taxable income of the payor if they have the features noted below. Payments deductible by the payor will be taxable to the recipient. Spousal support payments paid by an estate are not taxable to the recipient or deductible by the estate.

3.2 Features required to be deductible

Spousal support payments received in a particular calendar year are taxable to the recipient and deductible to the payor if they have the following features:

- The spousal support payments have the features listed in the "Support payments" section, above.
- The agreement or order must refer to the amount as "spousal support" or "spousal support amount."

- The payments were made pursuant to an order or written agreement (see below for amounts paid prior to an order or written agreement).

4. Child support

4.1 Definition

A “child support amount” is defined as a support amount that is not identified as being solely for the support of a spouse, a former spouse, or the parent of the payor spouse’s child. Therefore, all support paid will be treated as child support for tax purposes unless a portion of the payment is clearly identified as spousal support.

4.2 Tax treatment

Child support paid pursuant to orders or agreements commencing after April 30, 1997, will not be deductible to the payor nor taxable to the recipient. In order to accommodate orders or agreements that commenced before May 1, 1997, certain transitional rules were enacted. These are described on the following pages.

4.3 Commencement day

A “commencement day” is a defined term under the *ITA* and refers to a fixed date provided in an agreement or court order.

The actual day an agreement or court order is made will become the commencement day for post-April 30, 1997 agreements or orders.

Agreements or orders predating May 1, 1997, require careful attention when determining the applicable commencement day. The commencement day for these agreements or orders will be the earliest of four dates after April 30, 1997, as follows:

- the date specified in a joint election filed by both parties to have the new rules apply to child support payments. Form T1157 (Election for Child Support) is available from the CRA for this purpose.
- the date on which the first payment of child support is required to be made pursuant to an agreement or order that has been varied.
- the date of another subsequent agreement or court order made after April 30, 1997, that changes the amount of child support payable.
- the date specified in an agreement, court order, or any variation thereof.

If none of the conditions outlined above apply to pre-May 1, 1997 agreements or orders, then there is no commencement day.

If there is no commencement day, then child support paid will continue to be taxable/deductible. New or varied orders or agreements that do not change the child support amount will not trigger a commencement day.

For example, a change in the amount of spousal support will not trigger a commencement day for child support purposes.

Automatic changes in child support amounts that are built into the order or agreement (e.g., a cost-of-living increase or an adjustment proportionate to a change in the payor spouse’s income) are not considered by the CRA to result in a variation for tax purposes.

4.4 Tax treatment for child support payments made after a commencement day

Child support payments that become payable after a commencement day are not deductible from income by the payor nor included in the income of the recipient (i.e., not taxable).

If a court order or written agreement provides for both child and spousal support, payments made will be treated for tax purposes first as child support and then as spousal support. Therefore, all child support has to be paid before the payor can claim a deduction for spousal support. If support amounts are paid under a court order or a written agreement that does not clearly indicate a separate amount for the support of the spouse, then the full amount paid will be treated as a child support amount.

If a court order or written agreement provides for payment of amounts to a third party (such as amounts to be paid directly to a dentist for dental bills), such payments will be treated as child support and not taxable nor deductible unless the payments are clearly identified as being only for the benefit of the recipient spouse.

If a court order or written agreement requires only payment of spousal support or separate amounts for spousal and child support, it should be registered with the CRA by completing Form T1158 (Registration of Family Support Payments) and sending it with a copy of the written agreement or court order directly to the CRA. Court orders or written agreements that provide for child support payments only are not required to be registered.

4.5 Tax treatment for child support payments made before a commencement day

This section also applies to child support payments made pursuant to court orders or written agreements without a commencement day.

Payments will be deductible in determining the taxable income of the payor if they have the features noted below.

4.5.1 Features required to be deductible

Child support payments are deductible from income by the payor and included in the income of the recipient (i.e., taxable) if they have the following features:

- The child support payments meet the requirements outlined in the “Support payments” section, above.
- The payments were made in the year of the court order or written agreement, or in the prior year.
- The payments were made pursuant to the court order or written agreement.

4.5.2 Child support payments not deductible

In the following situations, child support payments are not deductible:

- The court order or written agreement provides that child support payments to be made after a certain date (not earlier than May 1, 1997) are no longer taxable or deductible. These arrangements or court orders should be registered with the CRA by completing Form T1158 (Registration of Family Support Payments) and sending it with a copy of the written agreement or court order to the CRA.

- The court order or written agreement is changed after April 30, 1997, to vary (increase or decrease) the amount of child support payable. These written agreements or court orders should also be registered with the CRA.
- The parties elect that the existing tax rules (i.e., child support payments are not taxable and not deductible) will apply after a certain date (not earlier than May 1, 1997) by signing the CRA’s Form T1157 (Election for Child Support Payments) and sending it with a copy of the written agreement or court order to the CRA.

5. Lump sums

5.1 What are they?

A lump sum is a single amount, generally paid at once or in instalments over a specified time.

5.2 Tax treatment and features

Lump sums are generally not deductible. Below are examples that illustrate the tax treatment of lump-sum payments and receipts.

Nature or Reason for Lump-Sum Payment	Deductible to Payor/ Taxable to Recipient
(a) Paid to satisfy any and all future claims for support	No
(b) An instalment payment on account of a specified larger sum, that is, an instalment paid on the amount owed as in (a) above	No
(c) A series of annual payments for support pursuant to a court order or written agreement	*Yes (if series of payments is specified in an order or agreement)
(d) (i) Payment made in advance of several periodic payments <i>not yet due</i> (ii) Lump sum pursuant to an order in conjunction with an existing obligation to pay periodic spousal support: payment that represents the acceleration or advance of future support payable on a periodic basis for sole purpose of securing funds for recipient will be deductible/taxable	No** *Yes, if to secure funds***
(e) Payment made on account of past-due (arrears) periodic payments that is required pursuant to a court order or written agreement (see summary of cases in Appendix III)	*Yes
(f) Paid subsequent to the date of the order or written agreement to satisfy claims for support in respect of a period prior to the date of the court order or written agreement that stipulates the payment, that is, a payment required by an agreement to “catch up” for support not made in periods prior to the date of the agreement	No (not periodic). See section on third-party and prior-period payments, below
(g) A capitalized single payment of the support obligation (e.g., the present value of the next five years support paid in one amount)	No (see (a) above)
(h) A payment to obtain a release from a liability imposed by an order or agreement whether such liability is in arrears of support payments, future payments, or both	No (not made in accordance with the separation agreement)

* Lump-sum support payments made after a commencement day and
 1. on account of child support are not taxable/deductible;
 2. on account of spousal support must be identified as spousal support to be taxable/deductible.
 ** In *Jardine v. R.* (1997), [1998] 1 C.T.C. 2374, 97 D.T.C. 3336 (T.C.C.), a lump sum paid reflecting spousal support payments due within one year was held to be deductible/taxable.
 *** *Ostrowski v. R.*, 2002 FCA 299, [2002] 4 C.T.C. 196, 56 D.T.C. 7209.

5.3 Income-averaging of lump-sum arrears of support

Income-averaging is available to persons who have received certain types of lump-sum payments in a particular year that were in fact attributable to amounts owing in prior years. Income-averaging impacts those receiving lump-sum taxable support payments (usually in the form of an arrears payment). The purpose of income-averaging is to ensure that the recipient of a lump-sum taxable support payment in respect of arrears is in the same tax position as he or she would have been in if the payment had been received when it was due.

Form T1198 (Statement of Qualifying Retroactive Lump-Sum Payment) has to be completed so that the special tax calculation can be applied to retroactive lump-sum payments.

6. Arrears

6.1 Tax treatment

Payments will be deductible in determining the taxable income of the payor if they have the features noted below. Payments deductible by the payor will be taxable to the recipient.

6.2 Features required to be deductible

Support payments are deductible/taxable when paid/received if the payment is considered to be on account of

- child support payments made before a commencement day; or
- spousal support.

Unpaid amounts that fall into arrears will not be deductible/taxable. A single catch-up payment of all the arrears is deductible when paid and taxable when received. Arrears may not always be paid in full. When the catch-up payment does not equal the total sum of the delinquent payments, there is some ambiguity as to the tax treatment of this lesser amount. The CRA views this amount as a lump sum and not a periodic payment; therefore, it is not deductible or taxable. However, certain court decisions have taken a different view and have permitted the deductibility of such arrears payments (see Appendix III).

Where a written agreement or order has a commencement day and spousal support payments are in arrears at the time of payment, those payments on account of arrears will only be deductible/taxable if all child support amounts are paid in full at the time of the arrears payment.

Payments on account of arrears owing pursuant to an agreement or order made before April 30, 1997, are taxable and deductible even if these arrears payments are varied pursuant to an order or agreement made after May 1, 1997.

7. Third-party payments

7.1 What are they?

These are payments made to a third party for the benefit of a spouse, former spouse, or a child—for example, amounts paid directly to a private school for tuition or to a landlord for rent.

7.2 Tax treatment

Payments will be deductible in determining the taxable income of the payor if they have the features noted below. Payments deductible by the payor will be taxable to the recipient spouse.

7.3 Features required to be deductible

Third-party payments will be deductible by the payor and taxable to the recipient if the payments have the following features:

- The nature of the third-party payment should be specified in a court order or a written agreement.
- Both parties must agree that the third-party payments will be deductible by the payor and taxable to the recipient.
- The court order or written agreement must specifically refer to the intention of the parties to have ss. 60.1(2) and 56.1(2) of the *ITA* apply to the payments. This specific reference to the *ITA* must be made in the court order or written agreement. (Specific reference may not be required provided that the court order or written agreement contains a clear and unambiguous clause that the parties understand that the third-party payments will be deductible/taxable.)
- The payments are
 - made before a commencement day or pursuant to court orders or written agreements without a commencement day and are for the maintenance of the spouse, former spouse, or dependent children in the custody of the spouse or former spouse; or
 - made after a commencement day and are solely for the maintenance of the spouse or former spouse (further, the third-party payments must be clearly identified in the order or agreement as being solely for the benefit of the spouse or former spouse).
- The parties must be living separate and apart, not only when the payment is made, but also at the time the expense is incurred.

7.4 Third-party payments not deductible

No deduction may be claimed for the following:

- Amounts paid in respect of a residence occupied by the payor, i.e., mortgage payments, utilities, taxes, maintenance expenses related to a home in which the payor resides, cannot be claimed under any circumstances.
- Generally, amounts paid for the purchase of tangible property are not deductible. This does not include
 - medical or education expenses or expenses incurred for the maintenance of a residence in which the spouse, former spouse, or parent of the spouse's child lives (e.g., property taxes or utilities); and
 - within certain limitations, expenditures for the purchase or improvement (as distinct from maintenance) of the residence in which the spouse, former spouse, or parent of the spouse's child lives (mortgage payments are limited to 20% of the original amount borrowed to acquire or improve the residence).

Payments that are reimbursed to a spouse that would otherwise qualify as third-party payments receive the same tax treatment as third-party payments.

8. Amounts paid prior to an order or written agreement (“prior-period payments”)

8.1 What are they?

These are payments made by one spouse to the other for the support of the recipient or children of the marriage prior to the signing of an order or a written agreement.

8.2 Tax treatment

Payments will be deductible in determining the taxable income of the payor if they have the features noted below. Payments deductible by the payor will be taxable to the recipient.

8.3 Features required to be deductible

Prior-period payments will be deductible by the payor and taxable to the recipient if they have the following features:

- The payments are made in the same year an order is made or an agreement is signed or in the immediately preceding full calendar year. The payments may not be paid pursuant to a preceding agreement.
- Prior payments must have all the attributes of spousal support payments (i.e., they cannot be lump

sums, they must be periodic and for the maintenance of the recipient, etc.), or they must be child support payments made prior to a commencement day.

- The agreement or order must refer to these payments, and the parties must clearly indicate that these payments are to be deductible to the payor and included in the income of the recipient in the year in which the amounts were paid. Amended personal income tax returns for prior years will be necessary where there is retroactive deductibility.

9. Non-resident spouses

9.1 Payments to a non-resident

Payments to a non-resident spouse or former spouse are not subject to withholding of non-resident tax.

9.2 Payments from a non-resident

When certain tax treaties with foreign countries are in place, payments generally will be taxed in the hands of the Canadian recipient only if they would have been taxed had the recipient been a resident of the source country (e.g., Canada/U.S. treaty).

See the summary of non-resident rules for other countries in Appendix IV.

9.3 Property transfers for non-residents

Property transfers between a Canadian resident and a non-resident are subject to tax as if the parties are unrelated. There can be no rollover of capital property (transferring of property with no tax consequences) between a Canadian resident and a non-resident. For a more detailed discussion on property transfers, see “Transfers of property,” below.

Subject to rules outlined below in “RRSPs,” it is possible for a registered retirement savings plan (RRSP) to be transferred between spouses and former spouses with no tax consequences (i.e., on a tax-free basis) where the recipient spouse's RRSP is owned by a person who has become a resident of the U.S. Any withdrawals from such a plan would be subject to a 25 percent Canadian withholding tax.

9.4 Residency

Residency for tax purposes is a question of fact in each case. Refer to the CRA's Interpretation Bulletin IT-221R3-CONSOLID for guidelines in determining Canadian residency for tax purposes.

The following summarizes the Canada/U.S. non-resident rules.

Tax Treatment				
Type of Payment	Payor Residence	Tax Treatment	Recipient Residence	Tax Treatment
Child support	Canada	not deductible*	U.S.	not taxable
Child support	U.S.	not deductible	Canada	not taxable
Spousal support	Canada	deductible	U.S.	taxable**
Spousal support	U.S.	deductible	Canada	taxable

* Child support paid by a Canadian to an American before a commencement day will be deductible to a Canadian payor.

** Under U.S. tax rules, married spouses may designate that payments otherwise qualifying as spousal support payments are not to be taxable or deductible in the U.S. by providing for this in their agreement. Using this approach, spousal support received by a U.S. recipient spouse would not be taxable but remains deductible to a Canadian payor spouse. This provides the parties with tax saving opportunities in both countries. An adjustment to the amount paid should also be considered. See Appendix V for an example of the clause that should be included in the separation agreement. The separation agreement must be filed with the recipient's tax return for the first year in which the clause applies.

10. Transfers of property

The settlement of marital property and support rights often requires the transfer of capital property between spouses or former spouses. Federal and provincial governments have avoided the imposition of income taxes on such transfers as a matter of social policy. To impose an income tax cost on such transfers would be an unreasonable impediment to an equitable settlement of family property rights. Consequently, there are a variety of provisions in the *ITA* to permit separating spouses to transfer the tax cost to the spouse who ultimately disposes of the property to a third party.

10.1 Common capital property transfers

The following are common capital property transfers:

- matrimonial home;
- cottage;
- marketable securities;
- RRSPs;
- registered retirement income funds (RRIFs);
- shares in private and public companies; and
- rental properties.

10.2 Tax impact of capital property transfers

Capital property transfers between related or unrelated parties are generally considered to be taxable transactions. Notwithstanding that a property might be transferred to a related party for no consideration or as a gift, except under special circumstances, it is treated as a "deemed sale" or "deemed disposition," giving rise to tax consequences.

When a transfer of capital property is as described below, there may be no tax consequences

- between spouses who are married; and
- between spouses or former spouses if the transfer is in settlement of marital property rights.

Inter-spousal transfers of capital property (such as private company shares or marketable securities) are deemed to take place at the transferor's adjusted cost base (ACB) for tax purposes, and therefore, neither a capital gain nor a capital loss will result at the time of transfer. The term rollover is used to describe these transfers to reflect the fact that the transferee of the capital property is put in the same position as the transferor. That is to say, the tax status of the property "rolls over" from the transferor to the transferee.

Capital property transfers between separating spouses pursuant to a written agreement or court order will automatically receive the rollover treatment. No election is required for the rollover to take place.

Transfers of depreciable capital property (such as a rental property) are deemed to take place at the transferor's undepreciated capital cost (UCC) for tax purposes, and therefore, a recapture of previously claimed capital cost allowance will not be triggered as a result of the transfer.

10.3 The transferee's position

The transferor's tax values of the capital property will be inherited by the transferee. When and if the capital property is sold, any gain, loss, or recapture will belong to the transferee spouse only if the parties sign a joint election agreeing not to have the capital gain attribution rules apply to the subsequent sale of the transferred property.

10.4 Tax impact of non-capital property transfers

There is no relief from the immediate tax consequences when non-capital property is transferred between spouses or former spouses, whether or not it takes place before or after divorce or is pursuant to an agreement or court order. Therefore, if property such as inventory is transferred, then a sale at fair market value will be deemed to have occurred, and the transferor must recognize any resulting gain or loss in the year of the transfer.

10.5 Can the transferor take advantage of any tax planning opportunities?

The transferor may choose to have the property transferred at its fair market value for tax purposes. The transferor may prefer this treatment in order to trigger a capital gain, a capital loss, or the recapture of capital cost allowance. Note that a capital loss will only be allowed between spouses that are separated or divorced. Capital losses on transactions between married parties are considered “superficial” and are disallowed. Where there are unused capital gains exemptions, capital loss carryforwards, or other tax reasons, the transferor may elect, on a property-by-property basis, not to have the rollover apply. This election is made by indicating in the transferor’s tax return for the year in which the transfer takes place that the rollover provisions should not apply and that the transfer has taken place at fair market value.

10.6 Specific property transfers

10.6.1 Matrimonial home

Generally speaking, an individual is permitted, for income tax purposes, to designate one home as their “principal residence,” which is defined as a housing unit that is inhabited by the taxpayer or by his or her spouse, former spouse, or child. The gain on the sale of a principal residence is completely tax free. There was a time when families were permitted to designate two principal residences for tax purposes. This is no longer the case. Clearly, because the gain on the sale of a principal residence is tax free, care must be taken to preserve this status. Generally, it is easy to do except where there is more than one dwelling.

The titled spouse can transfer the matrimonial home to the other spouse without any tax consequences. The transferee inherits the cost for tax purposes of the transferor.

Where there is more than one dwelling only one can be designated as the principal residence for tax purposes. Care must be taken to ensure that the person receiving that property is able to designate it as their principal

residence during the period of time that the parties were living together including the end of the calendar year in which an agreement is signed. This is required to avoid the income inclusion of any possible capital gain when that property is sold by the recipient at a later date.

The portion of the gain on the sale of a principal residence that is tax free is calculated by the following formula:

$$1 + \frac{\text{Number of taxation years property designated as the principal residence}}{\text{Number of taxation years property owned}} \times \text{Gain}$$

After calculating the exempt portion of the gain, as above, deduct it from the actual gain to determine that portion of the gain that will be taxable.

Where there are two or more principal residences, professional advice should be obtained to examine the results of various hypothetical sales.

10.6.2 RRSPs

All or any part of one spouse’s RRSP may be transferred to the RRSP of his or her spouse or former spouse without any tax consequences if the following conditions are met:

- The transfer is made by the trustee of the payor’s plan directly to the trustee of the recipient’s plan. A direct deposit must be made from one bank or trust company to another. The CRA’s Information Circular IC72-22R9 provides additional information.
- The parties agree to sign the CRA’s Form T2220. The form must be filed within 30 days of transferring the funds along with a copy of the written agreement or court order. (Tax-free rollovers are permitted to settle all marital rights, which include both property and support rights.)
- The transfer is made when the parties are living separate and apart pursuant to a decree, order, or written separation agreement. The agreement must specifically require a division of property between the parties in settlement of rights arising out of or on a breakdown of the marriage or common-law relationship.

An RRSP may be transferred to the recipient spouse’s or former spouse’s RRSP on a tax-free basis as consideration for a lump-sum spousal support payment if the lump sum is being paid to satisfy all future claims for spousal support. The RRSP transfer is considered to be a payment in settlement of a right arising out of or on a breakdown of a marriage or common-law relationship. (Tax-free rollovers are permitted to settle all marital rights, which include both property and support rights.)

An RRSP cannot be pledged to secure an obligation to pay support. An RRSP used in this fashion will be deemed to have been collapsed with the entire value included in income.

11. RRIFs

11.1 Definition

An RRIF is basically a continuation of a registered retirement savings plan (RRSP). In most cases, the investments held in an RRSP are rolled into a RRIF plan in the year an RRSP owner turns age 72. The income earned in an RRIF is not taxable while it remains inside the plan. The difference between an RRSP and RRIF is that one cannot make tax deductible contributions to a RRIF and that one must receive a specified minimum amount out of the RRIF in each year following the year in which the RRIF was established. All amounts withdrawn from a RRIF are included in the income of the annuitant in the year withdrawn.

The benefit of the RRIF is that it permits the RRSP holder to avoid having to include the entire value of an RRSP in one year, thus permitting additional tax deferral.

11.2 Transfer of an RRIF

All or any part of one spouse's RRIF may be transferred to the RRIF of his or her spouse without any tax consequences if the conditions outlined above for RRSP transfers are met.

12. Income attribution

12.1 What is it?

The *ITA* has a variety of prohibitive rules. One set of these rules is referred to as the "attribution rules." These rules may attribute income previously ascribed to a particular spouse without regard to the actual ownership of the property. That is to say, notwithstanding that one spouse might own a property, the income from the property or the gain on its sale might be attributed or allocated to the other spouse for income tax purposes. These rules ensure that property income and gains cannot be artificially shifted between family members to minimize income taxes.

Where income is attributed to one spouse for tax purposes but the other is in fact the recipient of the income or proceeds of sale, it is the former spouse that will have to carry the tax burden without the benefit of ownership. To ensure this result comes as no surprise, it is important to understand the attribution rules that follow.

12.2 Tax treatment

Attribution rules can be divided between those concerning

- income from transferred property; and
- capital gain income arising on the sale of transferred property to a third party.

12.3 How is the income from transferred property taxed?

12.3.1 As between separated parties

Separated parties who transfer property as a result of marriage breakdown must consider the attribution rules. One must first examine the property transferred and determine if there is income produced by that property. For example, an apartment building would produce rental income, and a savings bond would produce interest income. Where the property has been transferred pursuant a written agreement or court order, any income arising from the transferred property will be included in the taxable income of the transferee and not the transferor from the date the property is transferred as long as the parties remain separate and apart. This rule is automatic.

12.3.2 As between not separated parties

Income arising from the transferred property will be included in the taxable income of the transferor and not the transferee. This rule is automatic. The attribution rules may be avoided on inter-spousal transfers in certain circumstances (for example, a sale for fair market value consideration). However, careful planning is necessary.

12.4 How is the capital gain taxed when the transferred property is sold to a third party?

12.4.1 As between separated parties

When property is transferred pursuant to a written agreement or order, it is usually anticipated that any capital gain on a subsequent sale will belong to the transferee or recipient of the property. To ensure this result, both parties must

- be living separate and apart by reason of marriage breakdown and have not resumed co-habitation within the same year; and
- sign a joint election whereby they agree not to have the capital gains attribution rules apply to any subsequent sale of the transferred property.

(a) How to elect

A jointly signed election form must be filed by the transferring spouse with his or her personal income tax return for the taxation year the property is transferred.

The election is usually signed by both parties upon the execution of a written agreement. Since there is no formal election form, an election must be drafted for each agreement. A sample is included at Appendix VI.

(b) What happens if the election is not made?

Without the election, any capital gain arising from the subsequent sale of the transferred property by the transferee spouse will attribute back to the transferor if the parties are not yet divorced at the time of the sale to a third party.

Example—If a portfolio of stocks were transferred pursuant to a written agreement and subsequently sold, any gain or loss would attribute back to the transferring spouse if the parties were still married at the time of the sale. Filing the election prevents this unintended result.

12.4.2 As between not separated parties

The capital gain arising from sale of the transferred property will be included in the taxable income of the transferor and not the transferee. This rule is automatic.

12.5 Attribution example

The following example describes transactions and events involving Mr. and Mrs. Breakdown. Mr. Breakdown has owned a rental property for many years. The details with respect to this property are as follows:

Original capital cost	\$50,000
Undepreciated capital cost	\$40,000
Fair market value	\$100,000
Annual rental income	\$10,000

The following chart illustrates the operation of the applicable attribution rules as they relate to the separate courses of action contemplated by Mr. Breakdown with respect to his spouse.

Transaction Considered	Income Tax Consequences
1. (a) Give the rental property to Mrs. Breakdown while married.	(a) No capital gain or recapture to Mr. Breakdown on the transfer since the rollover of depreciable capital property will automatically apply. The capital cost and undepreciated capital cost assumed by Mrs. Breakdown will be her husband's. (b) The rental income will be attributed to Mr. Breakdown (considered property income).
(b) Give the rental property to Mrs. Breakdown while married, then the parties separate.	(a) Same as above. (b) The rental income will be attributed to Mrs. Breakdown from the date of separation onwards.
(c) Give the rental property to Mrs. Breakdown after the parties are separated and are no longer living together.	(a) No capital gain or recapture to Mr. Breakdown since the rollover of depreciable capital property will automatically apply. The capital cost and undepreciated capital cost assumed by Mrs. Breakdown will be her husband's. (b) The capital gain is automatically deferred, but if the parties wish to trigger it, they can do so by electing under s. 73(1)(d). (c) The rental income will cease to be attributed to Mr. Breakdown subsequent to the date of transfer. It will then be taxable to Mrs. Breakdown.
2. After Mr. Breakdown transfers the property to his spouse, Mr. and Mrs. Breakdown decide to separate formally.	(a) All rental income will be included in Mr. Breakdown's income for that part of the year he is not separated from Mrs. Breakdown. Subsequent to separation, the rental income will be taxable in Mrs. Breakdown's hands.
3. Having been given the property by Mr. Breakdown, Mrs. Breakdown sells it on the open market while they are married and living together.	(a) A capital gain of \$50,000 and a recapture of \$10,000 will be included in Mr. Breakdown's income. (b) All rental income earned to the date of sale will be attributed to Mr. Breakdown.
4. (a) Mrs. Breakdown decides to sell the property subsequent to separation and before divorce. Upon separation, both spouses jointly elected under s. 74(3)(b) not to have the attribution of capital gains apply.	(a) Mrs. Breakdown's income for the year will include (i) a capital gain of \$50,000; (ii) recapture of \$10,000; and (iii) rental income to date of sale. Mr. Breakdown will not be affected by this transaction.

Transaction Considered	Income Tax Consequences
(b) Mrs. Breakdown decides to sell the property subsequent to separation and before divorce. Upon separation, the spouses did not elect to avoid the attribution of capital gains.	(b) Mrs. Breakdown's income for the year will include: <ul style="list-style-type: none"> (i) recapture of \$10,000 (because it is considered income); and (ii) rental income to the date of sale. Mr. Breakdown's income for the year will include a capital gain of \$50,000.
5. (a) Mr. and Mrs. Breakdown obtain a certificate of divorce; the property is then transferred to Mrs. Breakdown, but not pursuant to any settlement agreement.	(a) This transfer will be deemed to take place as if it were a sale between arm's-length parties, at fair market value; no tax-free rollover is available. Mr. Breakdown must include a capital gain of \$50,000 and recapture of \$10,000 in his income in the year the property is transferred.
(b) Mr. and Mrs. Breakdown obtain a certificate of divorce; the property is transferred to Mrs. Breakdown pursuant to an agreement entered into subsequent to the divorce, dealing with settlement of their marital rights.	(a) This transfer will not result in any capital gain or recapture to Mr. Breakdown, since a rollover will automatically apply. The capital cost and undepreciated capital cost assumed by Mrs. Breakdown will be her former husband's. (b) All rental income to the date of transfer will be included in Mr. Breakdown's income. Subsequent to the transfer, it will be included in Mrs. Breakdown's income.

13. Unanticipated joint and several tax liabilities

13.1 General rules

The joint and several tax liability rules in the *ITA* are different for married and separated spouses.

13.1.1 Married parties

Married persons may be held responsible for their spouse's unpaid tax liabilities in the circumstances described below:

- Where there has been a transfer of property from one spouse to the other and the transferor spouse had an existing tax liability at the date of transfer, the transferee may become liable for the tax.
- When one spouse transfers property to the other whether by way of gift, by sale, or by any other direct or indirect means, there is a joint and several liability for the spouse's unpaid tax, but only to the extent that the fair market value of the property exceeded the amount paid for the property on the initial transfer.

13.1.2 Separated parties

When property is transferred pursuant to an order or written agreement and parties to the transfer are living apart as a result of a breakdown of their marriage, then there will be no liability to the transferee for the transferor spouse's unpaid income taxes.

Any potential liability arising under these particular rules as a result of inter-spousal property transfers is deemed to be discharged if the property is transferred on account of marital breakdown pursuant to an order or written

agreement and provided the parties were living separate and apart at the time the property was transferred.

13.2 Impact

The transferee does not require an indemnity from the transferor in respect of the potential application of these rules in connection with property transferred upon marital breakdown.

The rules continue to impose on separated spouses and former spouses liability for unpaid taxes of the spouse or former spouse when property transfers have taken place

- prior to the breakdown of the marriage;
- after the parties have commenced to live apart, but not pursuant to an order or written agreement; or
- after legal separation and the transfer is not pursuant to an order or written agreement.

13.3 Recommendation

Lawyers should do the following:

- Obtain a thorough understanding of both parties' tax liabilities and history of property transfers.
- Include the appropriate indemnity clauses in any written agreement to ensure that the transferor's tax liabilities do not become those of the transferee spouse.

14. Legal fees

14.1 The deductibility of legal fees

As a result of recent court decisions and changes to the CRA's assessing position, the tax treatment of legal fees paid in respect of a separation and/or divorce has been clarified.

14.2 Legal fees paid by a payor spouse

Legal fees paid by the payor spouse (whether on account of child or spousal support) are not deductible under any circumstances; see para. 21 of Interpretation Bulletin IT-99R5-CONSOLID, "Legal and Accounting Fees."

In *Bayer v. MNR*, the court stated that legal expenses incurred by the **payor spouse** to reduce the spousal support payments under an existing agreement were not deductible.

In *Bergeron c. R.*, the court stated that legal fees incurred by the **payor spouse** to contest an application by the recipient spouse to have child support increased were not deductible.

Taxpayers cannot claim legal fees relating to

- the custody of children;
- obtaining a divorce or negotiating a separation agreement;
- establishing a right to spousal support after divorce, even if subsequently provided for under a court order or written agreement; and
- lump-sum spousal support amounts.

14.3 Legal fees paid by a recipient spouse

The CRA's current position was announced in the October 10, 2002, *Income Tax Technical News*. Legal fees relating to the following types of procedures are now deductible by the recipient of support in the year the fees are paid:

- to obtain an order for child or spousal support (our understanding is that legal fees would remain deductible notwithstanding that an action had not commenced or an actual order had not been obtained);
- to enforce an existing order for child or spousal support;
- to vary an existing order for child or spousal support; and
- to defend a reduction of child or spousal support.

Legal expenses paid (and deducted from income) for the above must be reduced for any legal costs awarded by the court that are received by the recipient spouse.

15. Potpourri

15.1 Pre-judgment interest

Pre-judgment interest is generally taxable as income if it is in the nature of interest. Where an award is made either by court order or by agreement and an amount is explicitly identified to be interest in the award or settlement, such amount will be considered income in the hands of the recipient. Therefore, an amount specified as

interest in respect of an equalization amount will be taxable to the recipient. It is not however deductible by the payor.

15.2 Tax instalments

15.2.1 Who must make instalments?

All individuals resident outside Quebec are required to make quarterly instalments if the difference between their total tax liability (federal and provincial) in both the current year and either of the two preceding years exceeds the amount of tax withheld at source (generally by an employer) by more than \$3,000.

Most persons receiving spousal support or taxable child support are required to make tax instalments. Individuals who are self-employed are also required to make tax instalments.

15.2.2 Timing of instalment payments

Instalments must be paid by the 15th day of the last month of each calendar quarter (i.e., the 15th day of March, June, September, and December).

15.2.3 Penalties and interest

Interest at the prescribed federal rate of 5 percent (compounded daily) is charged on late or insufficient instalment payments from the day the instalment was due. This rate is effective from January 1 to March 31, 2011, and is subject to change quarterly.

A penalty may also be assessed, calculated using the following formula:

- 50 percent of the interest payable on instalment shortfalls for a year, minus the greater of
 - (a) 25 percent of the interest that would have been payable if no instalment payments had been made; or
 - (b) \$1,000.

15.3 Loss carryforward rules

15.3.1 What are they?

Certain types of losses that cannot be offset against income in the year in which they are incurred may be applied against income from prior or future years.

There are two types of losses:

- (a) Non-capital losses
 - A non-capital loss is essentially the amount of the taxpayer's losses from business sources in excess of the taxpayer's net income from all other sources.
 - Non-capital losses that are not utilized in the year they are incurred can be applied against

income earned from other sources for the previous three years (including capital gains) or be applied against income to be earned over the next 20 years with the earliest losses being applied first (i.e., non-capital losses can be carried back three years and forward 20).

(b) Net-capital losses

- A net-capital loss is the excess of allowable capital losses over taxable capital gains for that particular year plus allowable business investment losses not previously used.
- Net-capital losses that are not utilized in the year they are incurred can only be applied against any net capital gains reported during the previous three years or be applied against any future net capital gains (i.e., capital losses can be carried back three years and forward indefinitely).

15.4 Release of marital and support rights

A spouse's release of marital and support rights in return for a property settlement (a lump-sum settlement) does not give rise to a taxable disposition of property. The CRA's Interpretation Bulletin IT325R2, "Property Transfers after Divorce and Annulment," dated January 7, 1994, provides additional information on property transfers after separation, divorce, and annulment.

15.5 Capital gains exemption

The *ITA* provides a special \$750,000 capital gains exemption for individuals (other than trusts) in respect of capital gains realized on the disposition of shares of a qualified small business corporation and certain farm property.

If a person has previously utilized the \$100,000 exemption (which was eliminated in 1994) available for capital gains arising from the disposition of other capital properties, then the exemption as it relates to a qualified small business corporation shares and farm property will be limited to \$650,000. A qualified small business corporation is a term defined by the *ITA*.

Due to the technical complexity of these rules, professional advice is necessary to ensure that a corporation's shares qualify for the exemption.

15.6 Support payments and earned income for RRSP purposes

Spousal support payments and taxable child support payments form part of "earned income" to the recipient for the purposes of calculating the level of RRSP contributions. These contributions are generally limited to 18% of earned income to a maximum of \$22,450 for 2011. The earned income of the payor of support for RRSP purposes will be reduced by the amount of the

deductible support paid. Only taxable support received will be considered to be earned income.

15.7 Support payments and estates

Support payments made by an estate to a recipient are not taxable to the recipient and are not deductible to the estate. The support payments do not meet the definition of "support amount" under the *ITA*. For an amount to be a support amount, the recipient must be the spouse or former spouse of the payor spouse. In this case, the recipient is not the spouse or former spouse of the estate, and therefore, the payments are not support amounts and are not taxable nor deductible.

15.8 Tax free savings accounts (TFSA)

Effective January 1, 2009, all individuals over the age of 17 are permitted to contribute up to \$5,000 per year to a TFSA. Amounts contributed are not tax deductible; however, investment income of any kind (interest, dividends, capital gains) earned by the contributed funds will not be taxable, either as earned within the account or upon withdrawal. All funds held within a TFSA may be withdrawn at anytime, for any purpose, without any tax consequences.

15.9 Taxation of compensatory support

Where support is awarded to a spouse or former spouse to compensate him or her for a financial contribution that was made to the other spouse's career, the payment (which is considered a lump sum) will not be taxable to the recipient nor deductible to the payor. Support in these instances is based on "compensation" as opposed to "need." The CRA does not view these amounts as representing an allowance payable on a periodic basis for the maintenance of the recipient, and therefore, it is not considered to be taxable or deductible.

16. Registered Education Savings Plans (RESPs)

An RESP is a type of trust recognized by the CRA that facilitates in saving for a child's (or grandchild's) post-secondary education. If the child does not pursue post-secondary education, the principal paid into the plan is returned to the contributor, but some of the earnings may be forfeited.

Contributions to the plan are not tax-deductible, but income accumulates within the plan on a tax-deferred basis. (The lifetime limit is \$50,000 per beneficiary.) When the funds are used in the prescribed manner, the income portion is considered the child's income and is taxed at his or her tax rate.

To minimize the risk of forfeited income, contributors may receive RESP income directly under certain

circumstances. If contributions have been made to a RESP that has existed for at least 10 years and none of the intended beneficiaries are pursuing a post-secondary education by the age of 21, the contributor may receive the RESP income. This income (up to a lifetime maximum of \$50,000) may be transferred to a RRSP (or to a spousal RRSP) provided there is sufficient RRSP room to claim an RRSP deduction for the year of the transfer.

Effective January 1998, there are government grants to RESPs for contributions made for children under the age of 19.

17. Relevant corporate tax issues

17.1 Corporate distribution taxes

Corporate assets cannot be removed from a corporation without the imposition of tax. However, on marital dissolution, it is possible for each spouse to distribute corporate assets to other corporations. Distribution of corporate assets directly to individuals will generally trigger a tax of approximately 27% to 33% in Ontario of the value of those assets. The advantage of distributing the assets to a corporation owned by one of the spouses is that tax will not be immediately payable on the transfer to the corporation but will be deferred until such time as the assets are withdrawn from the corporate entity by the individual spouse.

17.2 Objectives in marital dissolution

Where corporate assets are to be distributed as part of a financial settlement between separating spouses, the primary objective is to distribute such assets without incurring income taxes immediately. Just as there are rollover provisions for property transfers between separating individual spouses, there are rollover provisions for property transfers between corporate entities owned by spouses or separating spouses that allow property to be transferred to corporate entities owned by the appropriate spouse without tax consequences. Almost all types of property can be transferred in this fashion.

To effect the distribution or transfer of properties owned by a corporation to corporate entities owned by the appropriate spouse, corporate restructuring techniques are required. These techniques provide alternative mechanisms for funding amounts owed as between separated spouses. The corporate and tax mechanisms and procedures to achieve these results are extremely complex and should not be undertaken without professional advice.

18. Spouse and common-law partner

Since January 1, 2001, same-sex common-law couples have been treated the same as other couples for all purposes of the *ITA*. Same-sex common-law couples will be eligible for the same tax benefits and subject to the same obligations as married couples and opposite-sex common-law couples.

The *ITA* defines common-law partners as persons who

- are the parents of the same child;
- have been living together for at least 12 continuous months; or
- lived together previously for at least 12 continuous months and have resumed co-habitation.

The above includes any period that the parties were separated for less than 90 days because of a breakdown of the relationship. Any period of separation lasting more than 90 days may affect whether the parties are considered common-law partners for tax purposes.

19. Personal tax credits and deductions

19.1 Personal credit

A tax credit of \$460 is available in Ontario (see Appendix II for credits in other provinces) and \$1,579 federally. This credit is available to all taxpayers who throughout the year either carried on business in Canada or were resident in Canada.

19.2 Eligible dependant credit (formerly equivalent-to-spouse credit)

A tax credit of \$390 is currently available in Ontario (see Appendix II for credits available in other provinces) and \$1,579 federally to a single individual or separated spouse supporting a child under 18 (unless infirm) who is living with them (limited to one child). The credit is not available to an individual paying child support to another person. Therefore, it is the recipient of child support who can claim the eligible dependant credit.

In situations where no child support is being paid, it may be possible for each parent to claim the credit in respect of different wholly dependent children. The meaning of wholly dependent does not necessarily mean dependent all year round. Parents having joint custody may each be able to demonstrate that the children were wholly dependent on them while they were living with each respective parent.

The credit is reduced for federal purposes by the amount of the dependant's net income. For Ontario, the credit is reduced where the dependant's income exceeds \$759 and is not available where the dependant's income is greater than \$8,353.

19.3 Spousal credit

A tax credit of \$390 in Ontario and \$1,579 federally may be claimed by a taxpayer who supports a spouse or common-law partner at any time in the taxation year. If the spouse or common-law partner's net income exceeds \$770, the credit is reduced for Ontario purposes. Any federal credit amount is reduced by the amount of the spouse's net income for the year. Where spousal net income exceeds \$8,471 for Ontario, no credit will be available.

A taxpayer who separated during the year and is required to make support payments to a spouse or common-law partner may choose to claim either the deductible support amounts paid for the year or the spousal credit.

19.4 Child amount

A tax credit of \$315 may be claimed on the federal return by either parent for a child born in 1994 or later who resides with **both** parents throughout the year. There is no parallel credit for Ontario tax purposes.

19.5 Tuition, education, and textbook credit

Tuition and education tax credits are available to full-time and part-time students. A tax credit of 15% is available for the total of the following:

- tuition fees in excess of \$100 paid by students to a university, college, or other educational institution in Canada for post-secondary school level courses; and
- an education amount calculated at \$400 per month and a textbook amount of \$65 per month for each month a student is enrolled in a qualifying educational program at a university or college on a full-time basis.

If the student cannot utilize the credit, any unused portion may be transferred to a student's spouse, parent, or grandparent. Only a maximum amount of \$5,000 comprising a combination of the above is eligible for transfer. The student is required to designate in writing the one parent or grandparent who will be entitled to claim the unused credit in respect of the student. The amount eligible for transfer cannot be shared; however, if there are two students then each parent can claim a credit for one of them. A certificate (Form T2202) issued by the educational institution must be filed by the person claiming the credit.

19.6 Dependant(s) infirm over 17

A tax credit of \$217 may be claimed in Ontario (see Appendix II for the amount of this credit available in other provinces) and \$642 federally by a taxpayer in respect of a relative who is dependent by reason of mental or physical infirmity. If the dependant's income

exceeds \$6,076 in Ontario or federally, then the credit is reduced.

The CRA requires that the supporting person obtain a letter from a medical practitioner that confirms the dependant's infirmity.

19.7 Age 65 and over credit

A tax credit of \$224 may be claimed in Ontario (see Appendix II for the amount of this credit available in other provinces) and \$981 federally if a spouse turned 65 or older by December 31, 2011. The amount claimable is reduced by 15 percent of the taxpayer's net income in excess of \$32,961 (for Ontario and federally). The credit is not available for taxpayers whose income exceeds \$76,541 or in Ontario where the taxpayer's income exceeds \$62,484.

In certain situations, an individual may not be able to take advantage of the credit. In these instances, it may be possible to transfer a portion of the credit not used by the individual to his or her spouse.

19.8 Disability credit

An individual who is certified by a medical practitioner as having a severe and prolonged mental or physical impairment may claim a tax credit of \$371 in Ontario (see Appendix II for the amount of this credit available in other provinces) and \$1,101 federally.

In certain situations, an individual may not be able to take advantage of the credit. In these instances, it may be possible to transfer a portion of the credit not used to a supporting person.

19.9 Child tax benefit

Commencing in July 2011, parents who share custody of their children will be eligible to each receive 50% of all child tax benefits.

Family allowance payments, dependent child tax credits, and refundable child tax credits were eliminated and replaced by a new child tax benefit scheme in 1993. The Canada Child Tax Benefit has three components—the basic benefit, the National Child Benefit Supplement, and the Child Disability Benefit (CDB). The benefit is calculated for a 12-month period beginning in July of one year and ending in the following June.

Both the basic benefit and the National Child Benefit Supplement are based on the number of children in a family, their ages, the taxpayer's province or territory of residence, family net income, and any deduction claimed for child care expenses. The CDB is based on the number of children in the family who are eligible for the federal disability amount, the number of children in the family

for whom the Canada Child Tax Benefit is received, and family net income.

For the period January to June 2011, the basic benefit is equal to \$112.33 per month for each child under the age of 18, plus \$7.83 per month for the third and each subsequent child. The total benefit is reduced by a fixed percentage of family net income over \$40,970. The reduction is 2% for a one-child family and 4% for families with two or more children. (Note: The basic benefit amounts will differ for residents of Alberta.)

The supplement for each child under the age of 7 was replaced after June 2007 by the Universal Child Care Benefit, a taxable \$100 per month payment for each child under the age of 6. This benefit is available to all families with a child under the age of 6 regardless of family income.

For the period January to June 2011, the National Child Benefit Supplement amounts are \$174 for the first child, \$154 per month for the second child and \$146.50 per month for each additional child. The supplement is reduced where family net income exceeds \$23,855 with the percentage reduction dependent on the number of children in the family, ranging from 12.2% to 33.3%.

The CDB is available for children in respect of whom the federal disability credit may be claimed and is based on family net income. For the period January to June 2011 the maximum monthly CDB is \$205.83 per eligible child. The benefit is reduced for families where family net income exceeds \$40,970. The reduction is 2% for a one-child family and 4% for families of two or more children.

The Canada Child Tax Benefit is paid on a monthly basis to the taxpayer who has primary responsibility for the care of the children. In joint custody cases where the parties cannot decide between themselves, the CRA will determine who has primary responsibility and make payments to that person.

All Canada Child Tax Benefits received except for the Universal Child Care Benefit are not taxable.

20. Child care expenses

Annual child care expense deduction limits are set at

- \$7,000 for each child who is under 7;
- \$4,000 for each other child between the ages of 7 and 16 or a dependent child over 16 who has a mental or physical infirmity but is not eligible for the disability tax credit; and
- \$10,000 for a dependent child of any age who is eligible for the disability tax credit (the deduction is available in the year the child turns 16).

Claims for child care expenses cannot exceed two-thirds of earned income for the year.

The deduction limit is \$10,000 for each child 16 or under at the end of the year for whom a disability tax credit may be claimed.

While married, the spouse with the lower income is entitled to claim child care expenses. In the year of marriage breakdown (assuming that the breakdown is for a period of at least 90 days and the parties were living separate and apart at the end of the year), the higher income spouse may claim child care expenses that he or she has incurred. When the parties have been living separate and apart for an entire year, both parties have a potential claim for child care expenses incurred by each of them in respect of the same children.

The CRA will scrutinize the nature of the child care expenses to ensure that they relate to the children and are incurred while the children are living with each respective parent. For example, the costs of a full-time nanny may be prorated to cover the six months of the year during which the children live with each parent.

Appendix I

Combined Top Personal Marginal Income Tax Rates (5-Year Summary)

	2007	2008	2009	2010	2011
British Columbia	43.7%	43.7%	43.7%	43.7%	43.7%
Alberta	39.0%	39.0%	39.0%	39.0%	39.0%
Saskatchewan	44.0%	44.0%	44.0%	44.0%	44.0%
Manitoba	46.4%	46.4%	46.4%	46.4%	46.4%
Ontario	46.4%	46.4%	46.4%	46.4%	46.4%
Quebec	48.2%	48.2%	48.2%	48.2%	48.2%
New Brunswick	46.8%	47.0%	46.0%	43.3%	41.7%
Nova Scotia	48.3%	48.3%	48.3%	48.3%	48.3%*
Prince Edward Island	47.4%	47.4%	47.4%	47.4%	47.4%
Newfoundland	48.6%	45.5%	44.5%	44.5%	42.3%
Yukon Territory	42.4%	42.4%	42.4%	42.4%	42.4%
Northwest Territories	43.1%	43.1%	43.1%	43.1%	43.1%
Nunavut	40.5%	40.5%	40.5%	40.5%	40.5%

*All rates are the highest marginal rate on taxable income over \$128,000, with the exception of Nova Scotia, which has a 46.5% marginal rate on taxable income between \$128,000 and \$150,000 and a 50% marginal rate on taxable income over \$150,000. Therefore, an average of 48.3% is used to be in line with the other provinces (same as shown in 2010).

Appendix II

2011 Personal Tax Credits – Federal and Provincial Values

Type of Credit	Federal	B.C.	Alta.	Sask.	Man.	Ont.	N.B.	N.S.	P.E.I.	Nfld.	Que.	N.W.T.	Nun.	Yukon
Personal (Basic)	1,579	561	1,698	1,489	878	460	815	724	755	615	2,128	762	475	741
Eligible Dependant	1,579	492	*	1,489	878	390	692	614	642	503	**	***	****	*****
Dependant(s) Infirm and Over 18	642	210	983	942	389	217	385	239	240	195	**	253	171	301
Age 65 and Over	981	215	473	487	403	224	398	353	369	393	458	373	356	460
Disability	1,101	360	1,310	942	667	371	660	430	675	415	484	618	475	517

* The Alberta eligible dependant amount is calculated as 10% x (\$16,825 less the dependant's net income for the year).

** Effective January 1, 2005, the tax credit for dependent children was replaced by quarterly child assistance payments.

*** Eligible dependant credit for the N.W.T. is calculated as 5.9% x (\$12,740 minus the dependant's net income for the year).

**** Eligible dependant credit for Nunavut is calculated as 4% x (\$11,714 minus the dependant's net income for the year).

***** Eligible dependant credit for the Yukon is calculated as 7.04% x (\$10,382 minus the dependant's net income for the year).

Child Tax Benefit

1. Basic Benefit:
\$1,348 per child, per year.
+ \$94 for third and subsequent children
+ The benefit is reduced by a fixed percentage if family net income is over \$40,970. The reduction is 2% for a one-child family and 4% for families with two or more children.

2. National Child Benefit Supplement:
This benefit is reduced by a percentage of the amount of family net income that exceeds \$23,855. This supplement is calculated as follows:
• first child = \$2,088 per year
• second child = \$1,848 per year
• for each additional child = \$1,758 per year

3. Child Disability Benefit: \$2,470 per year for each child who qualifies for the federal disability amount. This benefit is reduced for families where family net income exceeds \$40,970. The reduction is 2% for a one-child family and 4% for families of two or more children.

4. Universal Child Care Benefit:
• additional supplement of \$1,200 per child per year under the age of 6 taxable, regardless of family income.

RRSP Maximum Contribution Limits

1996-2002	13,500
2003	14,500
2004	15,500
2005	16,500
2006	18,000
2007	19,000
2008	20,000
2009	21,000
2010	22,000
2011	22,450

After 2011, the maximum limits are indexed to increases in the average industrial wage.

Appendix III

Tax Treatment of Lump-Sum Arrears Payments Summary of Decisions Concerning Deductibility of Amounts Paid and Taxability of Amounts Received

Case	Court	Amount of Arrears Paid as a Lump Sum Vs. Amount Owed	Court Decision and Reason	Canada Revenue Agency's or Appellants' Argument
N.C. Soldera v. M.N.R. [1991] 2 C.T.C. 2097 (T.C.C.)	Tax Court of Canada	\$7,500 paid vs. \$14,000 owed	<ul style="list-style-type: none"> deductible—represents a portion of arrears that were periodic under prior order a simple reduction of a liability—no change to its substance (i.e., periodic allowances) 	<ul style="list-style-type: none"> lump sum, not periodic a discharge of a liability not for maintenance of children
The Queen v. B.D. Sills [1985] 1 C.T.C. 49, 85 D.T.C. 5096 (Fed. C.A.)	Federal Court of Appeal	\$3,000 paid vs. \$4,400 owed (approx.)	<ul style="list-style-type: none"> taxable to wife related to periodic amounts payable pursuant to a prior agreement do not change nature of payment just because they are not made on time payments do not have to be received exactly as specified fulfilling a pre-existing obligation 	<ul style="list-style-type: none"> lump sum of arrears not a periodic allowance represents reimbursement for maintenance for an earlier period
I.E. Burnes v. M.N.R. [1983] C.T.C. 2399, 83 D.T.C. 338 (T.R.B.)	Tax Review Board	\$6,000 paid vs. \$11,900 owed	<ul style="list-style-type: none"> not taxable—not received pursuant to an order lump-sum payment not a periodic allowance payment made to satisfy claim for arrears and not payment of maintenance 	<ul style="list-style-type: none"> received pursuant to an order on account of an allowance payable on a periodic basis
M.A. McGuire v. M.N.R. [1982] C.T.C. 2830, 82 D.T.C. 1813 (T.R.B.)	Tax Review Board	\$4,000 paid to settle arrears and to settle any future support obligations	<ul style="list-style-type: none"> not taxable—not payable pursuant to court order a lump sum, not periodic 	<ul style="list-style-type: none"> arrears paid pursuant to court order
M.A. McNeely v. M.N.R. [1981] C.T.C. 2886, 81 D.T.C. 796 (T.R.B.)	Tax Review Board	\$3,000 paid vs. \$11,620 owed	<ul style="list-style-type: none"> not taxable—lump sum was not for maintenance but made to obtain release from all alimony and maintenance liabilities not received pursuant to separation agreement 	<ul style="list-style-type: none"> paid pursuant to a written separation agreement on a periodic basis as an allowance only required to have amounts payable periodically but need not be paid on that basis
D.J. Bertram v. M.N.R. [1970] Tax A.B.C. 759, 70 D.T.C. 1510	Tax Appeal Board	\$8,000 paid vs. in excess of \$8,000 (actual amount owed not determinable)	<ul style="list-style-type: none"> taxable to wife—represents a portion of arrears that were a periodic allowance under a previous court order adopted <i>Sills</i> reasoning re: late payments agreement to pay arrears not a final release of liability to make future support payments 	<ul style="list-style-type: none"> original periodic payments lost their character as such therefore not taxable
S.A. McDonald v. M.N.R. [1968] Tax A.B.C. 1271	Tax Appeal Board	\$7,000 paid vs. \$29,996 owed	<ul style="list-style-type: none"> not deductible—lump sum, not periodic lump sum based on a compromise settlement made on arrears—not a new separation agreement 	<ul style="list-style-type: none"> lump sum composed of arrears which, if paid on time, would have been periodic not changing nature of payments, just method of payment
J.J. Armstrong v. M.N.R. [1956] C.T.C. 93, 56 D.T.C. 1044 (T.A.B.)	Tax Appeal Board	\$4,000 paid vs. all future payments—payment not for arrears but to release husband from future payments	<ul style="list-style-type: none"> not deductible—a lump sum Supreme Court of Canada agreed on appeal, payment not pursuant to the divorce decree payment in full settlement of all payments due or to become due paid to obtain a release from a liability 	<ul style="list-style-type: none"> amount paid pursuant to agreement

Appendix IV

Tax Treatment of Spousal and Child Support Cross-Border Payments*

Type of Payment	Payor Residence	Tax Treatment	Recipient Residence	Tax Treatment	Type of Payment	Payor Residence	Tax Treatment	Recipient Residence	Tax Treatment
Child support	Canada	Not deductible	Australia	Not taxable	Child support	Canada	Not deductible	Japan	Not taxable
Child support	Australia	Not deductible	Canada	Not taxable	Child support	Japan	Not deductible	Canada	Not taxable
Spousal support	Canada	Deductible	Australia	Not taxable	Spousal support	Canada	Deductible	Japan	Not taxable
Spousal support	Australia	Not deductible	Canada	Taxable	Spousal support	Japan	Not deductible	Canada	Taxable
Child support	Canada	Not deductible	France	Partially taxable	Child support	Canada	Not deductible	Korea	Not taxable
Child support	France	Deductible	Canada	Not taxable	Child support	Korea	Not deductible	Canada	Not taxable
Spousal support	Canada	Deductible	France	Taxable	Spousal support	Canada	Deductible	Korea	Not taxable
Spousal support	France	Deductible	Canada	Taxable	Spousal support	Korea	Not deductible	Canada	Taxable
Child support	Canada	Not deductible	Germany	Not taxable	Child support	Canada	Not deductible	Mexico	Not taxable
Child support	Germany	Limited deduction	Canada	Not taxable	Child support	Mexico	Not deductible	Canada	Not taxable
Spousal support	Canada	Deductible	Germany	Taxable	Spousal support	Canada	Deductible	Mexico	Not taxable
Spousal support	Germany	Limited deduction	Canada	Taxable	Spousal support	Mexico	Not deductible	Canada	Taxable
Child support	Canada	Not deductible	Israel	Not taxable	Child support	Canada	Not deductible	Spain	Not taxable
Child support	Israel	Limited credit	Canada	Not taxable	Child support	Spain	Deductible	Canada	Not taxable
Spousal support	Canada	Deductible	Israel	Not taxable	Spousal support	Canada	Deductible	Spain	Taxable
Spousal support	Israel	Limited credit	Canada	Taxable	Spousal support	Spain	Deductible	Canada	Taxable
Child support	Canada	Not deductible	Italy	Taxable	Child support	Canada	Not deductible	United Kingdom	Not taxable
Child support	Italy	Deductible	Canada	Not taxable	Child support	United Kingdom	Not deductible**	Canada	Not taxable
Spousal support	Canada	Deductible	Italy	Taxable	Spousal support	Canada	Deductible	United Kingdom	Not taxable
Spousal support	Italy	Deductible	Canada	Taxable	Spousal support	United Kingdom	Not deductible**	Canada	Taxable
					Spousal support	Hong Kong	Not deductible	Canada	Taxable

* For treatment concerning payments between Canada and the U.S., see "Non-resident spouses," above.

** Post-April 6, 2000. A limited deduction in the U.K. for child and spousal support payments was allowed pre-April 6, 2000.

Appendix V

Sample Clause for Separation Agreements Regarding Spousal Support Paid by Canadian Resident to United States Resident

We hereby designate the amounts listed in section/paragraph X of this agreement as payments which are not includable in gross income under section 71 and not allowable as a deduction under section 215 of the United States *Internal Revenue Code*. This designation is made pursuant to IRC § 71(b)(1)(B) and Reg. § 1.71-1T and is not to have any effect for any other purpose.

DATED this _____ day of _____, 20__.

Witness as to the wife's signature

Wife

Witness to the husband's signature

Husband

Appendix VI

SAMPLE FORM JOINT ELECTION UNDER PARAGRAPH 74.5(3)(b) OF THE INCOME TAX ACT

WHEREAS the undersigned executed a written Separation Agreement.

PURSUANT to the provisions of paragraph 74.5(3)(b) of the *Income Tax Act* of Canada, the undersigned do hereby jointly elect that section 74.2 of the *Act* not apply to any loans or transfers of property between the undersigned, pursuant to the Separation Agreement and prior to the said Separation Agreement, whether or not specifically referred to therein, and any dispositions of such property to which section 74.2 would otherwise apply but for this election.

DATED this _____ day of _____, 20__.

Witness as to the wife's signature

Wife

Witness to the husband's signature

Husband

Alternative dispute resolution

1. Introduction

Alternative dispute resolution (ADR) is the resolution of disputes by means other than traditional litigation, where a resolution is the result of negotiation between parties through their lawyers or imposed on them by a judge. ADR may help separated spouses achieve resolution with less bitterness and expense than traditional litigation, which will be especially important if they have children. It can also allow for more flexible and individualized resolutions than traditional litigation.

While different types of ADR have been in use for years, in family law, ADR generally involves participation in one or more of the following: mediation, mediation-arbitration, arbitration, and collaborative law. Each has its own set of advantages, disadvantages, and special considerations.

2. Mediation

2.1 Definition

Mediation is a method of dispute resolution whereby the parties retain a third-party professional to assist them in reaching an agreement. A more specific definition is as follows:

Family mediation is a co-operative dispute resolution process, in which an impartial person called a mediator helps parties reach a mutually acceptable resolution of some or all of the issues of the disputes relating to the breakdown of their relationship. Participation is voluntary and agreement is consensual, based on each party obtaining sufficient information and advice.

The purpose of mediation is to assist the parties to accept the realities of their respective situations, understand the underlying interests of the opposing party, and try to reach agreement about how to settle outstanding differences. Its overriding goal is to build consensus between litigious or potentially litigious spouses. It is not marriage counselling nor is it to be used as a tool to pressure a party into, or to debate the wisdom of, reconciliation. The mediator's role is to listen to both parties and try to help them reach their own agreement.

A mediator does not, should not, and cannot impose an agreement, decide an issue, or provide legal advice. A mediator is not an assessor, namely, a person retained to provide observations, opinions, and make recommendations that could be detrimental to one side. At best, a mediator takes two diametrically opposed views and through discussion, questioning, prodding,

and often direct challenging of the parties' underlying motives seeks to expose the real interests that lie behind their positions, thereby helping them create new options for settlement that neither had previously considered and paving the way for an agreement that meets both their needs. Even if the parties do not reach an agreement, mediation allows for a focused process in which the parties identify the issues and canvass potential solutions. It can provide a form of catharsis, enabling the parties to acknowledge the destructiveness of blaming and the importance of accepting responsibility for their behaviour, a situation that can put them in a better mindset for a negotiated settlement with the assistance of their counsel.

In practice, it is common for lawyers not to be present with their clients when the issues are being mediated, especially where parenting issues are concerned. While the lawyers are usually involved in the selection of the mediator, deciding whether it will be "open" or "closed" (see below), the number of sessions, and how the fees shall be paid, the actual sessions usually occur solely between the parties and the mediator. Clients can and often do report back to their counsel after sessions for guidance and advice. When an agreement is reached, the mediator reports back to the lawyers, preferably in a memorandum of understanding, and the lawyers take over, draft, and revise the separation agreement and ensure each party signs.

Because of the lawyer's limited role in the actual mediation sessions, one of the mediator's most crucial responsibilities is to ensure that the parties employ a fair, safe, and balanced process to negotiate their settlement. The mediator should not be in a position of power over the parties, for example, by also being the assessor—otherwise there would be concerns that the settlement was not a true reflection of the parties' views but rather something imposed by subtle pressure from the mediator. Throughout the process, the mediator must act fairly in structuring the negotiation, maintaining the channels of communication with each party and between them, articulating their needs, identifying the issues in dispute, and making suggestions. A good mediator will keep the lawyers apprised of progress during the mediation.

2.2 Open vs. closed mediation

One of the most important considerations for lawyers is whether the mediation should be “open” or “closed.” Open mediation means that at the conclusion of the mediation, the mediator files or prepares a full report and is free to include anything relevant to the matter. Evidence of anything said or of any admission or communication made in the course of the sessions is admissible in a proceeding whether the clients consent or not. Closed mediation means that at the conclusion of the mediation, the mediator files or prepares a report that either sets out the agreement reached by the clients or states only that they did not reach agreement on the matter. Here, evidence of anything said or any admission or communication made in the course of the mediation is not admissible in any proceeding except with the consent of both parties.

It is extremely important that the lawyer canvass the difference between open and closed mediation with the client *before* signing the agreement to mediate. Whether mediation is open or closed is a decision to be made by the parties. Usually, the mediator or the lawyers will have a preference that tends to influence the decision. Proponents of open mediation suggest that participants in closed sessions are prone to take unfair advantage of the fact that what is said cannot be revealed in court and are often less motivated to adopt reasonable attitudes and positions. Critics of open mediation, on the other hand, contend that knowing that each and every utterance made in a session might be used in court inhibits the parties from negotiating in a full and frank manner.

While neither method is perfect and each has its advantages and disadvantages, mediation cannot be effective unless both sides are open to the process. Spouses who are motivated to mediate in good faith should be equally able to resolve their dispute regardless of whether the mediation is open or closed. While most mediation is closed, clients should be made aware of the differences between the two types before they start the process, since there is no guarantee that there will be a resolution of their case by this method.

Lawyers should be aware of the decision in *C.A.M. v. D.M.*, where the Ontario Court of Appeal refused to admit into evidence reports prepared by a clinical investigator for the Office of the Children’s Lawyer where such reports were prepared as part of an attempt at a failed mediation of the appeal. The case is also significant in that it confirms the Court of Appeal’s policy to abide by its Practice Direction for Pre-Hearing Settlement Conferences in Family Law Appeals Pilot Project, a pilot mediation project for family law appeals. The policy is

that if there is a successful resolution arising from the mediation, the resulting agreement and draft order are disclosed to the panel when the appeal is to be heard. Otherwise, “the fact of the settlement conference, the memoranda filed and all deliberations in the process will remain strictly confidential and without prejudice to the parties’ legal positions.” Rosenberg J.A. held that the appellant’s “proposed fresh evidence” consisting of the parties’ subsequent involvement with the Office of the Children’s Lawyer and the investigator’s reports prepared after the trial were not in accordance with the practice direction and should not have been accepted as fresh evidence. To allow such reports to be filed into evidence without the other party waiving the confidentiality and containing without prejudice conditions would be incompatible with and undermine the legitimacy of the without prejudice nature of the settlement conference process.

Where parties have agreed to closed mediation, the court cannot compel the mediator to testify (*Rudd v. Trossacs Investments Inc.*).

2.3 Optimal conditions

It is important for the lawyer to be able to identify whether the client is a suitable candidate for mediation. While by no means exhaustive and while the presence or absence of any of these factors does not necessarily predict for or against an eventual outcome that is satisfactory to the parties, in general, the more the conditions listed below are present, the greater the likelihood of a speedy agreement being amicably reached:

- The parties are emotionally ready.
- They are evenly matched in terms of bargaining power.
- They are patient in temperament and flexible in attitude.
- They are good listeners.
- Where parenting issues are concerned, they are child-focussed.
- They do not shy from fulfilling their financial disclosure obligations.
- They are motivated to reach a negotiated resolution.
- They trust each other, or if not, they trust the mediator to be the guardian of trust.
- There are genuine issues to negotiate.
- There is more than one way to shape or structure a settlement.
- A critical legal principle or governing regulation is not in issue.

- The timing and certainty of an early outcome are important to them.
- They want to control the degree of risk associated with a resolution.
- They want to craft their own resolution.
- Cultural factors or considerations exist that would not or perhaps could not be addressed in any other process.
- A less formal, more caring atmosphere is needed to allow challenged or vulnerable persons to participate.
- Non-evidentiary issues are as important as, or more important than, technical legal issues.

On the other hand, mediation may not be advisable if some or all of the following conditions are present:

- There is a significant power imbalance between the parties that cannot be accommodated or addressed in a fair mediation process.
- There is any sign of bullying.
- There is a history of abuse.
- One party will not agree to make full and frank financial disclosure.
- The parties cannot or will not take responsibility for the outcome.
- One or both parties demonstrate extreme inflexibility on any issue.
- There is a lack of commitment by one or both parties that manifests itself in a failure to meet deadlines, last-minute cancellations, or general disdain of the process.

In these situations, litigation may be the most practical course of action.

Recognizing whether the client is a suitable candidate for mediation is important for several reasons. The lawyer's skills may be called upon in different ways depending on the presence or absence of the above factors. For example, the lawyer with a self-aware, resolution-oriented client will be kept informed by the mediator as to the progress of the sessions and may be consulted from time to time as to his or her suggestions. For the most part, the lawyer with this type of client is in the background until a resolution is achieved. Alternatively, the difficult, impatient, vengeful client will often require more involvement by the lawyer in the process. In these situations, the lawyers and mediator often collaborate more in order to resolve certain issues as they arise (see Resa S. Eisen's article "Identifying the Client for Whom Mediation Is Appropriate" in *Family Law Mediation: How to Use It, Whether To Do It*).

2.4 Mediation and domestic violence

Domestic violence is the intent by a spouse to intimidate, either by threat or use of physical force, the other spouse's person or property. A lawyer advising a client who has been a victim of domestic violence and is now contemplating mediation must proceed cautiously and with full awareness of the client's circumstances. Since the purpose of violence is to control someone's behaviour by the inducement of fear, the impact of violence may leave the client in fear of confronting or challenging the former partner even well after separation. This creates a power imbalance that may prevent meaningful negotiations, thus increasing the chance the client will agree to an unjust or impractical settlement. This is particularly so if both parties are in the matrimonial home during the process. An abused spouse living under the same roof as his or her partner is far more susceptible to intimidation tactics, both emotional and physical, than spouses living in separate residences, and thus lawyers should be confident that mediation is suitable for the client when these circumstances exist. Even if the parties have separated and the incidents of domestic violence occurred some time in the past, the emotional effects of the violence may continue to have an impact, and mediation may not be appropriate.

If the client already has a lawyer before deciding to mediate, the lawyer plays an integral role in advising the client. The lawyer should ask questions of the client that will hopefully establish whether domestic violence was present in the relationship and, if so, to what extent. The lawyer should inform the client that mediation requires both parties to be open and candid in expressing their views—even if they are strongly opposed by the other spouse—and that domestic violence may impair the client's ability to do so. The lawyer should advise the client not to mediate if there is anything to suggest that the client's ability to negotiate on an equal level with the other spouse is impaired by the history of domestic violence. In most cases of abuse, this will be the case, and mediation will not be appropriate.

The lawyer advising a client on this matter may wish to consult with any therapist that the victim of abuse or violence is seeing to help them advise the client. Also, it is advisable for the lawyer to speak to the mediator if the parties have already begun mediation at the time of the lawyer being retained, since the mediator is likely well trained in the area of domestic violence. If the parties have not yet started mediation at the time the lawyer becomes involved, the lawyer might consider having the client screened by the mediator before advising the client on the pros and cons of mediation. The mediator might rule out mediation or have other suggestions for the

lawyer and client's resolution. If the client insists on pursuing mediation despite a history of domestic violence, the mediator should engage in his or her own determination at the intake stage as to whether domestic violence was or is present in the relationship and whether mediation is feasible.

If the client has not previously seen a lawyer, this may be the first time that questions regarding domestic violence have been posed or answered. The mediator must determine whether the abuse and/or violence renders the client in an unequal bargaining position that would prevent them from negotiating. Where a client has been identified as having experienced domestic violence and is incapable of negotiating as a result, the mediation should not proceed, and the client should be encouraged to obtain immediate independent legal advice and to consider applying for a restraining order as soon as possible. Where domestic violence has been disclosed and the mediator has determined that the client has not been rendered incapable of negotiating, wants mediation, and has independent legal advice, the mediator may still conduct the mediation in a manner that offers maximum protection for the spouse. For example, he may meet with clients in separate rooms or meet with them together but allow the spouse to have a counsellor or friend present along with frequent contact with their separate lawyers.

2.5 The process

Although not all mediators employ the same process, the following constitutes the customary steps in a typical family mediation where both clients already have lawyers:

- **Step #1:** The lawyer discusses all aspects of mediation with his client and advises whether mediation would be feasible or advisable.
- **Step #2:** If the parties agree to attempt mediation, the lawyers make recommendations, and the clients eventually decide on a mediator and the sharing of cost. The decision is reached as to whether the mediation will be open or closed.
- **Step #3:** The mediator is contacted by the lawyers and consulted as to his or her availability, and a referral is made.
- **Step #4:** The mediator meets with the lawyers, usually by conference call, obtains the basic details of the case, establishes the terms of the assignment, including payment, and confirms whether the mediation will be open or closed.
- **Step #5:** The clients (and sometimes the lawyers) sign an agreement to mediate. Sometimes the mediator simply sends a confirming letter to the lawyers.
- **Step #6:** The mediator meets the parties separately for an introductory meeting to obtain the basic

details of the case, glean their expectations, and assess the viability of mediation, including assessing any domestic violence issues.

- **Step #7:** The mediator conducts one or more meetings with the parties, engaging in problem-solving, discussion, and negotiation of the issues. If the parties are mediating financial issues, the mediators often work through the financial statements and discuss disclosure issues with the clients.
- **Step #8:** The mediator liaises with counsel throughout the process as necessary, apprising them of the progress or eliciting assistance on an issue. Usually, mediators do not contact the lawyers unless directed to do so by the clients. More commonly, the clients seek the advice of their lawyers from time to time during the process, or the lawyers call the mediator.
- **Step #9:** The mediator assists the parties in reaching an agreement on one or more essential terms. The mediator summarizes the details of the agreement and forwards it to the clients or lawyers for their comment and input. This may be in a letter or basic outline called a "memorandum of understanding." Some mediators prefer to draft the entire agreement itself. If not already prepared by the mediator, the lawyers draft the agreement.
- **Step #10:** Each lawyer meets with their client and provides independent legal advice. The lawyers exchange comments, copying the mediator as necessary.
- **Step #11:** If necessary, revisions to the agreement are discussed and, if necessary, mediated and resolved.
- **Step #12:** Final revisions are made and the agreement is signed by the parties in the presence of their respective lawyers.

The process described above is followed generally by privately retained mediators who are not working through the family court mediation centers. The process used by mediators at courthouses that offer mediation is often considerably different, and lawyers should be familiar with the procedure used at court if the parties are contemplating using such a service.

2.6 Lawyer's role

Of utmost importance is the lawyer's responsibility to provide independent legal advice to the client. There is often a tendency on the lawyer's part to refrain from fully advising a client in the context of a mediated settlement as one would in a traditional litigation setting. The tension arises when the lawyer feels the client would be better protected if a particular clause was removed from or added to the memorandum of understanding when the client has already agreed in principle to something different in mediation. The tension is heightened when

the client very much wants to minimize legal and mediation costs and “just get it over with.” In the face of such pressure, the lawyer must be ever mindful of the prime responsibility to advise the client fully of the legal aspects of the proposed agreement.

While not an exhaustive list, the following summary highlights the lawyer’s roles and responsibilities in advising a client engaged in the mediation process:

- **Selecting the mediator:** The lawyer can help the client with such decisions as assessing the mediator’s qualifications, evaluating their professional experience, checking out references, determining costs and method of payment, obtaining availability, finding out any preconceived ideas about custody, or deciding between open and closed mediation.
- **Providing independent legal advice:** Each participant should understand their rights prior to negotiating the terms of an agreement. If this is done, clients are more likely to reach agreements that are reasonable as well as durable.
- **Preparing the client:** The lawyer should ensure the client has a clear understanding of the goals of mediation and the process and understands that the mediator is a facilitator, not a legal advisor, and the rules and goals in mediation differ from the adversarial process.
- **Demonstrating an ability to work in the mediation structure:** The mediator may seek out the lawyers’ assistance with a particular problem, practical or legal, and the lawyer must be prepared to work with the other lawyer and the mediator to overcome it. Part of this process may involve the lawyers offering their interpretations to the mediator (often a non-lawyer) of certain aspects of the law.
- **Demonstrating an ability to know what services to offer:** Understanding the dynamics of mediation and helping the client decide whether to enter mediation is key. The lawyer must understand that mediation is not appropriate in every case or for every issue and must avoid agreeing to the process when they believe it will not work.
- **Providing advice on selecting the mediator:** At a minimum, the lawyer should have some knowledge of the person to whom the client is being referred and an appreciation of their suitability for the assignment. Most importantly, the lawyer should be actively involved in the selection of the mediator and advising the client not to participate if they feel the mediator is not right for the case.
- **Avoid interfering with the mediator and the mediation process:** Lawyers should deal with matters as they arise and let the mediation run its natural course. They should refrain from becoming emotionally involved with the client, abstain from seeking to preserve control over “their” client, and

exercise restraint so that the adversarial process is not perpetuated.

The above summary is not an exhaustive list on all aspects of mediation.

3. Arbitration and mediation/arbitration

3.1 Definition and arbitrator’s role

Arbitration is a legal procedure where the parties agree to appoint a person, who becomes the arbitrator, to review the evidence and arguments of the parties and render a decision, called an award, which is binding.

In addition to the benefit of being able to select an experienced decision-maker, arbitration offers three other advantages. First, the parties have the ability to decide which steps they will take (examinations, affidavit of documents, conferences, documents they will exchange, and timelines); whereas in court, no such freedom exists. Second, unlike in traditional litigation, parties to an arbitration can not only choose their hearing date but usually have the hearing much earlier than having to wait for a trial. Third, like mediation, arbitration has the advantage of allowing for private resolution, thus minimizing the risk of exposing the parties and their children to public disclosure of intimate and potentially embarrassing matters.

3.2 Legislative basis — Arbitration Act, 1991

The *Arbitration Act, 1991 (Act)* provides a complete code for arbitrations in Ontario. An arbitrator’s jurisdiction is limited by court order or the document signed by the parties in which they agree to arbitrate, now referred to as the “family arbitration agreement” and previously known as a “submission to arbitration.”

An arbitrator has no inherent jurisdiction. Pursuant to the *Act*, the arbitrator has the following powers if not circumscribed by the parties or judge:

- to decide questions of law or refer such questions to court (s. 8(2));
- to rule on its own jurisdiction or on the validity of the *Act* (s. 17(1));
- to make an order for the detention, preservation, or inspection of property (s. 18(1));
- to determine the procedure to be followed during the hearing and to determine when and where it will be conducted, having regard to the parties’ “convenience” and other circumstances of the case (ss. 20(1) and 22(1));
- to appoint an expert to provide evidence before the arbitrator (s. 28(1));
- to administer an oath or affirmation (s. 29(1));

- to require a witness to testify (s. 29(3));
- to make interim decisions (s. 41);
- to dismiss a claim where a party fails to cooperate or to proceed without the party who is delaying and/or not cooperating (ss. 27(3)–(4)); and
- to award costs including the arbitrator’s fees (s. 54(1)).

The clear intention of the *Act* is to require parties to use the dispute resolution mechanism that they agreed to when they contracted for it. When crafting the terms of an arbitration, lawyers have the ability to participate in a process that is flexible and accommodating to the parties and counsel. This flexibility is subject to ss. 19(1)–(2) of the *Act*, which require the parties to be treated “equally and fairly” and be given an opportunity to present their case and respond to the other side’s case. Under s. 3, an agreement to arbitrate may not vary or exclude, among other things, these two criteria, which are commonly called the “rules of natural justice.” The following principles relating to the rules of natural justice apply to the conduct of all arbitration hearings (Terrence W. Caskie, “Alternative Dispute Resolution” *Pre-Trial Strategies for Family Lawyers: Creating the Right Foundation For Settlement*):

- Adequate notice of the time and place of hearing must be given.
- Each party must be allowed to lead evidence and to cross-examine.
- Each party must be allowed to make submissions and to respond to the other party’s submissions.
- The hearing must be conducted in the presence of both parties.
- The process must avoid evidentiary surprises for each party.
- The process must ensure each party knows clearly the case to be met.
- Each party must be allowed to make submissions if the arbitrator desires to consider evidence that has not been put into the record by either party.

Treating the parties equally and fairly includes listening fairly to both sides, giving the parties a fair opportunity to contradict or correct prejudicial statements, not receiving evidence from one party behind the back of the other, and ensuring that the parties know the case they have to meet. An unbiased appearance is, in itself, an essential component of procedural fairness.

3.3 Amendments to Arbitration Act, 1991 – Family Statute Law Amendment Act, 2006 (Bill 27)

In February 2006, the *Family Statute Law Amendment Act, 2006 (FSLAA)* was passed by the Ontario

government. The *FSLAA* amended the *Family Law Act (FLA)* and the *Act* with respect to arbitrations and was proclaimed into law on April 30, 2007.

Born of the government’s desire to ensure that faith-based arbitrations are not enforceable in Ontario, the *FSLAA* fundamentally changes the procedure and substance of how family arbitrations are conducted and enforced in this province.

Prior to its passing, Ontario law did not differentiate between family law arbitrations and other types of arbitration under the *Act*. Parties to an arbitration agreement were able to choose the governing law, including whether the parties could appeal the award. The *FSLAA* creates a new regime for Ontario family arbitrations by amending the *Act* and the *FLA*. Some of the features of this regime are the following:

- The new term “family arbitration” applies only to processes conducted exclusively in accordance with Ontario law or another Canadian jurisdiction. Other third-party decision-making processes in family matters are not considered family arbitrations and will have no legal effect (*Act*, ss. 1, 2.2, and 32(4); *FLA*, s. 59.2).
- Both the *Act* and the *FLA* now apply to family arbitrations, and the latter will govern in case of a conflict between the two statutes (*Act*, s. 2.1(2); *FLA*, s. 59.1).
- Family arbitrations must be conducted pursuant to a “family arbitration agreement,” which must contain independent legal advice, be signed by both parties, and be witnessed. A mediation-arbitration agreement is a family arbitration agreement that provides for mediation before arbitration and, if the mediation fails, the mediator arbitrating the dispute (*Family Arbitration*, made under the *Act*, O. Reg. 134/07, s. 1).
- Family arbitration agreements are now classified as “domestic contracts” under Part IV of the *FLA*, which means they must comply with s. 56(4) of that legislation. This means a court may, on application, set it aside if a party failed to disclose significant assets and liabilities, if a party did not understand the nature and consequences of the agreement, or otherwise in accordance with the law of contract (*FLA*, s. 51).
- A “secondary arbitration” is where an arbitration is conducted in accordance with a separation agreement, court order, or previous arbitration award that provides for the arbitration of possible future disputes relating to the ongoing management or implementation of the agreement, order, or award (*FLA*, s. 59.7(2)).

Secondary arbitrations still require a written family arbitration agreement, but it is not necessary for the parties to receive independent legal advice before participating (*FLA*, s. 59.7(1)2).

- Parties to a family arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of the *Act* except certain procedural requirements, including the right to appeal (*Act*, s. 3.2).
- Arbitration awards will now only be enforceable under the *FLA* by way of motion or application to the Family Court of the Superior Court of Justice or Superior Court of Justice, as the case may be, on notice to the opposing party. Provided the materials set out in the *FLA* are filed and the criteria fulfilled, the court shall make an order pursuant to its terms (*FLA*, s. 59.8; *Act*, s. 50.1).
- Power is provided to make regulations to require arbitrators to be members of a specified dispute resolution organization, undergo training, submit reports, keep records, and inquire into matters such as power imbalances and domestic violence (*Act*, s. 58).

Family Arbitration, which came into force on April 30, 2008, requires every mediation/arbitration agreement made on or after September 1, 2007, to contain clauses confirming the arbitration will be conducted in accordance with Ontario law, details in respect of appeals from an award, and a certificate signed by the arbitrator confirming that he or she will treat the parties fairly and equally, he or she has received the appropriate training approved by the Attorney General, and the parties were screened for power imbalances and domestic violence (s. 2). The regulation also, for the first time, requires arbitrators to keep a record of the arbitration and file a report about the award to the government (ss. 4–5).

3.4 The process

As in mediation, there is no one correct way of setting up an arbitration. The following, however, is an outline of how a common family-law arbitration usually proceeds, with mediation as a precursor:

- **Step #1:** Lawyers discuss the feasibility of arbitration with their clients.
- **Step #2:** Lawyers propose and agree upon an arbitrator and, ideally, the sharing of cost.
- **Step #3:** Lawyers have a conference call with the arbitrator. In the call, the major issues are discussed, a date is set for the mediation, and the briefs and agreements on retainers and disclosure are delivered.
- **Step #4:** The arbitrator prepares and sends to counsel a draft family arbitration agreement that contains a list of the issues to be decided, the name of the arbitrator, the time and place of the arbitration, information on the procedure to be employed, a waiver of the arbitrator's liability, the rights of appeal, and details of the arbitrator's fees.
- **Step #5:** The lawyers exchange mediation briefs and file a copy with the arbitrator.
- **Step #6:** The lawyers and clients meet with the arbitrator for mediation. The arbitrator ensures the family arbitration agreement has been signed, the parties have been screened for domestic violence issues, and the arbitrator's certificate has been signed. The parties then spend a day or half-day with the arbitrator trying to mediate the issues in dispute. The mediation can be extended to another day if the parties agree or the arbitrator feels the dispute can be resolved.
- **Step #7:** If a settlement is reached, the arbitrator will prepare a memorandum of understanding or the parties will sign minutes of settlement or a separation agreement. If no settlement is reached, the lawyers set up a date to discuss how the arbitration will unfold.
- **Step #8:** After a few calls and/or meeting, the format of the arbitration is set. The format of an arbitration can range from a written decision made after the parties submit a brief to a full-blown hearing, identical to a trial.
- **Step #9:** The arbitrator prepares and releases the award with reasons.
- **Step #10:** The arbitrator files the report with the government.

It is increasingly rare to have a case involving arbitration without a prior mediation session. However, those cases do still exist (such as when a client hires a lawyer for an arbitration concerning the implementation of one aspect of a custody and access agreement). The arbitration proceeds in the same way as above minus the steps relating to mediation.

3.5 Preparing for the arbitration hearing

Other than preparing for and presenting the actual case during the arbitral hearing, the lawyer must devote significant time and attention to preparation.

Well-prepared counsel and arbitrators canvass all of the important issues in advance, typically during a few conference calls. During these calls, they work out the precise manner in which the hearing will proceed, failing which the arbitrator can make an award on procedural matters, including the following:

- **Identification of the parties:** Who is the applicant? Who is the respondent? Who will go first in terms of presenting evidence?
- **Definition of the issues:** If not already contained in the arbitration agreement or court order, what issues will the arbitrator decide?
- **Details of hearing:** Principally, these are the exact time, date, and location of the hearing.
- **Pleadings:** If litigation has commenced, are the pleadings sufficient? If not, the arbitrator may require the parties to submit a statement on the points in issue, their position on each, and the relief

sought. Any documents relevant to the statement may be attached.

- **Financial statements/net family property statements:** Are the existing statements sufficient or are fresh statements required? If so, timelines for their exchange should be established.
- **Disclosure:** Is additional disclosure required? If so, timelines for its exchange should be established.
- **Sanctions for non-compliance:** How will the arbitrator deal with a party who does not comply with timelines or is uncooperative in some other manner?
- **Temporary proceedings:** Is there a need for a temporary step or order to be conducted or made before the main hearing?
- **Witnesses:** Who will the witnesses be, what will the timelines be for the exchange of witness statements, and will a “summons to witness” be required for any of them? Additionally, will their evidence be under oath, other affirmation, or not?
- **Expert evidence:** Has any expert evidence been obtained? Should a joint or third party expert be retained?
- **Settlement meeting:** Should a settlement meeting be held prior to the hearing, and if so, will it be conducted by the arbitrator or another third person unfamiliar with the case?
- **Final nature of award:** Will the final award be appealable only on a question of law, question of fact, question of mixed fact and law, or a combination thereof? The parties should canvas whether a court reporter will be required so that a transcript can be prepared.
- **Format of evidence:** Who will go first, and when will the arbitrator be able to ask questions? The common practice is that the arbitrator allows the evidence-in-chief, the cross-examination, and reply all to be completed before asking any questions and then allows each party to ask any questions which arise out of the arbitrator’s questions.
- **Rules of procedure and evidence:** What rules of procedure and rules of evidence will be used at the hearing? Will the parties agree that certain types of hearsay evidence may be admissible?
- **Costs:** If not already covered in the family arbitration agreement, what is the arbitrator’s hourly rate and retainer? Will the parties grant the arbitrator the ability to allocate costs depending on the award? In addition, the provisions of s. 54(5) of the *Act*, which deals with offers to settle, should be discussed.

The arbitrator will then commit everything that was agreed upon to writing and send a copy to counsel. Any errors or clarifications should be immediately brought to the opposing side’s attention. If all of the above are sufficiently completed, the parties, counsel, and

arbitrator will benefit from a well-organized and efficient arbitration.

3.6 Mediation/arbitration

A popular variation on the strict arbitration model is “mediation/arbitration,” commonly known as “med/arb.” Mediation/arbitration is a two-step process whereby the parties retain one person to assist them in reaching a negotiated agreement, failing which they confer on that person the right to make a binding decision.

The mediation/arbitration process has advantages and disadvantages. Like pure mediation, the process is private, confidential, and offers parties the option of selecting an experienced person to help them reach an agreement in a setting and manner entirely of their own choosing. The arbitration component is designed to allow for a relatively quick and final decision to be made by the same person in the event an agreement is not achieved, thus saving time and, hopefully, money. Proponents also assert that since at the end of the mediation the parties usually know the mediator’s stance on an outstanding issue, it is more likely they will save themselves the time and expense of a hearing and promptly settle.

Critics point out that mediation and arbitration by the same person is inherently incompatible because while an arbitrator is required by the *Act* to act fairly and impartially, a mediator’s job is to encourage settlement, which may or may not be consistent with a party’s rights under law. They argue that when negotiating the issues, the parties will inevitably have their eye towards what the mediator thinks and believes in order to persuade him or her to a particular point of view owing to the fact that at the end of the day the decision will not be theirs to make. An additional critique is that the mediator may glean information from one side during a caucus that may not be shared with the other side. If the mediation is not successful and the case is arbitrated, there is a risk the arbitrator may rely on that information in reaching a decision. Proponents of the process counter that in this regard, the arbitrators are bound to make an award based solely on the evidence presented and are not unlike a judge in a *voir dire* who is trained to exclude that which was heard during the *voir dire*.

Counsel who proceed with mediation/arbitration must be aware of s. 35 of the *Act*, which specifically prohibits arbitrators from conducting any part of the arbitration as a mediation or “conciliation process.” This provision can be waived in the arbitration agreement.

3.7 Rights of appeal, judicial review applications, and standard of review

Prior to the passing of the *FSLAA*, the parties to an arbitration had the freedom to decide whether to waive the right to appeal. The *FSLAA* has now amended the *Act* such that any provision in a family arbitration agreement that purports to exclude or vary s. 45 of the *Act* is of no force and effect (s. 45(6)). Section 45 provides as follows:

45. (1)— If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

(2)— If the arbitration agreement so provides, a party may appeal an award to the court on a question of law.

(3)— If the arbitration agreement so provides, a party may appeal an award to the court on a question of fact or on a question of mixed fact and law.

(4)— The court may require the arbitral tribunal to explain any matter.

(5)— The court may confirm, vary or set aside the award or may remit the award to the arbitral tribunal with the court's opinion on the question of law, in the case of an appeal on a question of law, and give directions about the conduct of the arbitration.

The “court” is defined as the Superior Court of Justice or the Family Court of the Superior Court of Justice (s. 45(6)).

The amendments have no effect on arbitration agreements that are silent with respect to appeals or where the parties specifically provide for an appeal on

- the law pursuant to s. 45(2);
- a question of fact alone; or
- a question of mixed fact and law pursuant to s. 45(3).

It is only where the parties purport to waive their right to appeal that there will be a change. In the past, a waiver was effective. The *Act* now invalidates the waiver so that there will be a right of appeal with leave pursuant to s. 45(1) if the agreement was silent on the right of appeal or if for some reason there is no agreement (e.g., the parties attended arbitration as a result of a consent order made in court).

It is not easy to overturn an arbitrator's decision—nor should it be. As noted by Blair J. in *Ontario Hydro v. Denison Mines Ltd.*:

[The *Arbitration Act, 1991*] entrenches the primacy of arbitration proceedings over judicial proceedings, once

the parties have entered into an arbitration agreement, by directing the court, generally, not to intervene, and by establishing a “presumptive” stay of court proceedings in favour of arbitration.

With respect to the standard that should be applied on a review of an award by an arbitrator, it is established law that a court will not interfere with an arbitrator's award unless it is satisfied that the arbitrator acted on the basis of a wrong principle, disregarded material evidence, or misapprehended the evidence. A party may also apply to have an award set aside on any one of the following “judicial review” grounds, all of which are enumerated in s. 46 of the *Act*:

1. A party entered into the arbitration agreement while under a legal incapacity.

2. The arbitration agreement is invalid or has ceased to exist.

3. The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement.

4. The composition of the tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with the *Act*.

5. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.

6. The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator.

7. The procedures followed in the arbitration did not comply with the *Act*.

8. The arbitrator committed a corrupt or fraudulent act, or there is a reasonable apprehension of bias.

9. The award was obtained by fraud.

10. The award is a family arbitration award that is not enforceable under the *FLA*.

There have been only a few reported cases where an arbitrator's award made in a family law case was set aside pursuant to s. 46(6): *Duguay v. Thompson-Duguay*, *Hercus v. Hercus*, and *Kainz v. Potter*.

In *Duguay*, the parties had previously entered into an agreement in which they agreed to arbitrate any access disputes. The agreement also provided the father would pay child support of \$600 per month. The father submitted the issue of access transfer arrangements to arbitration. The arbitration was conducted by a social worker. It began with open mediation and ended with arbitration after no agreement was reached. The mother refused to take part in the arbitration because she lost confidence in the social worker's impartiality and

fairness. The arbitration went ahead, and an award was made in favour of the father. The mother refused to follow the award, and the father brought an application to enforce it. The mother then brought an application to set the award aside and change the settlement agreement provisions for access and child support.

Perkins J. ruled in favour of the mother. He found that the arbitrator appeared to compromise his ability to decide impartially by proceeding in the mother's absence and that it was "incumbent" on the arbitrator to help the parties reach a "new agreement" before proceeding to arbitrate. Even though the parties agreed to (but did not sign) a "dispute resolution agreement" drafted by the mediator/arbitrator that stated that the mediator/arbitrator would determine when the mediation had concluded and that the fact that the mediator/arbitrator had mediated could not serve as the basis for a challenge to the arbitration, the court found that the arbitrator should not have proceeded to arbitrate absent express agreement from both parties.

A similar decision was reached in *Hercus*, although there were clear findings in that case that the mediator/arbitrator failed to treat the mother "fairly and equally" as required in s. 6 of the *Act* by not giving her sufficient notice and requiring her to state her position on certain issues before informing her of the father's proposed changes to the parenting plan. Nonetheless, Templeton J. agreed with Perkins J.'s reasoning in *Duguay* in finding that where the mediator/arbitrator declares the mediation at an end, it is incumbent on him or her to reach a new agreement between the parties.

To many, both decisions seem at odds with the fundamental essence of mediation/arbitration, for they seem to suggest that one party can avoid the arbitration portion of the mediation/arbitration by simply withdrawing before it begins. Commentators have voiced their concern about the practical impact of requiring parties to sign a new agreement on appointing an arbitrator when one of them has lost confidence in that person to arbitrate. Others have sought to explain the decision by pointing to the fact that in *Duguay*, the parties did not sign the dispute resolution agreement and observing that the social worker's position (it was the same arbitrator in both cases) was not represented before the court. Nonetheless, most troubling is that the court's *obiter* in *Duguay*, which is followed in *Hercus*, the *Act*'s enforcement clauses "are not framed particularly for family law, especially not for custody and access matters." This has left many with the impression that arbitral awards are not as "final" in custody and access cases as in other kinds of cases.

In *Kainz v. Potter*, the court set aside an arbitrator's access award because he allowed "unchecked and unjustifiably interventionist conduct" by the husband and his lawyer during the hearing, which resulted in the unrepresented wife not being treated fairly or equally. The procedural and evidentiary flaws committed by the (non-lawyer) arbitrator were so flagrant and manifest as to deny the wife equality and fairness. In admonishing the arbitrator's conduct, which essentially allowed the husband and his lawyer to "run the show" at the hearing, the court offered the following guidance for dealing with self-represented parties:

[S]elf-represented parties are entitled to receive assistance from an adjudicator to permit them to fairly present their case on the issues in question. This may include directions on procedure, the nature of the evidence that can be presented, the calling of witnesses, the form of questioning, requests for adjournments and even the raising of substantive and evidentiary issues.

In a recent case, the court varied an arbitral award following arbitration on custody, access, and child support. Full recovery costs were ordered to the wife. The husband's appeal was allowed in part on the grounds that the arbitrator should not have awarded full recovery costs when success was divided on custody and access issues. The court found the arbitrator erred in considering the husband's unreasonable conduct where such conduct was unrelated to the issues where success was divided. The award was varied to grant the wife full recovery costs only on the child support and income determination aspects of the process.

However, as noted above, with the passage of the *FSLAA* into law in Ontario, parties to a family arbitration agreement are no longer permitted to waive the right to appeal on a question of law. While on the surface, the amendments seem to erode the finality of arbitration decisions, in fact there are very few cases where such an appeal will succeed. Hopefully, notwithstanding the changes to the *Act*, this will continue so that parties to an arbitration can be secure knowing their case will be finalized without further litigation.

3.8 Conclusion

The mediation/arbitration process has advantages and disadvantages about which lawyers need to be keenly aware. Like regular mediation, the process is private, confidential, and offers parties the option of selecting an experienced person to help them reach an agreement in a setting and manner entirely of their own choosing. The arbitration component, however, is designed to allow for a relatively quick and final decision to be made by the same person in the event an agreement is not achieved, thus saving time and, hopefully, money.

Lawyers need to be very clear and careful when drafting ADR clauses in their separation agreements.

Finally, lawyers should only use a very experienced mediator/arbitrator who requires the parties to sign a mediation/arbitration agreement.

4. Collaborative family law

4.1 Definition

Collaborative family law (CFL) can be most easily described as a way of practising law where the lawyers for both clients agree to assist them in resolving conflict using cooperative strategies rather than adversarial techniques and litigation. Above all, the commitment to work collaboratively is reflected in an agreement between both lawyers and their respective clients that stipulates that should settlement fail, the lawyers will withdraw and not participate in litigation. A comprehensive Ontario-crafted definition is as follows:

Collaborative family law is a dispute resolution process in which the parties and their lawyers commit themselves to the realization of a negotiated outcome. They agree that litigation will not be commenced while they are negotiating and that, in the event they are unable to negotiate a resolution of their dispute, neither lawyer will be eligible to represent his or her client in any subsequent litigation. In the process itself, the participants communicate to promote the maximum exchange of information, to reveal all concerns of the parties, to generate an array of creative ideas, and, ultimately, to agree upon the terms and conditions of a mutually acceptable settlement that satisfies the interests of both parties.

CFL is not mediation. In mediation, the neutrality of the mediator is an essential element. A CFL lawyer is not neutral. The lawyer not only provides advice, but is an educator, legal resource, and watchdog for their client, as well as guardian of the integrity of the process.

4.2 Key principles and process goals

The principles and process goals of CFL present markedly different ways of practising family law:

- **Proactive participation:** The clients are responsible for and intimately involved in the resolution of their separation issues. As opposed to counsel fiercely advocating on behalf of clients, clients in CFL voluntarily work with their lawyers to understand the legal consequences of their separation for themselves, the other party, and their family.
- **Interest-based understanding:** Unlike the adversarial process, the CFL model promotes understanding of the other person's interests and concerns, the rationale being that when parties understand each other, trust is fostered and hostility thereby reduced. The underlying principle

is that when each person fully acknowledges what is important to the other, tries to understand the other, and is understood by the other, creative solutions often result.

- **Cooperative resolution:** The clients and the lawyers all commit to a cooperative resolution to ensure an enduring agreement. A key component is they agree that litigation is not an option for resolution. Instead, participants strive for common ground instead of focusing on differences. Negotiations are resolved by problem-solving and cooperative strategies rather than adversarial techniques. The clients and lawyers encourage each other to think “outside the box” and create solutions that although at times may be beyond the law, maximize solutions for both sides.
- **Multi-disciplinary team effort:** Central to CFL is the idea that clients and their lawyers work as a team. The team may also include neutral experts for any issue that requires specific expertise, e.g., child specialists, coaches, mental health professionals, or financial specialists/counsellors. The lawyers work with these individuals, modeling an atmosphere of cooperation and respect that allows the clients to gain from their knowledge, skills, and resources and helps them solve complicated issues.

The agreement by all parties that the lawyers' retainer is limited to settlement negotiations and that neither lawyer may represent either party in court is crucial to the commitment that both clients and their counsel are strongly motivated to reach a settlement. The theory is that once the option of litigation has been removed, counsel are free from noting how a particular document can be used at trial or how a client would fare as a witness, thus liberating the lawyer to focus on the goal at hand. The phenomenon has been described by one CFL expert as follows:

If the lawyers can still consider unilateral resort to the courts as a fallback option, their thought process does not become transformed; their creativity is actually crippled by the availability of [c]ourt and conventional trials. Only when everyone knows that it is up to the four of them and only the four of them to “think their way” to a solution, or else the process fails and the lawyers are out of the picture, does the special “hyper creativity” of [the] collaborative law [process] get triggered. At the moment when each person realizes that solving both clients' problems is the responsibility of all four participants, that is the moment when the “magic” can happen.

4.2.1 Good faith negotiations

The most important feature of the CFL lawyer's code of conduct is the requirement of utmost personal integrity and to negotiate at all times in good faith. Specifically, each side agrees to the following:

- Neither will take advantage of the other's mistakes.

- Neither will threaten the other.
- Neither will insult the other nor dwell on the negative aspects of the other's character.
- Each will make full disclosure of financial and other relevant information.
- Neither will intentionally delay the process in order to obtain some perceived benefit.
- Each will encourage the highest good faith problem-solving behaviour in themselves and in the other side.
- Each will behave with and demand the highest integrity from themselves and the other side.
- The lawyer must withdraw in the event his or her client withholds pertinent information, financial or otherwise, or persistently demonstrates bad faith in the process.

Bad faith behaviour includes refusals to provide full disclosure, unreasonable delays, breach of any temporary agreements, unilateral action to the detriment of the other party, persistent disrespect toward the other participants, and withholding of necessary funds to a dependant party required to meet living expenses or to pay legal fees during the process. Such behaviour should automatically warrant the lawyer's withdrawal from and termination of the CFL process.

It is not surprising that many cases are not well suited for CFL. Lawyers should be very careful about pushing a client into CFL where the circumstances strongly indicate that good faith and full disclosure will not be honoured. Lawyers should know that not every CFL case leads to resolution, and for those parties, a duplication of legal fees and time will inevitably ensue.

4.3 The participation agreement

Before the negotiations begin, the principles discussed above are reduced to writing and signed by both clients and their lawyers in a document called a participation agreement. This document is important because it sets out the steps in simple language along with a list of the commitments made. The lawyer will usually give a copy of the participation agreement to the client when CFL is first discussed and review it again before the process begins and at the outset of the first settlement meeting. It is always signed by both clients and their lawyers and may be attached to the separation agreement to confirm the ground rules utilized in reaching agreement. Generally, it contains the following provisions:

- The clients and lawyers agree to settle the outstanding issues in a non-adversarial manner using interest-based negotiation.
- The clients will rely on their lawyers to assist them in reaching a mutually agreeable settlement.
- The clients and lawyers will act in the children's best interests to promote a positive, caring relationship between the children and both parents and use their best efforts to minimize any emotional damage to the children as a result of the separation, including refraining from discussing separation issues in their presence unless both parties agree.
- All written and verbal communications between the participants during the settlement meetings and elsewhere will be respectful and constructive, and neither will take advantage of any errors made by the other.
- Full and voluntary disclosure will be made throughout.
- Any neutral experts will be retained if needed.
- Any temporary agreements will be reduced to writing and executed, which may then be converted into court orders in the event of withdrawal from or termination of the CFL process.
- The grounds and procedures for withdrawing from or terminating the CFL process will be as agreed to.
- Neither client will incur any debts or liabilities for which the other may be held responsible.
- The parties will maintain the *status quo* on issues relating to children (e.g., their ordinary residence will not be changed nor will they be removed from the province), and neither will dispose of any assets, alter their life or health insurance coverage, or make any other unilateral change during the process without the consent of the other.

4.4 The process

Lawyers who practise CFL are strongly committed to creating a safe process that does no further harm to separating families. The CFL process moves by carefully managed four-way meetings, preceded by considerable groundwork between lawyer and client and between lawyer and lawyer. The lawyer's job is demanding. In addition to the usual identification, investigation, and development of issues and proposals for settlement, they must work with the client and the other lawyer to anticipate and manage conflict and guide the negotiation process. At the same time, while ensuring the client is aware of their legal rights and obligations, the lawyer must also encourage the client to take a considered and broad view in setting goals and priorities and must teach the client how to use interest-based, rather than positional, bargaining.

Before any negotiating session, the lawyers usually meet and share information that will assist them both in managing conflict and in setting the agendas for the four-way meetings. The skill here is to manage agendas in such a way that the clients experience success during the early meetings, thereby building in the clients a sense of confidence, safety, and competency that will serve them

as more difficult issues are tackled. One central difference between four-way meetings in CFL and those in traditional four-way meetings is the dominant role the clients play in the former. As opposed to traditional negotiations where the clients offer little input and the discussion is largely driven by the lawyers, in CFL the clients are the prime authors of the shape and direction of the meeting. The lawyers, while still the legal advisors to the clients, can be more aptly described as “negotiation exemplars” as opposed to actual negotiators, and further, when they do negotiate, they stop short of taking control away from the clients.

A second difference is that unlike traditional four-way meetings, in CFL the lawyer is expected and even encouraged to discuss the issues directly with the opposing client. While this often strikes the uninitiated lawyer as something to resist, its success is pivotal to the creation of a smooth flow of communication between both clients and lawyers and to the full use of the dynamics of four-way communication.

Lawyers have found the following six steps helpful in finalizing a separation agreement negotiated through CFL:

- **Step #1 — Consulting with the client for the first time:** The lawyer listens to the client’s concerns, reviews the process options, talks about the client’s goals, screens for potential barriers (i.e., safety issues, mental-health concerns, abuse, substance abuse, etc.), explains the law as one option, signs the CFL retainer, provides copy of the draft participation agreement, and provides the client with resources for information on CFL.
- **Step #2 — Contacting the other CFL lawyer for the first time:** The lawyers meet, either by phone or in person, to begin the team approach to collaborative problem solving, identify any immediate concerns, agree to exchange disclosure necessary to solve the immediate issues, discuss what will happen at the first settlement meeting, confirm which participation agreement will be used and who will prepare it, and set the date and place for the first settlement meeting.
- **Step #3 — Preparing the client for the first collaborative meeting:** The lawyer explains the tasks and roles of lawyers and clients, teaches the client appropriate communication and negotiation skills, reviews the protocol and ground rules for settlement meetings, discovers the client’s interests, and helps prioritize them. The lawyer also explains the client’s legal rights and obligations as one of many settlement options.
- **Step #4 — Attending the first collaborative meeting:** The clients and lawyers are introduced. The key aspects of the participation agreement are reviewed, and it is confirmed who will record the minutes. The clients deal with any immediate

substantive and procedural concerns, and their objectives, interests, and concerns are addressed. Decisions may be made as to what financial disclosure is to be shared and the timeframes for its exchange, issues are prioritized, and the date and place of the next meeting are set. After the meeting, the lawyers debrief with their clients and each other.

- **Step #5 — Continuing the process toward agreement:** Further meetings are arranged and conducted to resolve all issues on the agenda; homework is assigned between sessions and reviewed at the next session; all required information is exchanged; neutral experts are retained if necessary; draft outline agreements are sometimes prepared to move the process forward; impasses are dealt with, either by negotiation, expert opinion, mediation, or arbitration; notes of meetings are exchanged; and the process is continued until all issues have been resolved.
- **Step #6 — Documenting and signing the separation agreement:** The lawyers jointly prepare the separation agreement collaboratively using language chosen by the clients wherever possible. They ensure the agreement addresses the clients’ identified needs ensuring it will work in practice and be legally enforceable.

4.5 Lawyers’ roles and responsibilities

An important element of CFL is that the lawyers commit to manage conflict, emotional issues, and relationship issues creatively. To do so effectively, the lawyer needs a whole new array of understandings and skills, and needs to learn to work with non-lawyer professionals. Without this new “tool box,” the lawyer runs the risk of promising more than can be delivered and disappointing clients. The “retooling” needed to become excellent at collaborative law can be described in four stages: retooling how one thinks, speaks, and behaves; retooling how one relates to the client; retooling how one relates to the other lawyer, the other party, and other professionals; and retooling how one conducts settlement meetings. This retooling requires ongoing professional training and often involves dramatic changes in how lawyers typically interact with one another and manage their files. Increasingly, special CFL training programs are available for lawyers who want to be able to deal with some or all of their cases this way.

Above all, lawyers involved in CFL should do the following:

- Advise their respective clients of the law that applies to their circumstances. The process of giving legal advice, analyzing legal problems, and suggesting solutions serves the purpose of collaborative practice as well but is carried out in a different context, namely, by the way negotiations are conducted.

- Model honesty, mutual respect, and dignified behaviour.
- Guide clients through a process of cooperative conflict by using disagreement as a way to find creative solutions to problems.
- Get to know their own client as well as the other client, and establish a rapport with both.
- Model listening skills for each party so that the interests of both are promoted, and in so doing, represent the client's interests while mediating the other party's interests as well.
- Help identify the issues and concerns of each party.
- Bring stability and reason to emotionally charged situations, and serve as agents of reality for unreasonable clients.
- Cooperate fully with each other to provide all necessary disclosure and discovery.
- Assist the client in organizing disclosure documentation and in understanding the disclosure from the other spouse.
- Assist the parties to analyze consequences of possible choices and competing values. This includes coaching the client in "debriefing" meetings, working with them to understand any barriers they may be experiencing, and referring them to outside resources that can assist them to move forward in the process.
- Respect choices made by a client even if different from what the law may provide or offer.
- Use clear and neutral language when drafting and speaking.
- Understand that court is not an option, and refrain from using adversarial techniques or tactics.
- Remain committed to finding effective ways to assist the parties in reaching agreement and overcoming impasses by using mediation or neutral experts to provide a third opinion.

4.6 Advantages and disadvantages

Lawyers should assess each situation and provide each client with information about all the processes available to resolve their issues. CFL is not for every client or for all situations. Some clients want others to make their decisions for them; others choose to use their financial resources and energy to use the courts to achieve their goals. There are also clients who do not want to compromise and are stuck in the traditional "win/lose"

mindset. There are also clients who maintain that their spouses are not trustworthy and are therefore determined to hide assets and income at any cost. Others suffer from clinical issues or serious drug and alcohol abuse. In these situations, CFL may not be appropriate, and traditional litigation, with all the rules and court sanctions, may be recommended to ensure the clients' rights are better protected.

Lawyers must determine whether a prospective client has or can develop the capacity to participate effectively in the CFL process. Clients must share a similar, if not mutual, commitment to work *with* rather than *against* each other. They must demonstrate an acceptance of their separation, a willingness to manage or at least try to learn to manage their emotions, an interest in the well-being of the other side, and a commitment to an honourable divorce process. They must value the benefits of maintaining their relationship, of taking a long-term view of the issues, and of retaining control over their own solutions. Clients must also understand that although designed to be successful, not every collaborative effort produces a settlement and that the time and expense that would be required to rehire a new lawyer and take the matter to court must be considered.

For those clients truly committed to open and honest negotiation, full and frank financial disclosure, and a strong desire to be flexible and creative in problem-solving, CFL is becoming, for many, the choice method of dispute resolution in the 21st century. The upsides are obvious: a negotiated agreement reached with less cost and none of the traditional conflict, lawyers for both clients working in an atmosphere of respect and cordiality, and the absence of the stress and uncertainty of litigation. Clients also have the benefit of confidentiality in that anything said in a CFL negotiated session cannot be disclosed without the consent of both parties. In this sense, CFL resembles closed mediation in that it provides the parties with the freedom to openly discuss options they may not otherwise be prepared to voice—with a lawyer by their side at all times. Finally, while critics would say that clients should never waive their right to litigate, clients should be reminded that participation in CFL does not mean that clients forfeit their right to go to court—only to do so without using their CFL lawyer.

Domestic contracts

1. Introduction

There are three types of domestic contracts that are permitted in Ontario, as set out in Part IV of the *Family Law Act (FLA)*:

- cohabitation agreements;
- marriage contracts; and
- separation agreements.

1.1 Cohabitation agreements

Cohabitation agreements are usually entered into by unmarried couples. They can be signed before they start cohabiting or while they are doing so. They can be stated to become marriage contracts if the parties subsequently marry. They can deal with all financial aspects of their relationship, including rights and obligations on its termination, but not custody or access.

1.2 Marriage contracts

These can be entered into prior to marriage or after marriage but before marriage breakdown. The same limits that apply to cohabitation agreements apply here.

Pursuant to s. 52 of the *FLA*, the following issues can be dealt with in a marriage contract:

- ownership in or division of property;
- support obligations;
- the right to direct the education and moral training of children but not the right to custody or access to children; and
- any other matter in the settlement of the parties' affairs.

However, a provision purporting to limit a spouse's right to possession of the matrimonial home is unenforceable, as are any other restrictions of a spouse's rights under Part II of the *FLA*.

Of particular importance to marriage contracts is s. 59.4, which provides that a family arbitration agreement and an award made under it are unenforceable unless the family arbitration agreement is entered into after the dispute to be arbitrated has arisen.

1.3 Separation agreements

These are by far the most common domestic contract. Virtually every separated couple who does not litigate to the point of a judgment and has anything that requires settling as a result of the separation will likely end up

with a separation agreement. They deal with all rights and obligations arising from the relationship and its breakdown, usually on a permanent basis.

2. Formal validity

The *FLA* contains the code for domestic contracts, starting with what is required as formal validity. They must be in writing, signed, and witnessed. Independent legal advice (ILA) is not a formal requirement, but is highly advisable to prevent challenges to the contract on other grounds. Where a lawyer feels that the party is not signing voluntarily, the agreement is unconscionable, adequate disclosure has not been provided, or any other ground upon which the contract may be attacked exists, the lawyer should recommend that the client not sign the agreement. If the client ignores the lawyer's recommendation and still wishes to proceed, the lawyer should generally decline to act. Please note that if a lawyer is unsure of what to do, he or she should seek advice from a senior member of the bar either directly or through an organization such as the Law Society or the Ontario Bar Association.

Parties do not have to be resident in Ontario to have a domestic contract to which Ontario law will apply. It must simply state that is their wish. If it does not, a domestic contract made outside Ontario is, under s. 58 of the *FLA*, governed by the proper law of the contract itself (that is, usually, the other state in which it was made) for the determination of the proper manner and formalities of the contract. But it is enforceable in Ontario if it meets our internal law, as discussed in this chapter.

3. Challenging domestic contracts

Section 56 of the *FLA* sets out the most common grounds relied upon to set aside a domestic contract, in whole or in part:

- A party to such a contract failed to disclose a significant asset or debt in existence when the contract was formed.
- A party failed to understand the nature and consequences of the agreement.
- Any other ground upon which an ordinary contract may be attacked.

Complete and honest disclosure will eliminate the first ground. It appears that this must include accurate values for assets and liabilities, as well as income; however, for cohabitation and marriage agreements, exact values are

less important so long as they are still reasonable. Independent legal advice will usually eliminate the second. The last basis includes fraud (which is usually a form of non-disclosure), duress, or undue influence. In 2004, the Supreme Court of Canada confirmed in *Hartshorne v. Hartshorne* that the unconscionability of a contract or term thereof can only be the basis of a successful attack if the deal is unfavourable to the challenging party and this result was caused by the other preying upon the weakness of the challenger. Both elements are required, i.e., it takes more than being a bad deal to set aside a domestic contract, especially regarding property provisions, if there has been full disclosure and ILA.

Hartshorne also stands for the principle that a certain degree of deference should be given to domestic contracts, since private parties should be able to reasonably rely on the arrangements that they have made for their financial well-being upon the dissolution of their marriage. The unconscionability of a contract is to be determined upon the breakdown of a marriage with regard to the financial needs, means, and other circumstances of the parties.

In 2008, the Ontario Court of Appeal opined in *LeVan v. LeVan* that even once grounds to set aside a domestic contract have been found under s. 56 of the *FLA*, the determination as to whether the contract should be set aside is a purely discretionary matter for the court. In this determination, fairness is an appropriate consideration. There is a positive duty on every spouse to make complete, fair, and frank disclosure of all financial affairs, even if there has not been a request for information. While a sworn financial statement may not be necessary, a statement of net worth with an indication of how that value was determined and including disclosure of all assets and income may suffice.

4. Overriding support terms of a domestic contract

This mainly pertains to support provisions. Under Part III of the *FLA*, unconscionable support provisions (which would include a release of support rights) may be set aside or varied by the courts (s. 33(4)(a)). Mere unfairness is insufficient. The unconscionable circumstances are assessed as of the date of the hearing.

Under the *Divorce Act*, the test set out in *Miglin v. Miglin* is used.

5. Independent legal advice

What should a lawyer do when a potential client presents the lawyer with a domestic contract that has already been drafted by the other side and is simply awaiting

execution? The first question that a lawyer must consider is whether ILA is adequate or if a recommendation of legal representation is required. In situations where there is time for negotiations and where there are complex issues with multiple options to consider, it may be more appropriate to recommend that the potential client obtain independent legal representation. Where time is short, where the parties have already negotiated most of the agreement, where the issues are few in number and degree of complexity, or where the contract comes to the lawyer as a *fait accompli*, a client may choose ILA. If ILA is adequate or the client waives the right to independent legal representation (which waiver has been reduced to or confirmed in writing), the lawyer may provide the client with ILA.

Assuming that ILA is appropriate and the lawyer is competent and does not have any conflicts in the matter, the lawyer providing ILA must

- explain the legal aspects of the domestic contract to the client; and
- satisfy himself or herself that the client understands the advice given.

A client who retains a lawyer for the limited service of ILA is still a client. The lawyer should not merely go through the motions of providing legal advice. As with any other client, the lawyer should open a file, confirm the client's instructions in writing, retain a copy of any relevant client documents that were reviewed, make notes of any meetings and advice given, docket the time spent, send a reporting letter and statement of account, and include the client's name in the lawyer's conflicts checking system.

The lawyer retained to give ILA with respect to a domestic contract should consider the following:

- The lawyer should get to know the client by exploring the current state of the client's relationship or marriage; the client's health; the net worths of both the client and his or her future, former, or current spouse; the existence of domestic violence; and the client's objectives for entering into the domestic contract.
- The lawyer should satisfy himself or herself that the client is signing the domestic contract freely and voluntarily, and not under duress, undue influence, or pressure from anyone. Any payments to the lawyer should come from the client only, and not from anyone adverse in interest.
- The lawyer should ensure that there has been complete financial disclosure, the contract accomplishes the client's objectives, the terms are certain and enforceable, all statutory and common-law requirements have been met, and the contract's provisions are not unconscionable.

- The lawyer should explain the nature of the agreement and review its effect, risks, and consequences. The lawyer should satisfy himself or herself that the client understands the advice given.

If the lawyer advises against signing the contract but the client wishes to proceed, it would be prudent for the lawyer to explain his or her advice in the presence of a witness and require the client to sign an acknowledgement, in front of the witness, that the client is signing the documents against the lawyer's advice.

Use of a checklist helps to ensure that all the issues are covered when discussing a domestic contract. It can also support the lawyer in successfully defending a negligence claim with respect to the ILA. A completed checklist should be placed directly in the client's file. A sample ILA checklist can be found on the LawPRO website.

Finally, an ILA certificate is usually appended to the end of the domestic contract, which is returned with the signed domestic contract to the other party's lawyer as proof that the client has received ILA. The ILA certificate normally certifies that the lawyer acted for the client and has explained the nature and effect of the domestic contract; acknowledges that the client understood the nature and effect of the agreement and that the client executed the agreement in front of the lawyer; and confirms that the client was entering the contract on his or her own volition, without any fear, threats, compulsion, or influence by any other person. As long as the lawyer can confirm the substance of the ILA certificate, the lawyer may sign it. In some circumstances, a lawyer may refuse to sign the ILA certificate where the client insists on signing the domestic contract against the lawyer's advice.

Representing a victim of domestic abuse

1. Introduction

From the moment a client advises that he or she has been a victim of domestic violence, the issue of violence impacts upon every decision in a family law file. This chapter discusses the issues that arise when a client has been a victim of domestic violence.

2. Initial disclosure of abuse

The first thing a lawyer must do when advised by a client that he or she has been a victim of domestic violence is attempt to assess existing and potential risks to the client and any children in the household. The significance of the alleged abuse will vary greatly depending on the frequency, type, and severity of the abuse. The lawyer should attempt to determine whether the abuse is escalating.

Victims of abuse often understate the extent of the abuse. They may do this because of embarrassment or fear, or as a coping mechanism. In some cases, abuse victims have simply lost the ability to recognize abuse. If someone has lived with abuse for an extended period of time, abusive behaviour may have come to seem like normal behaviour. To understand the extent of the violence, the lawyer must ask very specific questions to elicit information in order to gain an accurate understanding of the situation.

There are numerous issues to consider in cases of abuse. First is whether there is immediate physical risk to the client. If the parties are still residing together, is it safe for the client to return to the home? Does the client have a support system and an emergency system in place? If they are not residing together, is a restraining order necessary to ensure the client's safety? Should a report be made to the police?

If there are children, it must be determined if they are at risk. Have they also been victims of abuse? Have they witnessed abuse? In some cases, an abusive spouse uses threats about the children as a method of control, telling the victim that if he or she does something the abuser does not like (such as seeing a lawyer or leaving the marriage), the abuser will hurt or kidnap the children. Have such threats been made? Does the abusive partner have the means and opportunity to act upon them? Are the children's documents, i.e., birth certificates and passports, accessible?

The lawyer must not only consider the immediate risk but also recognize that the level of risk may change as

various steps are taken. For example, how will the abusive spouse react when served with pleadings? If the abuser is likely to become violent when served with pleadings, how can the lawyer ensure the client's safety?

Most lawyers have not received clinical training in respect of domestic violence and are not therapists. It is prudent for family lawyers to familiarize themselves with appropriate services within their community, for example, private therapists, clinics, and shelters, to whom they can refer clients to obtain necessary supports. This is a critical service for the client and an important way to avoid blurring professional boundaries and roles. In addition, clinical professionals may be able to offer assistance and guidance to both the client and the lawyer in developing appropriate ways to address the situation.

Independent evidence of the abuse will be extremely helpful if the parties end up in litigation. The lawyer should attempt to determine if such evidence is available. Are there people who witnessed the violence? If not, did the client ever report the violence to a doctor or a friend? Did the client ever call the police? If not, why not? If the victim has been struck recently, bruises or other marks may be visible. If so, photos should be taken.

Once the lawyer has an understanding of the nature of the abuse, the client's options can be discussed. In some cases, clients will choose to leave the home immediately and go to a shelter or stay with family or friends. If the client chooses to return home for even a short period, the lawyer should develop a safety plan with the client in case the client has to leave the home quickly. The client needs to think about where to go if required to leave quickly.

3. Mediation or litigation?

The lawyer will need to advise the client on how to enforce his or her family law rights. In most family law proceedings, lawyers recommend that clients attempt negotiations and/or mediation before commencing litigation. This is rarely appropriate in cases involving domestic abuse for both practical and psychological reasons. On a practical level, it is very unlikely that a victim of abuse can safely stay in the home while negotiation or mediation is attempted. Negotiating a separation is difficult and generates strong emotions including pain, anger, and betrayal. In many abusive situations, a client will not be safe once the abusive spouse realizes that the client intends to leave the relationship. If the victimized spouse has to leave the

home, there may be no time for negotiations or mediation. It may be necessary to obtain emergency relief from a court, possibly without notice, including a restraining order, an interim custody order, and interim support.

Even if the abuse victim is physically safe and financially self-sufficient, mediation is probably not appropriate. The fundamental problem with mediation in situations of abuse is that there is often a power imbalance between the abusers and victims, and the dynamics of abusive relationships do not lend themselves to fair or respectful negotiations. To protect themselves, many victims of abuse become appeasers in their relationships. They avoid expressing views that may provoke anger. If they do express a view that provokes an angry response, they will often immediately abandon it to avoid conflict with the abuser. Abusers often learn how to control the victim without direct abuse or threats. They may be able to intimidate the victim using subtle gestures, speech, or even glances. These dynamics are hard to change and make it unlikely that abuse victims could assert their interests in mediation.

4. Conduct of litigation

4.1 Drafting the application

Often in cases involving domestic violence, a lawyer will be under pressure to commence litigation immediately and bring a motion for urgent relief. The focus can easily be on the motion material with little attention paid to the application. The lawyer should take the time required to draft the application effectively. The relief sought in situations of domestic violence may differ from other family law proceedings, so the application must clearly identify the fact that there has been domestic violence. The following issues should be discussed with the client.

4.1.1 Exclusive possession

The client may want an order for exclusive possession of the matrimonial home. If so, this must be sought in the application. This relief is only available if the parties are married.

Section 19 of the *Family Law Act (FLA)* states that both spouses have an equal right to possession of the matrimonial home. Section 24 overrides that section, stating in s. 24(1)(b) that the court may give one spouse exclusive possession of the home. Subsection 24(3) sets out the criteria a court must consider in determining whether to make an order for exclusive possession. One of the criteria is “any violence committed by a spouse against the other spouse or the children.” The court is also directed to consider the best interest of any children

affected and the availability of other affordable accommodation.

A single incident of abuse, unless it entails significant physical violence or threat of physical violence, may not be sufficient to obtain an order for exclusive possession. If there is a history of abuse, the application should make this clear without going into excessive detail. The specific descriptions will be provided in affidavit material. If there is evidence of a history of abusive behaviour, a court is unlikely to permit the abuser to remain in the home and require the rest of the family to obtain alternate accommodation.

4.1.2 Restraining order

In many cases of domestic violence, some form of restraining order will be needed. Even if the victim is granted an order for exclusive possession, that will not protect the victim or the children while they are away from the home. The client may want an order preventing the abuser from attending at the client’s place of employment. If there has been violence towards the children or threats of abduction, the lawyer should seek an order restraining the abuser from having contact with the children as well as an order precluding the abuser from removing the children from the Province of Ontario without a court order. An order that specifically restrains the abuser from attending at the children’s school may be helpful in ensuring that the school staff does not allow the abuser to pick up the children from school.

Significant amendments to Ontario legislation regarding civil restraining orders were made in October 2009. Under s. 35(1) of the *Children’s Law Reform Act (CLRA)*, a court may make a temporary or final restraining order against *any person* if the applicant has reasonable grounds to fear for his or her safety or for the safety of a child in his or her lawful custody. Subsection 46(1) of the *FLA* permits the court to make a temporary or final restraining order against the applicant’s spouse or former spouse or against a person with whom the applicant is cohabiting or has cohabited for any length of time.

Restraining orders under the *CLRA* or the *FLA* must be made in the appropriate form prescribed by the *Family Law Rules (Rules)* (see Forms 25F–25H). The order may contain provisions restraining the respondent from communicating directly or indirectly with the applicant or any child in the applicant’s lawful custody, restraining the respondent from coming within a specified distance of one or more locations, and any other term the court considers appropriate.

Where the court is of the view that a restraining order is not required or appropriate, there are other mechanisms under which orders may be made to constrain the

respondent's behaviour. Clause 28(1)(c) of the *CLRA* enables the court to make a variety of orders such as limiting the duration, frequency, manner, or location of contact or communication between the parties or between a party and the child. In addition, when making an order dealing with family property, the matrimonial home, or support under the *FLA*, the court may now make a temporary or permanent order prohibiting a party from directly or indirectly contacting or communicating with another party.

4.1.3 Custody and access

If the client wants custody of the children, the client should be encouraged to seek sole custody. Joint custody is usually not workable in abuse situations since it requires a level of cooperation and respect that is not present.

The issue of access is also affected by domestic violence. If abuse has been directed at the children, the client may want to seek an order for supervised access or, in an extreme case, no access. If there is ongoing access, how should pick-up and drop-off be arranged to minimize the risk of contact between the victim and abuser?

Even if the children were never direct victims of abuse, other issues arise. Are the children likely to suffer abuse in the future? If the children have witnessed abuse in the home, they may require some form of therapeutic intervention. A growing body of research suggests that children who are exposed to violence between their caregivers are at an increased risk of psychological, social, emotional, and behavioural disorders. Subsection 24(4) of the *CLRA* specifically directs the court in assessing a person's ability to act as a parent to consider whether the person has at any time committed violence or abuse against his or her spouse, a parent of the child to whom an application relates, any member of the person's household, or any child.

Custody and access issues can be bitterly contested and very difficult to resolve. Because of this, when drafting an application in an abuse situation, the lawyer should discuss with the client whether to seek an order for a custody and access assessment pursuant to s. 30 of the *CLRA* or to request the appointment of the Children's Lawyer pursuant to s. 112 of the *Courts of Justice Act*. If these forms of relief are likely to be required, they should be sought in the application.

4.1.4 Spousal support

The existence of domestic violence can have an impact on the issue of spousal support. Subsection 15.2(5) of the *Divorce Act* prohibits a court from taking into consideration spousal misconduct in determining the

issue of spousal support. However, if the abuse has left the victim emotionally and/or physically traumatized to such a degree that his or her ability to work is temporarily or permanently compromised, that should be set out in the application as a factor to be legitimately considered as relevant to the issue of support. In particularly serious situations, consideration should be given to seeking damages. In the context of either of these forms of claim, the lawyer must turn his or her mind to the necessity of providing evidence of impairment or injury resulting from the abuse.

4.2 Emergency motions

As discussed above, victims of abuse often need some emergency relief from a court. A restraining order may be necessary to ensure the client's safety. If there is a concern that the abuser may try to abduct the children, a non-removal order may be necessary to ensure the children are not removed from the Province of Ontario without a court order. If the client has left with the children, they will need an interim custody order. If the client is financially dependent on the abusive spouse, support will be required. If the client wants to return to the matrimonial home, an order for exclusive possession is required.

Rule 14 of the *Rules* prohibits a motion prior to a case conference. In many jurisdictions, it can take weeks or months to get a date for a case conference. In most family law proceedings, it will be several weeks or months before any court orders are made. Such a delay can be dangerous in abuse situations. At a minimum, it will create very serious hardship for most abuse victims. The courts recognize this and will grant leave to hear emergency motions in cases involving abuse (*Rules*, r. 14(4.2)).

5. Drafting orders

In situations of domestic violence, it is critical to draft court orders carefully. The orders often have to be understood and enforced by third parties such as the police. Any ambiguity may lead to confusion and failure to enforce the order. As noted above, restraining orders made under the *FLA* or the *CLRA* must be in the prescribed forms under the *Rules*.

The terms of the order should be detailed and specific. For example, if there is an order that the abuser not attend at or near the children's school, the name and address of the school should be specified. The use of a geographic restriction (i.e., not to be within 200 metres of a specific location) is recommended as an aid to enforcement.

The terms of an access order should be drafted as clearly as possible. For instance, if the abuser is entitled to access on alternating weekends, the order should specify the date of the first weekend so that the order can be used to determine if a later weekend is an access weekend. If the abuser is not entitled to access, that should be set out rather than simply leaving the order silent as to access. Finally, it is important that the order specifically state that it is to be enforced by any peace officer whose assistance is requested for the purpose of

enforcing the order. The order should specifically mention the police force in the jurisdiction in which the client resides and should include mandatory language requiring the police to locate and apprehend a child, if necessary. Many police officers will not enforce the terms of an order unless the order specifically directs the police to do so. Reference should be made to the relevant statutory provision relied upon to obtain the restraining order, mirroring language used in the order.

Child protection law in Ontario

The substantive law governing child protection proceedings in Ontario is found in Part III of the *Child and Family Services Act (CFSA)*. The procedural law governing child protection proceedings in Ontario is in the *Family Law Rules (Rules)* in general and R. 33 in particular. This chapter will highlight the main provisions of the *CFSA* and give an overview of the steps in a child protection proceeding.

1. Background

A child protection application is a civil proceeding; therefore the burden of proof to be met is on a balance of probabilities, not the higher standard required in criminal law. Unlike other civil proceedings, however, in most child protection applications, the state, as represented by a children's aid society, is the moving party. The potential consequences for an individual's liberty and security in a child protection proceeding are often at least as dire as those faced in criminal law proceedings. If a child is found to be in need of protection, the court may make an order that has the effect of separating parents and children from each other, temporarily or permanently.

Children's aid societies (CAS) are created by the *CFSA* and designated by the Minister of Community and Social Services/Ministry of Children and Youth Services. They function within defined geographical and, in some cases, ethno/religious jurisdictions. Their duties are outlined in s. 15(3) and include investigating allegations that children may be in need of protection and taking steps to protect them. The *CFSA* allows a CAS to intervene, if there has been a report that there are reasonable grounds to believe that a child is at risk of harm.

If a CAS receives information that a child is at risk of harm, it must investigate the allegation and determine whether to verify it. When an allegation is verified, the CAS must decide what, if any, intervention is required to protect the child. Province-wide protocols have been developed in regard to the investigation, verification, and assessment of risk. There is a positive obligation imposed upon all persons in Ontario to report any reasonable suspicion that a child is in need of protection to the local CAS (s. 72). In the case of certain professionals and persons working with children, a failure to report can lead to criminal prosecution. With the exception of the lawyer-client privilege, this duty overrides any professional or statutory privilege.

If it is possible to do so while adequately ensuring the safety of the child, the CAS is expected to attempt to work with the family on a voluntary basis to address any concerns without the need for court intervention. However, if voluntary measures are deemed to be insufficient, whether due to the severity of risk or actual harm or because the parents are viewed as uncooperative, the CAS may commence a protection application. In cases of imminent risk of harm, the CAS may apprehend a child and take the child to a "place of safety," as defined in ss. 37(1) and (5) of the *CFSA*. This definition includes, but is not limited to, a foster home, a hospital, and a family or community member's home. The CAS may apprehend with or without a warrant and can obtain the assistance of the local police force to effect the child's removal to a place of safety. If the CAS apprehends a child, the matter must be brought before a court within five days (R. 33). There is no requirement that the CAS facilitate any contact between the child and the parents during this period of time.

The term "a child in need of protection" is defined in ss. 37(2)(a)–(l) of the *CFSA*. The list is extensive, ranging from actual or potential physical, sexual, emotional, or developmental harm to abandonment, and includes both harm by commission and harm by omission. It is necessary to have close regard to the definitions, particularly in reference to the emotional harm categories, to determine whether the CAS can adduce the necessary evidence to bring the case within one of the definitions. This is referred to as the "finding." If the CAS cannot satisfy a court that the subject child and family meet the criteria for a finding under one of the available categories, no order can be granted under the *CFSA*, and the application will be dismissed.

A child, for the purposes of Part III of the *CFSA* must be a person who is or appears to be under the age of 16 years (s. 37(1)). If the victim of suspected abuse has achieved the age of 16, no protection is available under the *CFSA*, and the reporting obligation does not apply.

2. Protection applications

2.1 Orders that can be sought

The type of order a CAS will seek in a protection application, provided that the child is found to be in need of protection, will depend upon the perceived nature and degree of risk to the child. This is what is referred to as the "disposition" stage of the proceeding, and the

applicable test is the “best interests” of the child as defined in s. 37(3). The enumerated criteria to be considered in determining the best interests for the purposes of the *CFSA* are not identical to those set out in the *Children’s Law Reform Act (CLRA)*, which governs private custody/access disputes. The issues of continuity of care and permanency planning are highlighted, and special consideration is given to Aboriginal heritage.

The available disposition orders vary in severity from leaving the child in his or her parents’ care with or without CAS supervision at one extreme, to a Crown wardship order placing the child in the permanent custody of the CAS without access by the parents at the other. In the latter case, the CAS bears a positive obligation to seek to place the child for adoption, thereby permanently severing all legal ties between the child and his or her family of origin. Recent amendments to the *CFSA* introduced an alternative disposition (s. 57.1) of granting custody to a person or persons. Although the initial order is made pursuant to the *CFSA*, without the need of a separate proceeding, future applications to vary the order are brought under the *CLRA*.

2.2 Rights of the child

If the child who is the subject of a protection application is 12 years of age or older, the child has the right to receive notice of the proceeding and to be present at the hearing, unless the court is satisfied that being present at the hearing would cause the child emotional harm (ss. 39(4) and (6)). Even if a child is not 12 years of age, the court may direct that legal counsel be provided to the child if the court determines that legal representation is desirable to protect the child’s interests (s. 38). If legal representation is provided to a child, the child is entitled to participate in the proceeding and to appeal as if the child were a party (s. 39(6)).

2.3 Timetable for the application

It is critical for both the child and the parents that the protection application be dealt with as quickly as possible. It is clearly undesirable for a child to suffer prolonged uncertainty about where and with whom he or she will live. Parents are prejudiced by protracted proceedings in that the longer their child is out of their care and becomes physically and emotionally dependent upon others, the greater the chance that the child will become psychologically attached to the new caregivers and experience diminished attachment to the parents. There is a very real risk that the passage of time alone can defeat the prospect of reintegration even if the concerns that led to the original apprehension cannot ultimately be proven by the CAS. There seems to be an ill-defined point at which the risk of disruption to the attachment between

the child and long-term caregivers, albeit caregivers paid by the state, takes priority over biological and cultural connections.

Both the *CFSA* and the *Rules* have provisions that attempt to ensure that a protection application moves quickly through the system. Rule 33 of the *Rules* establishes the following timetable for all child protection cases:

First hearing if a child has been apprehended	No more than 5 days from the start of the case
Service of answers and plans of care	No more than 30 days from the start of the case
Temporary care and custody hearing	No more than 35 days from the start of the case
Settlement conference	No more than 80 days from the start of the case
Hearing/trial	No more than 120 days from start of the case

The parties may not lengthen the times shown without leave of the court, and the court may grant leave only if it is in the best interests of the child. Section 51 of the *CFSA* provides that a court may not adjourn a hearing for more than 30 days unless all parties present consent. Unfortunately, given the realities of the family court system, these timelines are more often honoured in their breach.

An important restriction on the length of time a protection application may continue is set out in s. 70 of the *CFSA*. Section 70 prohibits a court from making an order that results in a child who was under six years of age at the commencement of proceedings from being placed in the care of a CAS for a period that would result in the child being in care for a period of more than 12 months (consecutive or cumulative in the preceding five years) after being initially placed under court order or voluntary agreement. A child six years or more may not be in CAS care for more than 24 months. By preventing a child from being a society ward indefinitely, s. 70 attempts to ensure that the court makes a decision about the child’s permanent placement within a reasonable time frame (s. 70(2.1)). The court may extend the 12- and 24-month periods by six months if satisfied that to do so is in the child’s best interest (s. 70(4)).

2.4 Evidence

Despite certain analogies between criminal proceedings and child protection proceedings, as noted above, child protection applications differ significantly from other judicial proceedings in that there are certain exceptions to the ordinary rules of evidence. Subsection 50(1) of the *CFSA* provides:

50.—(1) Despite anything in the *Evidence Act* ...

(a) the court may consider the past conduct of a person toward any child if that person is caring for or has access to or may care for or have access to a child who is the subject of the proceeding; and

(b) any oral or written statement or report that the court considers relevant to the proceeding...is admissible into evidence.

Subsection 51(7) of the *CFSA* allows the court to admit and rely on evidence that it “considers credible and trustworthy in the circumstances” for the purpose of determining a child’s placement during adjournments. The rationale for this less rigorous evidentiary approach appears to be that a child’s safety should not be jeopardized by unduly restrictive rules of evidence.

2.5 First appearance

As indicated in R. 33, if a child is apprehended, there must be a hearing within five days. Section 46 of the *CFSA* also directs the court to hold a hearing within five days of an apprehension. In practice, this is unrealistic since the parties will seldom have assembled the evidence necessary to argue the issues. The court may adjourn the hearing for 30 days pursuant to s. 51 of the *CFSA*, but it will be asked to determine what temporary order is necessary, if any, to protect the child from harm while the parties prepare their evidence for the temporary care and custody hearing. The orders a court may make at this stage are outlined in s. 51(2) of the *CFSA*. If the court decides that a child must remain in the care of the CAS pending the temporary care and custody hearing, it can make an access order with such terms and conditions as it considers appropriate (s. 51(5)).

An order made at the first appearance is usually without prejudice to the rights of all parties to argue all issues at the temporary care and custody hearing.

2.6 Temporary care and custody hearing

At the temporary care and custody hearing, the court will determine who shall have care and custody of the child pending final disposition of the application. If the CAS seeks to keep the child in its care, it must meet the tests set out in s. 51(3) of the *CFSA*. First, the CAS must prove that there are reasonable grounds to believe there is a risk that the child is *likely* to suffer harm if returned home. The CAS must also prove that the child cannot be adequately protected

- by being returned to or remaining in the care of the person or persons in whose care the child was prior to intervention with CAS supervision; or
- by being placed in the care and custody of any other family member or community member with CAS supervision.

This section makes it clear that the emphasis of the legislation is to keep a child within his or her family or community if that is possible. The section also highlights the ambiguous role of the CAS. While parents are likely to see the CAS as their adversary, the CAS has a mandate to work with the child’s family so that the child may be reunited with his or her family. The first section of the *CFSA* sets out the purposes of the *Act*. While its paramount purpose is to promote the best interests, protection, and well-being of children, the subordinate purposes include recognition that assistance should, where possible, be based upon mutual consent and that the least intrusive, appropriate course of action should be pursued. Further evidence of this mandate is found in s. 57 of the *CFSA*.

Because the CAS has an obligation to work with the child’s family, it is generally not in the parents’ interest to treat the CAS as if it were simply an adversary in litigation. Parents and their counsel should stay in communication with the CAS and determine what its specific concerns are and how they are expected to be addressed. If the concerns arise from inaccurate information, the parents can work with the CAS to help it obtain a more accurate understanding of the family. If the CAS has legitimate grounds for concern, the parents can report to the CAS about progress they have made in addressing those concerns. The best way for parents to resolve a protection application is to work with the CAS in developing a plan of care for the child that will address the CAS’s concerns and facilitate the reintegration of the family.

2.7 Alternative dispute resolution

If a child is or may be in need of protection, s. 20.2(1) of the *CFSA* requires the CAS to consider the use of alternative dispute resolution where it may assist in resolving any issue related to the child or the child’s care.

The *CFSA* further provides the court under s. 51.1 with the authority to adjourn a hearing under Part III of the *CFSA* to permit the parties to use alternative dispute resolution with the consent of the parties.

2.8 Assessments

The court may at any time during the proceeding order that a child, a parent, or any person other than a foster parent undergo an assessment within a specified period of time by a person appointed by the court. These assessments are frequently referred to as “parenting capacity assessments.” Section 54 of the *CFSA* is the operative provision. The content of the order is prescribed by regulation (O. Reg. 25/07, made under the *CFSA*) and a special s. 54 endorsement sheet provides the format in which the order should be drafted.

These assessments can be critical to the outcome of the proceeding. While, as in custody matters under the *CLRA*, the court is not bound by the assessor's recommendations, the report is generally accorded considerable weight, barring obvious flaws. An assessment report prepared pursuant to s. 54 of the *CFSA* is evidence and is part of the court record of the proceeding (see s. 54(6)). If a person refuses to undergo an assessment when ordered to do so under s. 54, the court may draw any inference it considers reasonable (s. 54(7)). No appeal lies from an order made under s. 54 (s. 69(2)).

2.9 Trial

After the temporary care and custody hearing, a protection application proceeds pursuant to the *Rules*. This requires a settlement conference and a trial management conference before the final hearing of the application.

At the final hearing, the court must first determine if the child is in need of protection. If the court does not find that the child is in need of protection, the child is returned to the parents.

The question of whether a child is in need of protection is not an analysis of whether the family of origin offers the best possible environment for the child. Subsection 37(2) of the *CFSA* defines the specific circumstances in which a child is to be considered in need of protection. For a court to find that a child is in need of protection, first, it must find that the case meets one of the definitions in s. 37(2). Subsection 50(2) of the *CFSA* prohibits the court from hearing evidence relating to the disposition of the case before it has determined whether a child is in need of protection. The intention of this bifurcation is to ensure that the CAS is able to satisfy the court that the parents have failed to meet a minimum standard of care-giving prior to embarking on a comparison between the relative strengths of the family of origin and those of other prospective care-givers, such as the foster or prospective adoptive parents.

If the court finds that a child is in need of protection, it must then determine if a court order is necessary to protect the child in the future. If it finds that a court order is necessary to protect the child, it must determine what order is in the best interests of the child. Section 57 of the *CFSA* outlines the orders a court may make. These range from a supervision order with or without terms and conditions, to a Crown wardship order, through which parental rights and responsibilities are transferred indefinitely to the state.

Section 57 contains specific directions about what is considered in determining what disposition is in the

child's best interest. These directions reflect the legislative intention to attempt to keep a child within his or her family or community if that is possible. To that end, the *CFSA* provides the following:

- Subsection 57(2) directs the court to ask the parties what efforts the CAS has made to assist the child before commencing a protection application.
- Subsection 57(3) directs that no order shall be made for the removal of a child from his or her home unless the court is satisfied that alternatives that are less disruptive to the child, including non-residential services and the assistance available through community resources, would be inadequate to protect the child.
- Subsection 57(4) directs that if the court has decided that it is necessary to remove the child from his or her home, before making an order of society or Crown wardship, the court must consider whether it would be possible to place the child with a relative, neighbour, or other member of the child's community or extended family.
- Subsection 57(5) directs that if the child is native, the court is required to place the child with a member of his/her extended family, band, or native community or with another Indian or native family, unless there is a substantial reason for placing the child elsewhere.

In 2006, a new form of disposition order was made available. Under s. 57.1, the court may, if satisfied that it would be in the best interests of a child, grant custody to one or more persons, other than a foster parent, with the consent of the person or persons. Although granted within the *CFSA* proceeding, the order is deemed to have been made pursuant to the *CLRA*. The court must make the same inquiries regarding the efforts made to assist the family and the availability of less intrusive measures as it does when making a society or Crown wardship order prior to granting custody under s. 57.1. Once a s. 57.1 order is granted, however, the matter becomes, for future purposes, a private custody dispute to which the CAS is not a necessary party.

2.10 Crown wardship

Crown wardship orders permanently transfer parental rights to the state. These orders are routinely referred to as the "death sentence" in child protection. The CAS, as the state's agent, assumes all custodial rights and responsibilities. The CAS is obligated to seek adoptive placements for all Crown wards in its care. Adoption extinguishes the parent/child relationship permanently.

Historically, access orders in favour of parents whose children were made permanent wards of the state were of crucial importance because a child could not be placed for adoption while an access order existed. Amendments

in 2011 to the legislation have enabled a CAS to move forward with adoption planning notwithstanding the existence of an access order in favour of the parent or caregiver. The CAS need only provide the parent with a “notice of intention to place for adoption” in order to shift the onus to the parent to bring an “openness application.” The parent has 30 days in which to bring such application, which in any event, does not prevent the CAS from effecting the placement prior to the determination of that application (see ss. 141.1 and 145.1 of the *CFSA*).

2.11 Appeals

Section 69 of the *CFSA* and R. 38 of the *Rules* govern appeals of orders made in child protection proceedings. With the exception of orders relating to assessments, from which no appeal lies, any order made in a child protection application may be appealed as of right. A notice of appeal must be served within 30 days of the granting of the order. No extension of the time for an appeal can be granted where the child has been placed for adoption (s. 69(5)).

If a party appeals an order regarding care and custody of a child, s. 69(3) provides for a stay of execution of the order for 10 days following service of the notice of appeal to allow the appellant to seek an interim order from the appellate court.

Subsection 69(6) allows the appellate court to receive evidence relating to events that occur after the order being appealed was made.

2.12 Status review applications

Section 64 governs status review applications. As the name implies, a status review application is a request by an interested party that the court review a child’s status. A status review application can only be made if a child is the subject of an order for society supervision, society wardship, or Crown wardship under s. 57. At the hearing of a status review application, the court may vary or terminate the original order made under s. 57 or make a different order under s. 57. In the case of supervision orders and society wardship orders, which are imposed for specified periods of time, a status review application must be commenced prior to the expiry of the existing order, failing which the original order, including the finding that the child is in need of protection, lapses.

If the child has been made a Crown ward and placed in a person’s home for the purpose of adoption and continues

to reside in that home, no status review application may be brought by any party. Subject to that restriction, a CAS may apply to the court at any time for a status review. If any other party wishes to commence a status review application, they must wait until six months have elapsed from either the date of the s. 57 order or from the date of the final disposition or appeal from that order, whichever is later, unless the court is satisfied that a major element of the plan for the child is not being carried out.

Other than a CAS, the parties permitted to apply for a status review are

- the child, if he or she is at least 12 years old;
- a parent of the child;
- the person with whom a child was placed under an order for society supervision; and
- if the child is an Indian or a native person, a representative chosen by the child’s band or native community.

If the child is a Crown ward and has lived with the same foster parent continuously for two years, the child’s parent may not commence a status review application without leave of the court.

2.13 Priority of child protection proceeding over custody disputes

A child protection proceeding is normally treated as paramount to a custody dispute even if the child protection proceeding is in the Ontario Court of Justice and the custody dispute is being litigated in the Superior Court of Justice. Similarly, a private custody order will be superseded by an order made under the *CFSA* if the two orders are inconsistent. Section 57.2 of the *CFSA* provides that where a proceeding is commenced under Part III, any proceeding respecting custody of or access to the same child under the *CLRA* is stayed.

If a CAS has been involved with a family and the parents subsequently have a custody or access dispute, the CAS file may be relevant. The CAS will not release a file without the consent of all parties or a court order. If one of the parties withholds consent, the opposing party may bring a motion pursuant to r. 19(11) for production of the CAS file. The motion must be brought on notice to the CAS.

The CAS may, however, upon request provide a written summary of their involvement with the family, blacking out any reference to a person whose consent to disclosure has been withheld.

Aboriginal law in a family law context

1. Introduction

As a general rule, family and child protection laws that apply to individuals in Ontario also apply to Aboriginal people in the same way. However, there are some very important exceptions that must be noted.

As a preliminary matter, the practitioner should be aware of the impact of self-governance on Aboriginal communities. Some First Nations have enacted their own laws, through inherent jurisdiction, self-government agreements, or by-law making authority under the *Indian Act*, that may displace provincial legislation in Ontario. Unless noted otherwise, the remainder of this chapter is based upon the assumption that the practitioner has found there to be no conflicting Aboriginal laws in place.

2. Marriage

Canadian courts have upheld customary laws on marriage and adoption even in the face of legislation that might be taken to have abridged such laws.

For example, the validity of a marriage under Cree customary law between a non-Aboriginal man and a First Nations woman in the Canadian north-west was upheld. As well, in another case, it was held that the customary wife of a man accused of a crime may refuse to testify against the man based upon spousal privilege.

It appears that so long as the customary marriage meets the criteria of common-law marriages in that the marriage is voluntary, the parties intend the marriage to last for life, and the marriage is not polygamous, it may be recognized as a legal marriage. (See Norman K. Zlotkin, “Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases” [1984] 4 C.N.L.R. 1.)

3. Division of family property

The discussion of division of property applies only to “registered Indians” under the *Indian Act*, and thus does not apply to Inuit, Métis, or non-status Indians. The *Family Law Act (FLA)* scheme for equalizing the value of net family property applies to Aboriginal people. However, provisions for exclusive possession of the matrimonial home (where the home is on reserve lands) infringe on federal constitutional jurisdiction, as would any other provision that attempts to deal with ownership or possession of property on reserve lands (such as

Ontario’s *Partition Act*). The federal government’s exclusive jurisdiction over lands reserved for Indians means that provincial statutes such as the *FLA* do not apply when it comes to dividing ownership or possession of on-reserve matrimonial property.

As a result of the Supreme Court of Canada’s decision in *Derrickson v. Derrickson*, no provincial court can issue an order regarding possession or ownership of a matrimonial home on reserve, regardless of whose name is on the Certificate of Possession.

This does not leave the non-possessing spouse entirely without remedies. The court may order that the spouse in possession of the reserve land pay cash or transfer other non-reserve property to the other spouse as compensation in lieu of a division of reserve property. There are, of course, practical difficulties associated with such a remedy, including arriving at a fair valuation of reserve property.

Assets that do not consist of interests in reserve land may be divided pursuant to provincial legislation such as the *FLA*.

Federal legislation does address the occupation of the matrimonial home located on reserve. The *First Nations Land Management Act* states:

17.—(1) A first nation shall, in accordance with the Framework Agreement and following the community consultation process provided for in its land code, establish general rules and procedures, in cases of breakdown of marriage, respecting the use, occupation and possession of first nation land and the division of interests or rights in first nation land.

At the present time, only 13 First Nations in Ontario are affected by this legislation, and several of those 13 have enacted laws regarding the division of a matrimonial home on-reserve.

As well, ss. 81(1)(p.1)–(p.2) of the *Indian Act* authorize a First Nation to enact by-laws to provide for the residence of persons on the reserve and specifically to “provide for the rights of spouses or common-law partners and children who reside with members of the band on the reserve.”

Thus, lawyers advising spouses who reside on-reserve or with property on-reserve should inquire with the First Nation whether there are any applicable First Nation laws that will impact upon property issues.

4. Support orders

Child support is available under both the federal *Divorce Act* and the Ontario *FLA*. Both Acts incorporate the Federal *Child Support Guidelines (Guidelines)*, which calculate the amount of child support that must be paid per child according to the paying parent's income. The recipient parent's income is relevant only when considering the special and extraordinary expenses that must be paid by the paying parent over and above the basic Table amount, as well as undue hardship.

The major difference in dealing with registered Indians under the *Indian Act* in relation to child support orders has to do with the application of s. 19 of the *Guidelines*. This section states as follows:

19.—(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

...

(b) the spouse is exempt from paying federal or provincial income tax;

...

This section has been applied to gross up the income of status Indians earning income, which is exempt from income tax, to determine the amount of support payable.

5. Enforcement of support orders

By virtue of s. 89 of the *Indian Act*, registered Indians are exempt from the garnishment or seizure by non-Indians of property located on a reserve. Property includes bank accounts and income located on reserve. In cases where the dispute over support is between two registered Indians, the garnishment of property or income earned by an Indian may be valid. In cases where the spouse attempting to enforce an order is not a registered Indian, the registered Indian may be exempt from garnishment for property located on a reserve, and the creditor spouse may have to look for alternative ways to enforce the support order.

6. Customary adoption

Customary adoption is an integral part of Aboriginal societies and is commonplace in Aboriginal communities. Customary adoptions in Aboriginal communities have been recognized by the courts. According to the court in *Re Tagornak*, there are four criteria for recognizing a customary adoption:

- There must be evidence that the custom extended back in time as far as living memory.
- The custom must be reasonable.

- The custom “must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the person whom it is alleged to affect.”
- The custom must have continued without interruption until the present.

7. Child custody and protection — Aboriginal heritage

In cases involving the custody, adoption, apprehension, and placement of children, Ontario courts must address the “best interests” of the child. In determining the best interests of an “Indian or Native” child, the *Child and Family Services Act (CFSA)* requires that courts take into consideration the importance of recognizing the uniqueness of Indian and native culture, heritage, and traditions of preserving the child's cultural identity.

Courts also have a positive obligation under s. 47(2)(c) to determine whether a child is an Indian or a native person and, if so, the child's band or native community.

8. Child welfare

In Ontario, in the absence of self-government agreements and legislation, the province has jurisdiction over child welfare services to Aboriginals.

The *CFSA* includes the following provisions:

1.—(2) The additional purposes of this *Act*, so long as they are consistent with the best interests, protection and well being of children, are:

5. To recognize that Indian and native people should be entitled to provide, wherever possible, their own child and family services, and that all services to Indian and native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family.

Section 211 of Part X of the *CFSA* permits the Minister of Community and Social Services to enter into agreements with First Nations and Aboriginal organizations for the provision of child and family services. It also allows the Minister to designate Aboriginal children's aid societies—of which there are currently five in Ontario. Section 213 in Part X requires that:

213.— A society or agency that provides services or exercises powers under this *Act* with respect to Indian or native children shall regularly consult with their bands or native communities about the provision of the services or the exercise of the powers and about matters affecting the children ...

In addition to the Part X provisions, the *CFSA* provides an extensive role for Aboriginal communities in proceedings.

For example, in cases of child apprehension, placement, custody, and access, the *CFSA* makes a representative of the Indian band or native community an automatic party to the proceedings. In cases of child apprehension, s. 57(5) mandates that an Indian child be placed with a member of the child's extended family, a member of the child's band or native community, or another Indian or native family, unless there is a substantial reason for other placement.

Amendments in 2006 added greater consultation requirements. For example, s. 213.1 of the *CFSA* requires a children's aid society or agency to consult with a band or native community whenever it proposes to provide a

prescribed service to a child who is an Indian or native person or to exercise a prescribed power under the *CFSA* in relation to such a child. Section 63.1 also imposes an obligation on children's aid societies to assist Crown wards to develop an enduring relationship within a family by way of Part X customary care agreements for Indian and native children.

Practitioners involved in family law matters where there is any possibility that the child is Aboriginal are faced with many different obligations and procedures under the *CFSA*, making a thorough review of the provisions mandatory.

The Change of Name Act

The *Change of Name Act (CNA)* establishes the name by which a person is entitled to be recognized for purposes of Ontario law. It also outlines the circumstances in which a person may change that name and the steps they must take. This chapter reviews the provisions of the *CNA* in general terms. For complete details of the statutory provisions, reference must be made to the statute.

1. General provisions

Subject to the exceptions listed in the statute, a person whose birth is registered in Ontario is entitled to be recognized by the name appearing on their birth certificate. If they have changed their name pursuant to the *CNA* or its predecessor statute, they are entitled to be recognized by the name on their change of name certificate (s. 2(1)).

Any person at least 16 years of age who has been ordinarily resident in Ontario for at least one year immediately preceding the application may apply to the Registrar General to change his or her forename or surname or both (s. 4(1)). A person may not change their name so as to have only a forename or only a surname (s. 2(3)).

The form of application to be submitted is specified in *General*, R.R.O. 1990, Reg. 68, made under the *CNA*. The application must be accompanied by the following:

- a statutory declaration containing all the information outlined in s. 6(2) of the *CNA*.
- any required acknowledgment of notice (Form 6) (s. 6(7)).
- the consent of every person who has lawful custody of the applicant (Form 7) or a copy of the court order dispensing with such consent. This is applicable only if the applicant is over 16 but under 18 years of age (ss. 4(3)–(4)).
- a statement of a person who knows the applicant confirming that the residency requirement has been met (Form 8). The statement must be by either a member of a prescribed class (listed in Form 8) who has known the applicant for at least one year or by any person who has known the applicant for at least five years (ss. 6(3)–(5)).
- all birth certificates and change of name certificates that are in the applicant's possession (s. 6(8)).
- a police records check, if applicable (ss. 6(9)–(10)).
- the prescribed fee (*General*, s. 5).

Upon receipt of the application, the Registrar General registers the change of name and issues a change of name certificate and, if the person was born in Ontario, a new birth certificate (*CNA*, s. 7(1)). If the Registrar General believes that an applicant is seeking a change of name for an improper purpose, he or she may refuse the application. If an application is refused, the applicant may, on notice to the Registrar General, apply to the Ontario Court of Justice for an order granting the application (ss. 7(2)–(4)).

Unless the Attorney General or a person authorized by the Attorney General certifies that a change of name is intended to prevent significant harm to the person whose name is being changed, upon the registration of a change of name, notice of the change is published in the *Ontario Gazette*; entered in the Change of Name Index maintained under the *Vital Statistics Act*; and in the event that the Registrar General was advised under s. 7.1 that the Ministry of Community Safety and Correctional Services has information about the person that would be included in a police records check, provided to the Ministry of Community Safety and Correctional Services (ss. 8(1)(a)–(b.1)). This is done for the protection of creditors and others. If the application for a change of name discloses

- an unsatisfied execution against the applicant;
- that the applicant is an undischarged bankrupt;
- that there is a registration in the applicant's name under the *Personal Property Security Act*; or
- that a pending court proceeding exists against the applicant,

notice of the change of name will be given to the sheriff of the jurisdiction where the unsatisfied execution exists, the Registrar of Personal Property Security, the Registrar in Bankruptcy, or the clerk or registrar of the court, whoever is appropriate (s. 8(1)(c)).

A person may request that notice of the change of name not be published because the person to whose name the application relates is, at the time of the application, a transgendered individual (*General*, s. 6).

A person who believes that a change of name was obtained by fraud or misrepresentation or for an improper purpose may apply to the Ontario Court of Justice for an order revoking the change of name (*CNA*, ss. 10(1) and (4)). If satisfied that the change of name was obtained by fraud or misrepresentation or for an

improper purpose, the court may revoke it in whole or in part. Ontario Court of Justice decisions can be appealed to the Superior Court of Justice by the person to whom the name change relates, the applicant, or the Registrar General (s. 11).

2. Marriage and cohabitation

The *CNA* provides an abbreviated procedure for people who wish to change their name as a result of marriage or the dissolution of their marriage. The abbreviated procedure is available to a spouse at any time during the marriage but only if a spouse is changing his or her name to

- the surname that the other spouse had immediately before the marriage;
- a surname consisting of the surnames that both spouses had immediately before their marriage, hyphenated or combined; or
- the surname that he or she had immediately before the marriage (s. 3(1)).

If a spouse wishes to change his or her surname to something else or to change a forename, they must apply using the lengthier procedure described in the previous section.

At any time after the dissolution of a marriage by divorce, annulment, or the death of the other spouse, a spouse may use the abbreviated procedure to elect to resume the surname he or she had immediately before the marriage (s. 3(2)).

To use the abbreviated procedure during a marriage, a spouse must complete and submit Form 1 (*General*, s. 1(1)). To use the abbreviated procedure following the dissolution of a marriage, a spouse must complete and submit Form 2. In both cases, the form must be accompanied by a marriage certificate, all birth certificates and change of name certificates in the applicant's possession, and if applicable, a police records check. An application following the dissolution of a marriage also requires proof that the marriage has been dissolved (a judgment of divorce, divorce order, nullity, or death certificate) (*General*, ss. 1(2)–(3)). It is not necessary to give notice of either of these applications to the other spouse (*CNA*, s. 3(8)).

Upon receipt of the fee (if applicable) and documents, the Registrar General issues a change of name certificate and, if the person was born in Ontario, a new birth certificate. While the new birth certificate will contain only the newly adopted name, the original certificate on file with the Registrar General will indicate the birth name and each successive change of name.

It has been found that the predecessor statute to the *CNA* did not override the common law, so the *CNA* is probably voluntary rather than mandatory. If that is the case, there is nothing to prevent a spouse from assuming the other spouse's name upon marriage without any application under the *CNA*. If this is done, the only difference would be that his or her birth certificate would continue to bear the birth name, not the newly assumed name.

The abbreviated procedures available to married spouses are also available to people living together in a conjugal relationship outside of marriage, including same-sex couples, if the couple files a joint declaration in Form 3 acknowledging that they are living together in a conjugal relationship outside marriage (*CNA*, s. 3(6); *General*, s. 1(6)). Either party may then avail himself or herself, without notice to the other person, of the name change procedure available to married spouses. Once a party in a conjugal relationship outside of marriage has changed his or her name, the previous surname can only be resumed without the necessity of a general name change if one of the parties files a declaration in Form 4 stating that the relationship has ended (*CNA*, s. 3(7)).

3. Children

If the residency requirements of the *CNA* are met, a person with lawful custody of a child may apply to the Registrar General to change the child's forename or surname, or both, unless a court order or separation agreement prohibits the change (s. 5(1)). Where a person is declared under s. 4, 5, or 6 of the *Children's Law Reform Act* to be the mother or father of a child and obtains an order under that *Act* changing the child's surname, an application under s. 5(1) by another person also requires the consent of the person declared to be a mother or father (s. 5(2.1)).

The application to change the name of a child requires, among other things, the written consent of any person with lawful custody of the child or any person whose consent is necessary in accordance with a court order or separation agreement, as well as the child's consent if he or she is over the age of 12. Notice of the application must be given to every person who is lawfully entitled to access to the child, but the application does not require the consent of a non-custodial parent unless this consent is required by court order or separation agreement (s. 5(6)). This provision is significant for family law practitioners. They must warn every parent consulting them that if he or she does not have custody of the child, the child's name could be changed without the parent's consent. If the issue of custody is litigated, the lawyer representing the access parent should request an order that the custodial parent may not change the child's name without the consent of the access parent. If custody is not

litigated, lawyers acting on behalf of access parents should ensure that a clause prohibiting a change of name is inserted into any separation agreement. In *Zho v. Chen*, Nelson J. held that the fact that a separation agreement prohibits a name change is only one element in the court's decision as to whether a child's name may be changed. The court has jurisdiction to override such a prohibition if it is not in the child's best interests (s. 5(5)).

Neither the *CNA* nor the case law makes clear how an access parent should proceed if he or she receives notice of an application to change a child's name and wishes to object to it. Since the access parent's consent is not required to change the child's name, the Registrar General will proceed with the application unless a court order is served upon them. The first step a lawyer should take when retained by an access parent with this problem is to contact the Office of the Registrar General, advise them of the access parent's objection, and ask for a grace period to permit the access parent to obtain a court order. The lawyer should then advise the custodial parent of the access parent's intention to commence court proceedings over this issue. If the custodial parent insists on proceeding with the application for the name change, the lawyer must immediately commence a proceeding seeking to vary the existing custody order (or vary the terms of the separation agreement between the parties)

to prohibit the name change. It is important that the application seek an order varying the existing custody order, not just an order prohibiting the name change, since case law has established that name change is an incident of custody. In *Felix v. Fratpietro*, Platana J. dismissed an application for an injunction restraining a name change that did not seek a variation of the existing custody order.

If there is an existing custody order, any application to vary it must be brought in a court with jurisdiction to do so. If the original order was made in the Superior Court of Justice, the Ontario Court of Justice does not have jurisdiction to vary it.

If an access parent seeks to set aside a change of name that has already been registered, the only remedy under the *CNA* appears to be an application to revoke the change of name on the basis that the change was obtained by fraud or misrepresentation or for an improper purpose (s. 10(1)). If fraud, misrepresentation, or improper purpose cannot be proven, there is no statutory remedy available (*Vanbuskirk v. Osborne*).

Appeals from decisions dispensing with consents under either s. 4(4) or 5(4) may be made to the Superior Court of Justice by the person whose consent was dispensed with (s. 11(1)).

Public Law

Public law: basic principles

1. Introduction

In very general terms, public law covers the relationship between the individual (which includes any entity with a legal capacity) and the state. Since the state regulates economic and social affairs in numerous ways, public law will affect the practice of lawyers in one aspect or another. Public law includes administrative law, constitutional law, and criminal law.

2. Administrative law

Administrative law is a body of principles that govern the exercise of power granted by statute. The source of the power, not the nature of the body, determines whether the decision-making is subject to administrative law principles. Courts have the ultimate supervisory control over the exercise of power delegated by statute or regulation. If the individual or body is acting within provincial jurisdiction, the superior court of the province supervises; in the federal sphere, the Federal Court generally exercises supervisory control.

The genesis of administrative law principles results from two main factors. First, Parliament and the legislatures had to delegate a great number of decision-making powers to agencies, boards, and commissions because of the complexity of the welfare and regulatory state. Second, there had to be some check or balance—some method of controlling the exercise of delegated authority in appropriate situations. The place for that control is the provincial superior courts and the Federal Court. The principles of administrative law inform us as to what are “appropriate circumstances” in which a court will control, prohibit, or direct the delegated decision-making.

There have been significant and rapid developments in administrative law in the recent past. Earlier administrative law cases that considered whether an administrative agency had to comply with the rules of natural justice or whether a question addressed by the agency was “jurisdictional” or “collateral” should now be read with caution. The trend in recent years has been to eliminate the arcane classifications seen in earlier jurisprudence. Two fundamental elements of administrative law reflect the present trend in jurisprudence: the development of the duty of fairness (governing the procedure for decision-making) and the pragmatic and functional approach to judicial review of the substance of the decision itself.

It is important to remember that when challenging an administrative body’s decision, the principles of administrative law apply whether one is appearing before an agency, board, or tribunal or one is pleading a case in Divisional Court or the Federal Court. The judicial review of administrative decision-making is only one branch of the entire study of the practice of administrative law.

As administrative law powers are granted by statute, lawyers must understand and apply the principles of statutory interpretation when analyzing a tribunal’s decision-making authority. For example, the word “shall” is usually imperative, while the word “may” is permissive.

For a practising lawyer, it is as important to understand the principles of administrative law (which limit the exercise of a delegated decision-making power) when advancing a client’s position before the decision-maker, as it is when subsequently challenging the decision that has been made.

3. The original exercise of the delegated decision-making power

Whether your client is applying for social benefits, a zoning variance, or a restaurant liquor licence, it is critical to examine what the decision-maker can do and how it can do it.

3.1 The source of delegated decision-making power

This is the starting point for any administrative law analysis. The primary source of a delegated power to decide will be a statute or a regulation.

The first fundamental skill for a lawyer is the capacity to analyze the source of the decision-making power—the statute, regulation, order-in-council, or rule of practice or procedure.

Ask three questions arising from the source:

- Who has the power to decide?
- What power has been delegated?
- How is the power to be exercised?

The source will indicate who can make a decision, for example, the Cabinet, a Minister, a government official, or a regulatory agency.

The source will also indicate what decision-making power has been delegated. The nature of the delegated power varies considerably. At one end of the spectrum is

a purely administrative function, such as the issuing of a fishing licence if certain information is provided. At this end of the spectrum, the main characteristic of the limited, delegated power is the absence of discretion. In contrast, at the other end of the spectrum, the delegated power may be to exercise a very broad discretion. For example, one sees statutory language permitting a Minister to make decisions “in the public interest.” Between these extremes is a broad range of decision-making power, often requiring consideration of specific enumerated factors in making decisions.

In analyzing how the power is to be exercised, there are two elements. First is the procedure to be followed before a decision is made. The statute or regulation may specify procedural steps before a decision is made. Second are the substantive standards to be applied in making the decision. The statute or regulation will usually set out the purposes for which a statutory power is to be exercised, any necessary preconditions before the decision can be made, as well as any factors to be considered in making the decision.

The source of the power will impose limits on delegated decision-making. In addition, limits will come from two other sources: the Constitution and the common law.

3.2 The Constitution

The Constitution places two kinds of limits on delegated decision-making. First, a delegated decision-making power and the way it is exercised cannot contravene the *Canadian Charter of Rights and Freedoms (Charter)*. Second, because of the division of powers between Parliament and the provincial legislatures, there are certain powers that a province or federal government cannot exercise, i.e., the power belongs exclusively to one jurisdiction or the other. For example, in *Canada Mortgage and Housing Corp. v. Iness*, the Human Rights Tribunal of Ontario (a provincial tribunal) could not add the Canadian Mortgage and Housing Corporation (CMHC) as a party to the tribunal’s hearing because the CMHC, in providing funding for co-operative housing, was acting in a sphere of federal jurisdiction. The provincial law could not be applied so as to regulate the terms on which the CMHC provided funding.

3.3 The common law

The common law imposes limits on the exercise of a delegated decision-making power. Generally, the limits fall into three categories: procedural limits, jurisdictional limits, and errors of law.

3.3.1 Procedural limits

The rules of natural justice centre on two elements:

- a person’s right to adequate notice of the case to be met and a right to a hearing or other fair procedure with respect to the decision; and
- a person’s right to an unbiased decision-maker.

In Ontario, the rules of natural justice have been codified in the *Statutory Powers Procedure Act (SPPA)*. The *SPPA* does not apply to every exercise of a delegated decision-making power. The *SPPA* applies only when the decision-maker is required to hold a hearing. The first step for a lawyer analyzing the content of a client’s procedural rights is to determine whether the *SPPA* applies. If it does, procedural rights are spelled out in the *SPPA* (and are sometimes supplemented or modified in the tribunal’s enabling legislation). When the *SPPA* does not apply, procedural rights are imposed by the common law. The extent of those rights will depend on the nature of the power being exercised and the nature of the person’s right affected by that exercise. When the full array of natural justice rights (e.g., the right to the presence of a lawyer, to call witnesses, to cross-examine adverse witnesses) is not applicable, more limited rights of fairness are still applicable: the right to know the case to meet and the right to make a submission to an unbiased decision-maker.

3.3.2 Jurisdictional limits

The second common-law limit is that of jurisdiction. The decision-maker must operate within the power that has been delegated. As indicated above, the source of that power is the statute delegating the decision-making power. The concept of jurisdiction is elastic and is a critical tool used by courts in judicial review of delegated decisions.

3.3.3 Errors of law

The third limit (and perhaps the most difficult to define) is errors of law. It is easier to list what have been recognized as errors of law rather than to attempt a comprehensive definition of errors of law. For example, it is an error of law to base a decision on irrelevant factors; equally, it is an error to fail to consider relevant factors (often specified in the statute delegating the decision-making power).

4. Control of the original exercise of the delegated decision-making power

This is the second major area for analysis. If the client is somehow dissatisfied with the original decision and wants to challenge it, the lawyer must examine how the original exercise of a delegated decision-making power can be controlled (whether varied, reversed, or set aside and ordered to be done again).

4.1 Statutory reconsideration or appeal mechanisms

Again, the starting point is the statutory scheme. In most situations, the statute will provide for some sort of appeal, review, or reconsideration mechanism. There is no free-standing right of appeal or reconsideration. One has to find a statutory provision permitting a challenge of the original decision. Different statutes provide different mechanisms. Some examples are provided here to illustrate the wide range of possible reconsideration mechanisms found in different statutes:

- *Ontario Disability Support Program Act, 1997*: An appeal of some of the Director's original decisions may be made to the Social Benefits Tribunal, but only after first seeking an internal review of the Director's decision. An internal review must be sought within 30 days of the decision. Section 21 sets out what decisions may be appealed. The decision of the Social Benefits Tribunal can then be appealed to Divisional Court, but only "on a question of law" (ss. 21–22 and 31). No request for internal review of the Social Benefits Tribunal decision is first required. The notice of appeal to Divisional Court must be filed within 30 days of the Tribunal's issuance of the decision.
- *Coroners Act*: A coroner may originally determine that an inquest is unnecessary. The statute first allows representatives of the deceased to request that the coroner make a final decision. The Chief Coroner may then be asked to review the coroner's final decision.
- *Residential Tenancies Act, 2006*: An order of the Landlord and Tenant Board can be appealed to the Divisional Court, but only on a question of law and within 30 days.
- *Human Rights Code*: A party may request the Human Rights Tribunal to reconsider a decision "in accordance with the Tribunal rules." The Tribunal's rules restrict requests for reconsideration to final decisions. The *Code* provides that Tribunal decisions cannot be appealed.
- *Legal Aid Services Act, 1998*: An appeal lies to an area committee from an area director's decision to issue a certificate or to cancel a certificate. A further appeal lies to the officer or employee of Legal Aid Ontario designated by the board of directors of Legal Aid Ontario.

When examining a statute for the possibility of control (review or appeal), consider these questions:

- Who exercises the control?
- Are there preconditions to seeking a review or appeal?
- Are there time limits for review or appeal?
- What are the criteria for review or appeal?
- What relief can be obtained by review or appeal?

As a general principle, a person is expected to exhaust all statutory appeal or review mechanisms before resorting to the courts by way of judicial review. While it is not required that a person pursue a review or appeal, failure to do so may be a factor in a court's exercise of discretion in judicially reviewing the decision in issue. Prior to commencing an appeal of the tribunal's decision, a lawyer should consider if there is any additional documentary evidence that should be obtained, a situation that may require making a written request for the record under s. 24 of the *Freedom of Information and Protection of Privacy Act*.

4.2 Judicial review

When the statutory mechanisms for challenging decisions have all been exhausted (or, in some cases, are not yet available), the next area for consideration is judicial review. Judicial review refers to the courts' control of delegated decision-making independently of any statutory authorization such as a right of appeal.

Courts will control delegated decision-making by way of judicial review when the decision-maker has exceeded the limits referred to above—limits set by the statutory scheme, limits imposed by the Constitution, or limits imposed by common law.

In Ontario, the procedure for judicial review is set out in the *Judicial Review Procedure Act (JRPA)* and R. 68 of the *Rules of Civil Procedure*. Applications for judicial review are brought in the Divisional Court. Two significant factors are emphasized. First, there is no statutory time limit for seeking judicial review in the *JRPA*. However, since the remedy on judicial review is discretionary, the doctrine of *laches* applies: a court may dismiss an application because of delay. Second, applications for judicial review can be brought not only to challenge decisions that have been made, but also, in appropriate circumstances, to prohibit a decision from being made or to require that a decision be made.

In the federal context, as in the provincial context, the specific statutory scheme will set out any appeal or reconsideration mechanisms. The *Federal Courts Act (FCA)* governs judicial review in the federal context. In contrast to Ontario's *JRPA*, the federal legislation attempts to codify the federal common law on administrative law remedies. The *FCA* specifies in which division of the court one seeks relief, specifies time frames for seeking relief, and indicates the grounds on which relief may be sought or granted.

The relief granted by courts on judicial review is limited. With very few exceptions, the courts will not substitute their decisions on the substantive issue decided by the delegated decision-maker. A court may set aside the

original decision and return the matter to the statutory decision-maker to be decided again.

5. Procedural entitlements

Public officials and agencies must follow proper procedure in exercising their delegated decision-making power. The first place to look is the applicable statutory scheme. The statute, regulations, or by-laws may specify what notice is to be given and to whom, and may set out other procedural components, such as the right to call witnesses and to cross-examine. The statute may also indicate what kind of evidence is admissible. In Ontario, the second source of procedural rights is the *SPPA*. When a statute is silent as to procedure, and whether or not the *SPPA* applies, administrative law imposes certain requirements on decision-makers to ensure that people subject to government action receive a fair process.

The jurisprudence had historically divided procedural requirements into two main categories: “natural justice” and “fairness.” The development of the principle of fairness and the subsequent decisions indicate that applicable procedural rights lie on a spectrum. While the topics of natural justice and fairness are addressed separately below, there is no rigid division between the two concepts. Chief Justice Dickson signalled this in *Martineau v. Matsqui Institutional Disciplinary Board* at 269:

In general, courts ought not to seek to distinguish between the two concepts, for the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework.

5.1 Natural justice

5.1.1 When are the principles required?

Principles of natural justice apply to statutory decision-makers that are classified as “judicial” or “quasi-judicial,” as opposed to those that exercise “administrative” or “executive” powers.

In *The Minister of National Revenue v. Coopers and Lybrand* at 504, the Supreme Court of Canada identified the factors to consider in determining whether a decision or order is one “required by law to be made on a judicial or quasi-judicial basis” (the language then used in the applicable legislation):

- Is there anything in the language in which the function is conferred or in the general context in which it is exercised that suggests that a hearing is contemplated before a decision is reached?
- Does the decision or order directly or indirectly affect the rights and obligations of persons?
- Is the adversary process involved?

- Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

The court noted that the above list is not exhaustive, adding:

In more general terms, one must have regard to the subject matter of the power, the nature of the issue to be decided, and the importance of the determination upon those directly or indirectly affected thereby

Although decided in 1979, *Coopers and Lybrand* is still referred to as the leading decision on the question of whether a proceeding is classified as judicial or quasi-judicial.

5.1.2 Content

The principles of natural justice have two main components: the right to be heard and the right to an impartial decision-maker.

(a) The right to be heard

A party who has a right to be heard is entitled to prior notice of the proceeding. The notice must be given early enough to allow a party to prepare his or her case, attend before the decision-maker, and make representations. The notice must be reasonable and provide sufficient information to be meaningful. It must disclose the real intention of the proposed decision-maker. For example, in *Re Central Ontario Coalition Concerning Hydro Transmission Systems et al. and Ontario Hydro et al.*, notices of public hearings regarding the location of possible hydro transmission lines referred to possible expansion in “Southwestern Ontario” but provided no map of the possible locations. The transmission corridor chosen as a result of the hearing was outside what many would consider as Southwestern Ontario (starting as it did near the Bruce Peninsula). The notice was deficient. In many public law situations, the legislation will indicate who must be notified and how.

Notice also goes beyond initial notification of the hearing. A party is entitled to know “the case to meet,” particularly if allegations are made against a party. A tribunal cannot rely on evidence provided to it without giving notice to affected parties and giving the parties a chance to respond to the evidence.

The form of the “hearing” will vary, depending on the context. There may be an oral hearing, or the hearing may be restricted to written submissions. Further, hearings may be open to the public or, in other cases, private.

(b) An impartial decision-maker

A decision-maker must not have a pecuniary interest in the outcome of the process. Similarly, a decision-maker might also be biased because of a relationship with or prior dealings with one of the parties or the issues. Also, the decision-maker must not demonstrate a lack of impartiality or neutrality through comments or conduct.

Administrative law principles go beyond actual bias and provide that a decision-maker must be free of a reasonable apprehension of bias. The test framed in *Committee for Justice and Liberty v. National Energy Board* at 394 was as follows:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information ... [T]hat test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

In *C.U.P.E. v. Ontario (Minister of Labour)* at para. 199, it was held that the test should not be directed to the subjective perspective of one of the parties but to the reasonable, detached, and informed observer.

(i) Apprehension of personal bias

In some circumstances, the reasonable apprehension of bias may arise because of the identity of the decision-maker; for example where the decision-maker in a case is also a party in another similar case.

Successful allegations of perception of personal bias are rare. First, as a practical matter, a decision-maker conscious of a potential appearance of bias could have another tribunal member assigned to the case. Second, in both the judicial and the administrative context, the threshold is high—there must be “substantial” grounds for disqualification. Tribunals, like courts, will resist adjudicator shopping and unsubstantiated attempts to delay proceedings.

(ii) Institutional bias

In other situations, the allegation of a reasonable apprehension of bias is made not because of the decision-maker’s identity, but because of perceived institutional bias. In these situations, a detailed examination of the statutory scheme is required to see whether a claim to natural justice is precluded by the statutory language and scheme. Legislation may authorize certain forms of “institutional bias.”

Many statutory schemes, notably those involving securities commissions, require the commission to

perform a variety of functions: investigative, prosecutorial, and decision-making. Some overlap is inevitable. The focus should be on whether it is arguable that the decision-making tribunal has arrived at a preliminary judgment before starting its hearing process. For example, in *Re W. D. Latimer Co. Ltd. and Bray*, the Court of Appeal noted the statutory scheme permitted commission members to be present at meetings where investigations were discussed. The same members later sat as decision-makers. Participation in the various statutory functions did not indicate prejudgment by the commission members.

The extent of involvement in the various aspects of a commission’s different functions may give rise to an apprehension of bias. In *Gardner v. Ontario (Civilian Commission on Police Services)*, the Ontario Civilian Commission on Police Services had various functions. Three members of the commission attended at various meetings where the commission decided to investigate. The investigation report (commenting adversely on Gardner’s credibility) was discussed. It was decided there would be an inquiry, and prosecution counsel was appointed. Those three members were then appointed to adjudicate the complaint against Gardner. The court found a reasonable apprehension of bias in having those members adjudicate, noting that the *Police Services Act* is flexible and would readily permit separation of members for investigation and adjudication.

Similarly, the statutory scheme for the appointment of decision-makers may prevent an argument that the decision-maker is not “independent,” as required by the rules of natural justice. In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, a licence holder argued that decision-makers appointed “at the pleasure” of the executive were not independent of government. The Supreme Court noted that like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language.

Institutional practices such as internal consultation may give rise to claims of an apprehension of bias or lack of independence. In *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, the Supreme Court recognized that institutional consultation ensures consistency in the decisions of an administrative body and does not create an apprehension of bias or lack of independence if the following rules are respected:

- The consultation proceeding cannot be imposed by a superior-level authority within the administrative hierarchy.
- The consultation must be limited to questions of policy and law.

- Even on questions of law and policy, the decision-makers must remain free to make their own decision.

(iii) The source for the claim of an apprehension of bias

If an adjudicator thinks that personal circumstances might give rise to an apprehension of bias, the prudent course is for the adjudicator to disclose the facts to the parties, since the parties might not be aware of the circumstances. That disclosure may form the evidentiary basis of the claim of a reasonable apprehension of bias.

Alternatively, there may be comments made by the decision-maker outside of the particular proceeding or hearing. For example, municipal councillors may have earlier expressed views supportive of certain projects before deciding rezoning applications with respect to those projects. In such circumstances, the courts recognize the particular context in which elected officials operate. As part of their political functions, they are expected to express certain views. The test for apprehension of bias is whether the official is still capable of being persuaded or had expressed a final opinion that could not be changed. Public statements expressed by a tribunal member during or after the hearing may form the basis of a claim of a reasonable apprehension of bias. Finally, a reasonable apprehension of bias may be based on the reasons for the administrative decision. In *Baker v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court concluded that the immigration officer's notes (which formed the reasons for the decision) were the basis of a reasonable apprehension of bias.

Actual bias or reasonable apprehension of bias on the part of the decision-maker renders the decision void. An allegation of bias, whether actual bias or reasonable apprehensions of bias, should be raised before the decision-maker at the outset of a hearing or as soon as circumstances are known. In this situation, the lawyer should bring a motion seeking that the tribunal recuse itself before any further proceedings are held. A court might find that a party has waived the right to allege bias by participating in the tribunal hearing process without objecting after knowing the circumstances.

5.2 Fairness

As indicated above, the principles of natural justice apply when a decision is required to be made on a judicial or quasi-judicial basis. However, state decision-making and regulation has increased greatly, and there are a number of decisions of public officials and regulators that cannot be characterized as "judicial" or "quasi-judicial." Moreover, the principles of natural justice, which often

require trial-like procedure, are overly formal and inappropriate for the exercise of many public powers. The concept of fairness arose as a result of these factors.

Through the doctrine of fairness, courts can assess the procedural adequacy of decisions made by public officials even though the decisions are not made in accordance with the principles of natural justice.

Re Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police is the leading decision. Nicholson was a probationary officer. He was dismissed from employment without being told why or having an opportunity to explain himself. The applicable regulations at the time gave officers procedural rights but indicated expressly that the regulations did not apply to probationary constables. The Supreme Court held that Nicholson was entitled to some procedural protection:

In short, I am of the opinion that although the appellant clearly cannot claim the procedural protections afforded to a constable with more than eighteen months' service, he cannot be denied any protection. He should be treated "fairly" not arbitrarily.

The doctrine of fairness aims to ensure that a person has the opportunity to advise the decision-maker before the decision is made of any relevant fact or argument that should be known for the decision-maker to reach a rational conclusion. The pre-decision right to fairness comprises two elements:

- the right to know the case to meet; and
- the right to make submissions to the decision-maker.

Further, depending on the importance of the decision to the person affected, fairness may require that the decision-maker provide reasons for the decision.

If those elements of fairness are in the decision-making process, courts are reluctant to be involved in mandating specific procedural steps or codes. As emphasized by the Supreme Court in *Knight v. Indian Head School Division No. 19*:

It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair.

The real issue is to see whether the procedural safeguards are sufficient to provide a fair decision in the particular circumstances. The inquiry should examine whether, in all of the circumstances, the person whose interests are

affected had a meaningful chance to present his or her case and have it considered by the decision-maker.

(a) Factors affecting the content of the duty of fairness

In *Baker*, the Supreme Court outlined the following criteria (while emphasizing that the list is not exhaustive) to use in determining what procedural rights the duty of fairness requires in a given set of circumstances:

- (1) **The nature of the decision being made:** The more procedural rights provided for by the process, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.
- (2) **The nature of the statutory scheme and the terms of the statute pursuant to which the body operates:** Greater procedural protections will be required when no appeal procedure is provided within the statute or when the decision is determinative of the issue and further requests cannot be submitted.

Conversely, when the decision is not “determinative,” less procedural protection is called for. So, for example, when the preliminary administrative process is investigatory or leads only to a recommendation and a right to a hearing occurs later in the process, a party’s procedural rights may be limited to receiving written disclosure of the substance of the investigation and having an opportunity to make a written submission. The parties would have full participatory rights at the hearing later in the legislative scheme.

- (3) **The importance of the decision to the individual(s) affected:** For example, when the decision will affect one’s employment (as in *Nicholson*) or the right to continue in a profession, higher procedural safeguards will be required.

Even when the decision under review is “legislative,” such as the passing of a by-law (usually calling for the lowest form of procedural rights), the Supreme Court has held in *Homex Realty and Development Co. v. Wyoming (Village)* that a party will be entitled to fairness because the decision affects property rights.

One also sees a distinction between procedural rights when a decision is made to cease providing a benefit, as opposed to granting a benefit in the first place. In *Re Webb and Ontario Housing Corporation*, the court held that a tenant was entitled to fairness when her lease was being terminated, but stated that a decision not to grant a tenancy could have been made without any procedural protection.

Note that a claim to fairness does not require that a “right” be affected by a statutory decision. The

development of the doctrine of fairness calls for procedural protection even when it is a person’s “interest” rather than a right that is affected by the decision.

- (4) **The legitimate expectations of the person challenging the decision:** The circumstances affecting procedural fairness take into account the promises or regular practices of administrative decision-makers. It will generally be unfair for them to act in contravention of representations as to procedure or to backtrack on substantive promises without according significant procedural rights.
Note that the doctrine of “legitimate expectations” gives procedural rights only. One cannot claim a right to a particular result or outcome.
- (5) **The choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures or when the agency has an expertise in determining what procedures are appropriate in the circumstances:** Again, this factor (like the others) is not determinative, but courts will give weight to the choice of procedures made by the agency itself and its institutional constraints.
- (6) **The influence of *Charter* principles on procedural protection:** The development of *Charter* jurisprudence has also helped to ensure that appropriate procedural protection pervades public law decisions. In *R. v. Cadellu*, the court held that a parole board could not revoke a person’s parole without holding an oral hearing. Although the principle of fairness did not call for such a hearing, s. 7 of the *Charter*, providing for the right to “life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice,” did require such a hearing before parole was revoked.

6. Substantive review of the decision

Leaving aside procedural safeguards, the core of judicial review is examining the extent to which courts will set aside decisions made by statutory decision-makers.

Statutory decision-makers must act within the scope of the powers given to them by the legislative scheme. If they do something they are not authorized to do, they have acted *ultra vires*—outside of their jurisdiction.

Historically, many of the administrative law decisions focussed on whether the impugned decision was “with respect to jurisdiction” or a “preliminary” or “collateral” question. Traditionally, the statutory decision-makers had to be correct when making such decisions, and courts would intervene if a tribunal erred as to its jurisdiction. On the other hand, if a statutory decision-maker made a decision within its jurisdiction, the courts

would not generally intervene. It is inappropriate for courts to intervene in the substance of public decision-making that is otherwise legal.

Starting with *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, the Supreme Court of Canada signalled the development of the modern approach to judicial review of the substance of the impugned decisions made by statutory decision-makers: a general policy of judicial restraint.

Following *C.U.P.E.*, two subsequent decisions of the Supreme Court of Canada, *U.E.S., Local 298 v. Bibeault* and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, have had a major impact on the modern approach to judicial review.

Briefly, the pragmatic and functional approach to judicial review calls for a two-step approach:

- (1) determine the appropriate standard of review for the particular element of the decision; and
- (2) scrutinize that element of the decision using the appropriate standard of review.

As the Supreme Court emphasized in *Voice Construction Ltd. v. Construction and General Workers' Union, Local 92*, "Only after the standard of review is determined can the administrative tribunal's decision be scrutinized."

Lawyers must be familiar with the Supreme Court's 2008 decision in *Dunsmuir v. New Brunswick*, holding that there are only two common-law standards of review: correctness and reasonableness.

Further, the Supreme Court's 2009 decision in *Canada (Citizenship and Immigration) v. Khosa* should be reviewed, since it deals with the principles of review when the standard of review is set by statute as patent unreasonableness. The court's comments suggest that when the standard of review is defined as patent unreasonableness, the legislature is calling for deference if the decision is reviewed. Deference is also called for when the standard of review is reasonableness, and the comments in *Khosa* suggest that from a practical perspective, decisions will receive the same sort of deference, whether the standard is reasonableness or a statutorily set patent unreasonableness. This approach is

reflected in the recent decision of Ontario's Divisional Court in *Shaw v. Phipps*.

The basic administrative law errors that permit judicial intervention fall into the categories below (again, the standard of review analyzed later is critical):

- Statutory preconditions to the exercise of public powers must be met before their exercise.
- A decision must be made on the basis of relevant considerations, relevancy being determined primarily by reference to the governing legislation. Reliance upon an irrelevant consideration or the failure to consider relevant ones are equally erroneous.
- Public powers may not be exercised for purposes other than those for which the powers were granted.
- A public decision-maker may not bind itself or fetter its discretion by making general rules that apply to every case. Each case must be decided on its own merits, although the decision-maker may establish guidelines or general policies that assist but do not determine the decision-making process.
- Public powers must not be exercised in bad faith.
- Public powers must be exercised in accordance with the principles of natural justice or fairness, where they apply.
- There must be some evidence before a decision-maker to justify findings of fact.
- Public powers must be exercised by those entrusted with them and may not be improperly delegated to others.
- Public powers must not be exercised in violation of the *Charter* or the *Canadian Bill of Rights*.
- A decision must not be unreasonable.

In addition, the official or tribunal may run afoul of the appropriate standard of review in its interpretation of the governing or related legislation or common-law principles applicable to the factual situation, or the application of those principles to the facts.

As a general rule, even when such an administrative law error is found, the courts do not substitute their opinion for that of the decision-maker. In most cases, the matter will be remitted to the decision-making body to be re-determined "in accordance with the law."

Practice before administrative tribunals

1. Introduction

The fundamentals of preparation for a hearing before an administrative tribunal do not differ in any great degree from those for a civil action. The lawyer needs to know the applicable law, develop and maintain a credible theory of the case throughout the hearing or settlement process, prepare and adduce evidence, and prepare to challenge opposing evidence.

As with any other matter, the lawyer needs to comply with the provisions of the federal *Personal Information Protection and Electronic Documents Act*. A privacy handbook for lawyers is available on the website of the Office of the Privacy Commissioner of Canada.

As the administrative tribunal is a creature of statute, some aspects of the preparation and conduct of the hearing differ from trial preparation, most notably in motion practice before the tribunal.

2. Material to examine before the hearing starts

2.1 Legislation

The legislation that creates the statutory decision-making is the central focus of the lawyer's analysis. The statute will govern what decisions can be made and by whom, and may well indicate what kind of evidence is relevant, by identifying the factors to be considered by the tribunal in making its decision. The statute may also prescribe certain procedures for the tribunal to follow.

The lawyer should read the statute that creates the tribunal and the statute that empowers it to act or decide in the instant case. Often this will be one statute. In other instances, it will be several pieces of legislation. The lawyer must ensure that the legislation reviewed is current. In reading the legislation, note not only the tribunal's power, but also any appeal or review mechanisms, since these may shape the way a lawyer creates the record during the hearing before the tribunal.

The lawyer should also understand the various roles of different counsel, depending on the nature of the administrative proceeding. For example, in a coroner's inquest, a Crown Attorney (or designate) shall act as counsel to the coroner. In proceedings before the Human Rights Tribunal of Ontario, the Ontario Human Rights Commission might intervene and be represented by counsel.

Further, the legislation may indirectly affect a party's procedural rights. For example, the Human Rights Tribunal of Ontario is permitted by its enabling statute to make rules that conflict with the *Statutory Powers Procedure Act (SPPA)*, and the rules prevail in case of conflict.

One should have available for ready consultation the *SPPA*, the *Judicial Review Procedure Act (JRPA)*, the *Evidence Act*, and a good text on administrative law.

2.2 Regulations

In a number of situations, the tribunal's powers may be prescribed, expanded, or restricted by the applicable regulations. Some tribunals have powers set out in their by-laws. The lawyer should obtain a copy of the applicable regulations or by-laws and ensure that they are up to date.

2.3 Rules

Section 25.1 of the *SPPA* permits tribunals to make rules of general or particular application. Some tribunals have established rules, even without explicit statutory authority as provided by the *SPPA*. The lawyer should check with the tribunal's registrar or secretary if in doubt as to the existence of rules. For example, s. 17.1 of the *SPPA* permits tribunals to order a party to pay all or part of another party's costs if they have made rules in that regard under s. 25.1. This power to award costs may not be exercised unless the conduct or course of conduct of a party has been unreasonable, frivolous, or vexatious or a party has acted in bad faith. The rules made under s. 25.1 may include the circumstances in which costs may be ordered and the amount of the costs or the manner in which the amount of costs is to be determined.

2.4 Policy and practice directions

In addition, a tribunal may have published policies or practice directions, most often available on its website. Alternatively, the minister responsible may be authorized by the applicable legislation to issue policy guidelines to which the tribunal must refer in making its decisions. The lawyer's reading of the statute will show whether the minister has that power. The registrar of the tribunal can advise as to the existence of tribunal policies, practice directions, or ministerial guidelines.

2.5 Tribunal decisions

With the advances in information technology, it is now much easier (and less time consuming) to find prior tribunal decisions. Many tribunals now have websites containing prior decisions. Examining prior decisions will help a lawyer assess the tribunal's authority to make particular decisions or how the tribunal has made procedural rulings.

Finally, if you are in doubt after looking at all of the above sources of information, you can ask a lawyer who has had experience before the tribunal. Most practising lawyers are willing to help in this way.

3. Application of the SPPA

To determine whether the *SPPA* applies to the tribunal's proceeding, one should

- examine whether the tribunal is expressly excluded from the *SPPA* by the statute creating the tribunal or by s. 3(2) of the *SPPA*, which excludes certain tribunals; and
- examine s. 3(1) of the *SPPA* to see whether the tribunal is required by statute or "otherwise by law" to afford the parties a hearing before making a decision.

Subsection 3(1) provides as follows:

Subject to subsection (2), this *Act* applies to a proceeding by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or to afford to the parties to the proceeding an opportunity for a hearing before making a decision.

If the statute provides for a hearing, then the criterion is met. If the statute is silent, then one has to turn to the principles of natural justice and fairness to see whether the common law requires that a hearing be held.

Note also that the tribunal must be exercising a "statutory power of decision." It may not be enough that the decision-maker is authorized by statute to make decisions. Rather, the decision-maker must be authorized by statute to make the decision in question.

3.1 Operation of the SPPA

This section of the material outlines some of the salient features of the *SPPA*.

If the tribunal has made rules, as provided by s. 25.1, the tribunal hearing may be oral, written, or electronic. Section 5.1 provides for written hearings, as long as the tribunal's rules provide for this procedure and unless a party convinces the tribunal that there is a good reason not to have a written hearing on the substantive matters in issue. Section 5.2 provides for electronic hearings if

authorized by the tribunal's rules, unless the tribunal is satisfied that a party will suffer significant prejudice and the hearing is not restricted to procedural matters.

Section 9 provides that an oral hearing is open to the public, subject to some exceptions. For example, the tribunal may receive some or all evidence *in camera* if it concerns public security or intimate financial or personal matters. An electronic hearing is also generally to be open to the public unless it is not practical to do so.

3.2 Parties' rights

Section 10 provides that a party may be represented by a lawyer or an agent.

Section 10.1 sets out the participatory rights of parties as follows:

10.1—A party to a proceeding may, at an oral or electronic hearing,

- (a) call and examine witnesses and present evidence and submissions; and
- (b) conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding.

The right to present "submissions" means that a tribunal must hear not only the party's evidence but also the party's argument before making a decision adverse to that party.

Note that the right to cross-examine is limited by the terms of s. 10.1(b) and also by s. 23 of the *SPPA*, which provides as follows:

23—(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

—**(2)** A tribunal may reasonably limit further examination or cross-examination of a witness where it is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding.

—**(3)** A tribunal may exclude from a hearing anyone, other than a person licensed under the *Law Society Act*, appearing on behalf of a party or as an adviser to a witness if it finds that such person is not competent properly to represent or to advise the party or witness, or does not understand and comply at the hearing with the duties and responsibilities of an advocate or adviser.

Note that s. 12 allows for the issuance of a summons to compel a witness to attend at a hearing and produce documents. A lawyer should consider the necessity of having a witness subject to a summons if there is doubt as to whether the witness will appear.

3.3 Witnesses' rights

Section 11 provides a witness with a right to advice from a counsel or agent, but the counsel or agent cannot participate in the hearing without leave of the tribunal and is not allowed to attend an *in camera* portion of the hearing except when that witness is being examined.

Section 14 provides protection to a witness whose answers at a hearing might incriminate that witness at a subsequent civil or criminal proceeding.

3.4 Evidence – admissibility

Note that the *SPPA* has a relaxed threshold for the admission of evidence. Subsections 15(1)–(3) provide as follows:

15.—(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

- (a) any oral testimony; and
- (b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

—(2) Nothing is admissible in evidence at a hearing,

- (a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or
- (b) that is inadmissible by the statute under which the proceeding arises or any other statute.

—(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

In addition, under s.16, tribunals can take broader judicial notice of facts, particularly specialized facts within its expertise, than courts usually do.

4. Motions

Motions brought before courts in civil actions generally relate to procedural matters, and the minutiae of motion procedure are spelled out in the rules.

Conversely, many tribunals have a policy-making role—they do more than just apply the law to the facts. A motion brought before a tribunal will be adjudicated not only on the basis of the facts and the law, but also on the public policy considerations as well. In addition, the purpose of many tribunal proceedings is to have an adjudicative system that is faster and less procedurally formal than court proceedings. Further, the details of motion procedure before tribunals and the possible relief

to be obtained by motion are not as easy to ascertain as they are in the *Rules of Civil Procedure*.

Tribunals have the ability to make interim orders or decisions. Section 16.1 of the *SPPA* provides as follows:

16.1—(1) A tribunal may make interim decisions and orders.

—(2) A tribunal may impose conditions on an interim decision or order.

—(3) An interim decision or order need not be accompanied by reasons.

Before bringing a motion, the lawyer should become familiar with the tribunal. The statute and applicable regulations should be studied to see if they say anything about the issue. The tribunal's rules should be consulted. Court and tribunal decisions should be examined for policy directions or decisions that affect the potential motion. Consult the tribunal staff, if necessary, to see whether similar issues have been dealt with in the past.

In deciding whether to bring a motion, you should think about the following:

- What is your objective, e.g., to narrow the issues, compel production, obtain an adjournment, or reduce confusion or delay?
- How will success in the motion help to achieve your client's primary objective in the case?
- What is the effect of losing the motion?
- How important is it? How far are you prepared to go? If you lose, are you prepared to seek judicial review? Is it worth the time, effort, and expense?
- Is there a professional obligation to bring the motion, i.e., an obligation either to the tribunal or to the client? Is there a jurisdictional issue that should be adjudicated?

Although it is in a client's interest to reduce costs and get a fair decision on the merits without preliminary procedural motions, there are times when a motion, brought in advance of the hearing, is the procedure best suited to meet the client's objective.

The tribunal's rules may address the procedure for bringing a motion. Note that parties may ask a tribunal to waive compliance with its rules, on consent of the parties and the tribunal. If the rules do not address motion procedure, the lawyer should consider whether it is more advantageous to give as much notice as possible or it is tactically better to wait.

A lawyer who brings a motion before a tribunal should assume that the amount of time to argue the motion is limited. Advocacy on motions should follow a basic format:

- describe your request in brief and simple terms;

- describe the finding you wish the tribunal to make;
- describe any action you wish the tribunal to take; and
- give the reasons in support of your request clearly and concisely in the hope that the tribunal will adopt them.

The request should seem fair and reasonable in light of the policy and public interest issues in the case, thereby making a denial of the request seem unreasonable.

The lawyer should try to obtain from the tribunal a specific ruling, along with reasons for the decision. If the motion is of enough importance that the lawyer may seek judicial review, the lawyer will want as complete a record as possible.

Tribunals have no inherent jurisdiction. Their powers are set out in their enabling legislation or in the *SPPA*. The lawyer needs to find a legislative basis for any relief sought by way of motion.

5. Alternative dispute resolution (ADR)

Both the *SPPA* and the legal profession recognize that the adjudicative system is not the only procedure for resolving disputes. Administrative tribunal processes, originally designed to be fast and less formal than court processes, have become increasingly complex. The benefits of alternative dispute resolution (ADR) are as obvious in administrative law proceedings as they are in civil litigation. The benefits of ADR should be explained to and explored with a client.

Section 4.8 was added to the *SPPA* in 1999. It permits tribunals, if they have made rules under s. 25.1 respecting ADR and the parties consent, to direct the parties to participate in ADR. Even if ADR does not resolve the

whole proceeding, it may still be very useful in narrowing the issues that will be addressed in a hearing. ADR includes mediation, conciliation, negotiation, or any other means of facilitating the resolution of the issues in dispute.

Under s. 4.8(3) of the *SPPA*, tribunal rules respecting ADR must include procedural guidelines dealing with situations when

- tribunal approval of the resolution is required; and
- a tribunal order is required by statute or otherwise.

Typical provisions protect the confidentiality of the ADR process. The person who conducts the ADR may or may not be a member of the tribunal; if a member, the person will not later adjudicate unless the parties consent. Provisions are made to protect such persons from being compelled to testify as witnesses and to protect their notes or records from becoming evidence.

There appears to be an inconsistency in the *SPPA*. Clause 4.8(1)(b) indicates that parties must consent to participating in an ADR mechanism. Subsection 4.8(4) suggests that a tribunal's rules on ADR may provide that participation in the tribunal's ADR mechanism is mandatory or mandatory in some circumstances. This inconsistency may have no significant practical effect—ADR will lead to a resolution only if the parties enter into the ADR process voluntarily, with a view to making a good-faith effort to reach a solution.

6. Decisions

Under s. 18 of the *SPPA*, a tribunal is required to deliver its decision, including reasons if any, to the parties or their representatives. Section 21.1 allows the tribunal to correct typographical or similar errors at any time.

Judicial review of administrative action

1. What is a judicial review?

The courts have supervisory jurisdiction over administrative decision-makers, i.e., the actions of public tribunals, boards, officers, and other public decision-makers. The rationale for this is that all statutory decision-making powers have legal limits. Judicial review is the means by which courts supervise those who exercise statutory or administrative powers in order to ensure that they do not overstep their legal authority.

On application from a party, the courts may review administrative decisions and, at their discretion, intervene where they find the decision exceeds the decision-maker's statutory mandate or breaches principles of procedural fairness. In some circumstances, courts will also intervene where the decision-maker has committed an error of law or of fact.

A judicial review is distinct from an appeal in several respects. First, a right of appeal is a statutory right and must flow from some legislative instrument. Conversely, a judicial review is generally available in a public law context; the right to a judicial review need not be set out in a statute. A judicial review is a discretionary remedy (i.e., the court is never required to intercede), and courts will usually refuse to review administrative action where a right of appeal exists and has not been exhausted.

Second, on appeal, the level of deference accorded to the lower court depends primarily on the nature of the issue under review. The Supreme Court of Canada explained in *Housen v. Nikolaisen* that the standard of appeal on pure questions of law is one of correctness. On pure findings of fact, an appellate court will typically only intercede where there is a “palpable and overriding error,” an error that is plainly seen. The standard of judicial review, which is discussed in greater detail below, is not determined solely by the nature of the issue or error. Whether the question is one of fact, law, or mixed fact and law is but one of a number of factors the courts must consider when determining the level of deference in a judicial review.

Third, the courts typically have very broad remedial jurisdiction on appeal. They can substitute their own decision for that of the tribunal or court appealed from and can generally order a broad range of remedies. In a judicial review, the courts' remedial jurisdiction is limited to the powers set out in the applicable statutes (i.e., the *Federal Courts Act (FCA)* and the *Judicial*

Review Procedure Act (JRPA)). Importantly, in a judicial review, the court cannot award damages.

2. Jurisdiction of the courts to review administrative action

There are two main venues in which a judicial review can be pursued: federally, before the Federal Courts, and provincially, before the Ontario Divisional Court (a branch of the Superior Court of Justice; see s. 18 of the *Courts of Justice Act (CJA)*). In addition, in limited circumstances, the Ontario Superior Court of Justice can oversee some administrative action.

Judicial review of administrative decisions of Ontario bodies or tribunals is governed by the *JRPA* and the *Rules of Civil Procedure (Rules)*. The review of federal administrative action falls under the *FCA* and the *Federal Courts Rules (FCR)*. As additional legislation may apply to particular administrative acts, it is important for counsel to review the tribunal's enabling statute as well as other legislation relevant to the administrative action or decision-maker.

The appropriate venue for a judicial review depends on the nature of the decision under review. The Federal Courts may review any authority exercising powers conferred by a federal statute or order (*FCA*, s. 2(1)). Thus, the Federal Courts have exclusive jurisdiction to review decisions, orders, and other administrative actions of all federal boards, commissions, or other tribunals (*FCA*, ss. 18.1 and 28). The Federal Courts cannot, however, review the actions of a body created by a provincial statute.

The Ontario Divisional Court has jurisdiction to review decisions of bodies exercising statutory powers of decision conferred upon them by an Ontario statute. The Divisional Court cannot, however, review the acts of federal bodies. The *JRPA* defines “statutory power of decision” to include the powers of an inferior court. Thus, in appropriate circumstances, decisions of inferior courts are reviewable by the Divisional Court (*JRPA*, s. 1).

The Divisional Court and the Federal Courts are created by statute. As statutory courts, they have no inherent powers or jurisdiction: all of their powers must derive from statute.

Conversely, the Ontario Superior Court of Justice is a court of inherent jurisdiction, distinct from the Ontario Divisional Court. The Superior Court of Justice's powers

are inherent; they are set out in but do not flow from the *CJA* (s. 11(1)). As a court of inherent jurisdiction, the Ontario Superior Court of Justice's powers derive not only from statute but from royal grant. It has all the jurisdiction, power, and authority historically exercised by courts of common law and equity in England and Ontario (*CJA*, s. 11(2)).

There are two instances in which the Ontario Superior Court of Justice can review the acts of federal bodies (i.e., can encroach on the Federal Courts' jurisdiction).

First, the Ontario Superior Court of Justice has inherent jurisdiction to make declarations regarding the constitutionality of legislation or its application as well as matters relating to Part I of the *Constitution Act, 1982*, being the *Canadian Charter of Rights and Freedoms* (*Charter*). Provincial superior courts can therefore review administrative action on constitutional grounds. While a provincial superior court can declare that a statute or tribunal's application of a statute is in breach of the Constitution or the *Charter*, it cannot otherwise properly hold that this same tribunal committed an error of law or of fact.

The case law suggests that the Ontario Superior Court of Justice's (and other provincial superior courts') powers to determine the constitutionality of both statutes and the application of statutes is shared with the Federal Courts. Both can make free-standing declarations of constitutionality regarding matters that are otherwise within their jurisdiction. In practice, this means that applications for judicial review of federal tribunals can almost always be brought before the Federal Courts, even where the application raises questions relating to the *Charter* or the constitutionality of federal legislation. Indeed, while their jurisdiction cannot be ousted, provincial courts have been directed to defer to the Federal Courts where Parliament has created an effective statutory scheme that allows the Federal Courts to address issues related to the Constitution and the *Charter*.

Second, while the Federal Courts have jurisdiction to issue most of the traditional prerogative writs (*certiorari*, prohibition, *mandamus*, *quo warranto*, and *habeas corpus*) as well as the equitable remedies (injunctions and declarations) (*FCA*, s. 18(1)), its power to issue *habeas corpus* is limited by the *FCA* to cases involving members of the Canadian Forces serving outside of Canada (*FCA*, s. 18(2)). (Prerogative writs are described in more detail below.)

Writs of *habeas corpus* against any other class of individuals fall within the jurisdiction of the provincial superior courts. In addition, provincial superior courts

may quash or set aside a decision of a federal board (i.e., issue *certiorari* in aid of *habeas corpus*).

3. General principles

While there are some differences between federally and provincially conducted judicial reviews, the following general principles are relevant to both types of proceedings: the availability of a judicial review, the standard of review, discretionary bars, the relief available, the evidence that can be used on a judicial review, and notice to the attorneys general.

3.1 The availability of a judicial review

Not every decision or action is subject to judicial review:

- Only public action or decision-making can be judicially reviewed (*FCA*, s. 2(1); *JRPA*, s. 1)). Private action, such as a private corporation's decision to terminate an employee, can be the subject of a lawsuit, but it cannot be judicially reviewed.
- Only the actual exercise of or failure to exercise statutory powers can be judicially reviewed (*FCA*, s. 2(1); *JRPA*, s. 1)). If a public body is exercising a power conferred on it by statute (for example, when a licensing board decides to renew a license), its decision is generally reviewable by the courts. Conversely, a decision by a public body that is of a purely commercial, managerial, or other non-statutory nature is not a government or public act and is not generally subject to review. In determining whether there has been an exercise of statutory powers, it is critical to consider the nature of the powers conferred on the particular decision-maker by statute. For example, a licensing board's decision to purchase stationery will not normally be reviewable. The same decision made by a body whose statutory mandate relates to procurement may be subject to review.
- Generally, only decisions with some element of finality will be reviewed. The courts will generally refuse to review action (such as a warning letter, a non-binding recommendation, or the preliminary results of an investigation) that does not determine the rights, duties, or entitlements of the parties. Only in exceptional circumstances will the courts review interlocutory action. It is important to look beyond the label attributed to a particular administrative action: an act is not insulated from review simply because it has been termed a "recommendation" or deemed preliminary. If it might prejudice or determine the rights and interests of the parties, an act can be judicially reviewed.

3.2 Standard of review

The standard of judicial review refers to the level of deference the courts will show to a particular administrative decision-maker. In a judicial review, the

determination of the standard of review is a threshold question: the level of court deference often determines the outcome of the case.

In 2008 in *Dunsmuir v. New Brunswick*, the Supreme Court of Canada overhauled its approach to determining the standard of review.

3.2.1 Two standards of review defined

There are now two possible standards of review: reasonableness and correctness. In defining “reasonableness,” the Supreme Court of Canada recognized that many questions that come before administrative decision-makers have more than one reasonable or acceptable answer. For the purposes of a judicial review, a decision is “reasonable” if it falls within a range of acceptable answers and is accompanied by the requisite level of transparency, intelligibility, and procedural fairness.

The standard of reasonableness is the less exacting of the two standards available and is meant to reflect a degree of deference to the administrative decision-maker. Thus, when reviewing on the standard of reasonableness, courts should only intervene if (a) the decision in question is not within the range of defensible solutions, or (b) the decision-making process involves a breach of procedural fairness.

The standard of correctness is a more exacting one. Under the correctness standard, the courts do not show deference to the original decision-maker but rather undertake their own analysis. A reviewing court applying the standard of correctness will not tolerate error and will intervene unless the impugned decision is correct.

3.2.2 Determining the appropriate standard of review

(a) Summary

The standard of review is determined by first considering whether existing jurisprudence has appropriately identified the standard of review in similar or analogous circumstances. Where no existing jurisprudence determines the standard of review in a satisfactory manner, the Supreme Court of Canada directs us to consider a number of factors in order to determine which standard of review applies.

(b) Existing jurisprudence

In determining the standard of review, courts must first consider whether existing jurisprudence has already determined “in a satisfactory manner” the degree of deference to be accorded to a particular category of question and/or a particular decision-maker. This

requires the courts to consider two things about the decision-making context:

- the nature of the question before the administrative decision-maker (this is discussed in greater detail below); and
- the nature of the decision-maker whose decision is under review.

Thus, to determine whether existing jurisprudence determines the standard of review applicable in particular circumstances, the courts will consider what standard of review the decision-maker in question has attracted in the past when it has determined the kind of issue that is under review. They may also look to what standard has been applied to similar decision-makers tasked with addressing similar issues.

For example, a court judicially reviewing an issue of law determined by a human rights tribunal will generally look to what standard of review has been applied in the past to questions of law determined by that tribunal. The nature of the question before the tribunal is important because, as we shall see below, different types of issues attract different levels of deference.

Importantly, the fact that the courts have applied a standard of reasonableness in the past does not mean that reasonableness will always be the appropriate standard. The qualifier (“in a satisfactory manner”) means that a standard of review used in the past is not applied automatically. Courts may distinguish earlier case law in certain circumstances, and this may add both flexibility and uncertainty to the standard of review analysis.

(c) Factors to consider

Where there is no clear jurisprudence addressing the standard of review applicable to a particular type of question in a satisfactory manner, the Supreme Court of Canada directs us to consider the decision-making context and a number of factors. The factors are described below.

(i) The nature of the question

The key factor in the standard of review analysis is the nature of the issue that was before the administrative decision-maker. Indeed, *Dunsmuir* suggests that the nature of the question is relevant at two different stages of the standard of review analysis. First, as indicated earlier, it is a critical step in the initial stage of the analysis, where the nature of the question is determined and then compared to existing jurisprudence in order to determine the standard of review.

Second, it is an important factor (along with the existence of a privative clause, the tribunal’s expertise,

and the nature of the decision-maker) at the final stage of the analysis. Where no jurisprudence satisfactorily determines the appropriate standard of review, the nature of the question forms part of the contextual test to determine the standard of review.

In this regard, the Supreme Court of Canada has provided some guidelines based on the nature of the question. The following categories of decisions will generally attract a standard of reasonableness:

- questions of fact;
- exercises of discretion;
- policy questions;
- questions of mixed fact and law;
- an administrative decision-maker's interpretation of its enabling statute as it relates to its functions; and
- issues of general law applied in a context where the decision-maker has particular expertise (for example, in the labour law context), especially where these do not raise issues of general legal importance.

According to the court, the following categories of decisions will generally attract a standard of correctness:

- constitutional questions, including those related to the division of powers;
- questions directly related to the administrative decision-maker's jurisdiction and the scope of his or her powers or authority; and
- issues of general law that fall outside the administrative decision-maker's area of expertise and that raise issues of general legal importance (for example, the interpretation of a statute of general application).

(ii) Privative clause

A privative clause is a provision in a tribunal or administrative decision-maker's enabling statute that attempts to limit or exclude judicial review of that body's administrative action. A privative clause will often include language such as "the tribunal's decision is final and conclusive."

While the intended effect of a privative clause may be to render the tribunal's decision final and binding, the courts preserve their supervisory jurisdiction. Not even a full privative clause can oust the courts' oversight of administrative tribunals. Thus, although a privative clause (particularly a strong or full clause) is suggestive of a high level of deference, it will not necessarily insulate the tribunal from judicial review.

Conversely, the existence of a statutory right of appeal regarding an administrative decision is suggestive of a more exacting standard of review. A right of appeal

indicates that the tribunal's decision was not meant to be final and that a high level of deference may not be necessary. However, as discussed below, a court may refuse to judicially review an administrative decision until statutory rights of appeal have been exhausted.

(iii) Expertise

The expertise of the tribunal pertains to both questions of law and of fact and refers to the relative experience or knowledge of the tribunal compared to that of the court. It also relates to the composition of the tribunal and to its mandate. More deference is shown to tribunals perceived to have specialized knowledge or expertise over the particular subject matter (for example, in labour law matters). Conversely, in areas where the courts are as competent and experienced as the tribunal (for example, with constitutional questions), a less deferential standard may be more appropriate.

(iv) The purpose of the tribunal and its enabling statute

Under this factor, the courts will consider the original decision-maker's role and purpose as conferred in the empowering statute. Where the statutory scheme or the questions under review relate to principles of general law and are of importance to the legal system as a whole, the administrative decision will generally be reviewed at a more exacting standard. Where the scope of the administrative decision-making is broad and could have wide repercussions, the courts' will be more inclined to intervene to ensure consistency and fairness.

(d) Summary of the *Dunsmuir* test

The following is a summary of the *Dunsmuir* test:

- Determine the nature of the question. Is it a question of fact, law, mixed law and fact, or policy, or an exercise of discretion?
- Based on the nature of the question, does the existing jurisprudence "satisfactorily" point to a standard of review? (Consult the guidelines set out by the Supreme Court and summarized previously.)
- If there is no helpful jurisprudence, perform a contextual analysis and consider the following factors: the nature of the question, the existence or absence of a privative clause, the relative expertise of the decision-maker, and the enabling statute.

3.3 Discretionary bars to judicial review

The courts' supervisory jurisdiction over administrative tribunals is a discretionary power. Despite the merits of an application for judicial review, the courts may refuse to exercise their supervisory jurisdiction or grant relief. While government action must generally fall within certain norms, there are circumstances in which the

courts will refuse to exercise their discretion, recognizing that the general public interest in appropriate government action can be overridden.

The following are examples of circumstances where courts may refuse to exercise their discretion even in cases where the judicial review has merit:

- The parties have failed to exhaust adequate, alternative remedies, such as a right of appeal or reconsideration.
- There has been an unreasonable delay in bringing the application for judicial review, particularly where the delay may have prejudiced the other parties.
- The issues raised in the application for judicial review are hypothetical, moot, or not justiciable (i.e., are of a purely political, moral, or ethical nature).
- The application is premature.
- The errors raised are too minor or trivial to warrant judicial intervention.

Section 2 of the *JRPA* states that on an application for judicial review, the Ontario Divisional Court may grant relief despite any right of appeal. Although the court will not generally exercise its supervisory jurisdiction until appeals have been exhausted, it is not statutorily precluded from conducting a judicial review in such circumstances. Nor is it precluded from reviewing issues that have already been the grounds of an appeal.

Conversely, s. 18.5 of the *FCA* bars judicial review by the Federal Courts where a statutory right of appeal exists. The word “appeal” in s. 18.5 has been broadly interpreted to include most types of review provided by statute. Thus, where a trial *de novo* (a retrial), a stated case, or a statutory appeal is available, the Federal Courts cannot also conduct a judicial review.

It is important to consider whether the decision in question is actually subject to appeal. Judicial review is only precluded for those issues that can be raised on appeal. Where a party has a statutory right of appeal on certain grounds, judicial review may still be available to contest the decision on grounds not appealable pursuant to the statute.

3.4 Relief available

The powers of the court conducting a judicial review are set out in s. 2 of the *JRPA* in the case of the Ontario Divisional Court and in s. 18.1(3) of the *FCA* in the case of the Federal Courts. These statutes codify the prerogative writs that had been available at common law. While the two statutes are worded somewhat differently, the powers they codify are very similar.

With the exception of costs, relief can only be granted against the tribunal under review. The courts cannot require an applicant before a public body to do or refrain from doing any act. For example, while they cannot order a potential licensee to comply with licensing conditions, they can order a tribunal to determine whether the conditions for obtaining a licence were respected.

Importantly, neither the Federal Courts nor the Divisional Court may award damages on a judicial review. They are, however, able to award costs between the parties (*CJA*, s. 131; *FCA*, r. 400).

3.4.1 The prerogative writs

Where a judicial review is available (i.e., where the action is of a public nature, involves the exercise of a statutory power, and has the requisite element of finality), the Federal Courts and the Divisional Court may order prerogative remedies against tribunals within their respective jurisdictions. These remedies do not lie against the Crown and legislative assemblies.

(a) Mandamus

Mandamus is used to compel the performance of a legal duty. Both the Federal Courts (*FCA*, s. 18.1(3)) and the Divisional Court (*JRPA*, s. 2(1)) may order a tribunal, actor, or decision-maker to perform a duty it has unlawfully failed to do or has unreasonably delayed in doing. For example, where a public body has a legal obligation to render a decision and has delayed in doing so, a court can grant *mandamus* to force that body to decide; however, *mandamus* cannot force a tribunal to decide a matter in a particular manner.

Mandamus is a coercive power and, as such, is used cautiously by the courts. An order in *mandamus* is appropriate where the party requesting the order has a clear legal right to the performance of a public or statutory duty and, although that party has demanded the duty be performed, the public body has refused to act.

(b) Certiorari

Certiorari is the power to quash or set aside the decision of an administrative actor. Both the Federal Courts and the Divisional Court (*JRPA*, s. 2(1)) can set aside a decision on the grounds that the tribunal committed an error of law or an error of fact, failed to observe a principle of natural justice, or rendered a decision exceeding its jurisdiction.

Although the courts may quash an administrative decision, they may not substitute their own decision for that of the tribunal. The courts will generally refer the matter back to the administrative decision-maker for determination, but may specify that it go before a

differently constituted tribunal (for example, in cases where the courts find the original decision-maker was biased). The courts may also remit the matter back with directions (for example, they may clarify a procedural issue before the tribunal or explain why a particular substantive issue was incorrectly determined). Only in very exceptional circumstances can the courts' directions amount to a directed verdict.

(c) Prohibition

The Federal Courts (*FCA*, s. 18.1(3)) and the Divisional Court (*JRPA*, s. 2(1)) may prohibit or restrain a decision, act, or proceeding of a public body. For example, a decision-maker can be prohibited from acting if his or her conduct would give rise to a reasonable apprehension of bias. Prohibition can also be used to prevent a tribunal from continuing proceedings that constitute an improper use of its jurisdiction. In this respect, prohibition is the mirror image of *mandamus*. Instead of forcing the tribunal to act (as with *mandamus*), prohibition restrains the tribunal from acting. While *certiorari* is only available after a decision has been rendered, prohibition, like *mandamus*, is typically sought before a final decision is made.

(d) Habeas corpus

Habeas corpus is a remedy available to persons detained or imprisoned and requires the person or entity detaining the applicant to produce the applicant before the court and justify his or her detention. *Habeas corpus* is available, for example, to cause the judicial review of the decision-making process of prison officials who impose more restrictive confinement measures upon inmates. Unlike other forms of relief available on judicial review, *habeas corpus* is not a discretionary remedy; where the applicant shows that his or her detention is without legal grounds, the remedy must be granted.

Section 18 of the *FCA* gives the Federal Court (formerly the Federal Court, Trial Division) exclusive jurisdiction to issue *habeas corpus* in relation to any member of the Canadian Forces serving outside of Canada. It is well established that provincial superior courts can issue *habeas corpus* in all circumstances where the Federal Courts do not have jurisdiction. The Supreme Court of Canada recently considered whether, notwithstanding s. 18 of the *FCA*, provincial superior courts also have concurrent jurisdiction to issue *certiorari* in aid of *habeas corpus* to review the validity of a detention imposed by a federal authority. The Supreme Court of Canada found that the provincial courts have this concurrent jurisdiction. In arriving at this conclusion, the Supreme Court considered the following factors:

- In the prison context, applicants have a choice of two venues (provincial superior courts or the Federal Court).
- While the Federal Court has greater expertise in federal administrative law, the provincial superior courts are equally well-versed in the applicable *Charter* principles.
- A *habeas corpus* hearing may be more rapidly available before provincial superior courts than before the Federal Court.
- *Habeas corpus* relief is locally more accessible through provincial superior courts.
- *Habeas corpus* is not a discretionary remedy.

(e) Quo warranto

Under s. 18(1)(a) of the *FCA*, the Federal Courts have the power to grant *quo warranto* against federal office-holders (i.e., to remove them from public office). The Divisional Court may grant *quo warranto* against a person holding a provincial office.

3.4.2 Equitable remedies

In addition to prerogative writs, both the Federal Courts (*FCA*, s. 19(1)(a)) and the Divisional Court (*JRPA*, s. 2(1)) may award equitable relief in the form of an injunction or a declaration.

(a) Declaration

A declaration is simply a way for the court to state or declare a legal position. The court can issue a declaration regarding, for example, a party's rights under a statute. It can also declare a particular statute invalid. A declaration is a flexible form of relief, and particularly when combined with other forms of relief available on a judicial review, it can be an effective remedy. For example, a court might declare a statute invalid and refer the matter back to an administrative tribunal to determine the parties' rights in light of the court's conclusion.

A declaration is non-binding. However, in practice it is usually an effective remedy because public bodies generally comply with the law as it is declared by the courts. Unlike other forms of relief available in a judicial review, a declaration can be issued against the Crown in the sense that a court may declare a legislative instrument invalid.

(b) Injunction

An injunction is an order that either restrains a public body from doing something or forces a public body to perform a particular act. Although the legal test is different, the effect of an injunction is essentially the same as either prohibition or *mandamus*. Injunctions

can be ordered for a fixed time period or can be permanent. Except where the order relates to s. 24(1) of the *Charter*, an injunction cannot lie against the Crown.

3.4.3 Interim relief

Both the Federal Courts (*FCA*, s. 18.2) and the Ontario Divisional Court (*JRPA*, s. 4) have the power to make interim orders, including staying an administrative proceeding pending judicial review. This power is particularly important because of the following:

- An administrative decision is not automatically stayed pending judicial review.
- Many administrative tribunals do not have the power to stay their own decisions pending review.

In cases where the tribunal has the power to stay its own decision, parties should apply to the tribunal for a stay before raising the issue with the courts.

A stay of proceedings is generally granted where the applicant can establish all of the following:

- There is a serious issue to be tried.
- Irreparable harm will result if the matter is not stayed.
- The balance of convenience and the public interest favour granting a stay.

Although the *JRPA* and the *FCA* use broad language to describe the courts' ability to make interim orders, there are limits to the exercise of this power. According to the case law, the courts can issue interlocutory injunctions, but neither *mandamus* nor prohibition can be awarded on an interim basis. Moreover, it is unlikely that the courts will award interlocutory declaratory relief.

3.5 Evidence admissible in a judicial review proceeding

The purpose of a judicial review proceeding is to determine whether the administrative tribunal committed a reviewable error in reaching its decision. Generally speaking, in a judicial review, the courts review the administrative decision on the basis of the record that was before the administrative decision-maker and will not allow new evidence. This is because the issue on judicial review is whether the tribunal erred in the way it dealt with the case that was before it. The issue is different from an appeal in that a judicial review cannot address whether, had a different case or different evidence been before the tribunal, it ought to have reached a different conclusion.

It follows that seeking to introduce new evidence on judicial review is very different from trying to adduce fresh evidence on appeal. Although there are strict

requirements for the latter measure, the courts will accept fresh evidence on appeal where that evidence

- (a) could not reasonably have been adduced at trial,
- (b) bears upon a decisive or potentially decisive issue,
- (c) is credible, and
- (d) could reasonably be expected to have affected the result.

In contrast, new evidence that could have formed part of the record before the administrative decision-maker is not admissible on judicial review. New evidence is permitted only where it is relevant to the fairness of the hearing procedure, any alleged bias, or the jurisdiction of a tribunal. For example, new evidence that undermines the credibility of a key witness before an administrative tribunal will not be admissible in the judicial review proceeding. However, evidence that a witness was treated with partiality by the tribunal may support an argument of bias or breach of procedural fairness and might be allowed.

3.6 Standing

Standing refers to the ability of an individual, corporation, or group to participate as a party and apply for relief in a legal proceeding. Standing is generally restricted to entities whose rights or interests are directly affected (this is an "as of right" standing) and those who have participatory rights by virtue of a statute. For example, s. 18.1(1) of the *FCA* gives standing to the Attorney General in all applications for judicial review and to those who are not directly affected but who meet the test for "public interest" standing (discussed below).

The rationale for standing restrictions is based on the need to efficiently allocate scarce judicial resources while ensuring that the court hears from those most directly affected by its decision.

Standing often becomes an issue where the constitutionality of a statute is challenged by someone who is not directly affected by the law. It can also become contentious where the matter deals with a public right and the applicant is no more affected than the general public.

In Ontario, because the *JRPA* is silent as to standing, this is determined according to the common law. Federally, the common-law principles have essentially been codified by s. 18.1(1) of the *FCA*.

Subsection 18.1(1) of the *FCA* states that an application for judicial review may be brought by

- "anyone directly affected" by the application for judicial review; or
- the Attorney General of Canada.

In addition, the Federal Courts have the discretion to grant standing to parties not directly covered by s. 18.1(1). This discretion is generally exercised in accordance with common-law principles.

In Ontario and at common law, a party has standing if it is an “aggrieved person” or is directly prejudiced by the administrative action in question. Under the common law and under s. 18.1(1) of the *FCA*, the party seeking standing must show a genuine and direct interest in the matter. At common law, the party must also show that the injury to its interest is not too remote. In other words, there must be a causal nexus between the impugned action and the alleged injury. For example, parents who did not have children attending a school that was scheduled for closure were refused standing to challenge the decision because their interests in the proceeding were too remote.

Parties who do not have as-of-right or statutory-based standing may nevertheless be permitted to claim relief in a proceeding. The courts have recognized that in circumstances generally related to constitutional or administrative law, it may be necessary or appropriate for parties who are not directly affected to participate in a proceeding. At the discretion of the court, parties may be accorded what is referred to as “public interest standing.” The courts will generally exercise their discretion and grant public interest standing where the party seeking to participate in the proceeding can show on a balance of probability all of the following:

- The matter raises a serious justiciable issue.
- The party seeking standing has a sufficient and direct interest in the issues raised.
- There is no other reasonable or effective way to bring the matter before the courts.

This test applies where parties are seeking a remedy under s. 52 of the *Constitution Act, 1982* (i.e., where they are seeking to have a statute declared invalid) as well as in applications for judicial review.

Recent case law suggests that public interest standing is not available when seeking relief under s. 24(1) of the *Charter*. Only those claiming their own rights have been violated have standing to apply to the court for a remedy under s. 24(1). In some cases, the courts have taken a broad view of what is meant by an applicant’s personal rights. The courts seem prepared to broadly interpret “personal rights” where denying standing to claim s. 24(1) relief would effectively circumvent the protection of *Charter* rights.

Finally, the power to award standing is entirely discretionary, and on rare occasions, the courts have

granted standing to parties who do not otherwise meet the test for standing.

3.7 Notice of constitutional question

The Attorneys General are entitled to participate in judicial review proceedings that relate to the constitutionality of a statute or of government action. In matters before the Ontario Divisional Court that raise constitutional questions, notice must be given to the Attorneys General of Canada and Ontario at least 15 days before the date of the hearing (*CJA*, s. 109). If a party fails to give the required notice, the court will either refuse to consider the constitutional question or will refuse to grant the remedy requested.

In matters before the Federal Courts, notice must be given to the Attorney General of Canada and to the Attorney General of each province (not just Ontario) at least 10 days before the date of the hearing. No statute or regulation can be adjudged to be invalid, inapplicable, or inoperable unless the required notice is given (*FCA*, s. 57; *FCR*, r. 69).

3.8 Other procedural considerations

In both the Federal Courts and the Divisional Court, a request for judicial review is brought by way of a notice of application. The applicant must indicate the grounds of review (i.e., the defects in the tribunal’s decision) in the notice of application. The courts are very reluctant to address errors not raised in the notice of application and will do so only in rare instances.

The grounds of review are now enumerated in s. 18.1(4) of the *FCA* and in s. 2 of the *JRPA*. Both of these statutes essentially codify the grounds for review available at common law: error of jurisdiction, error of law, error of fact, and breach of procedural fairness. The *FCA*, in particular, seeks to give the courts some flexibility in terms of grounds for review. Subsection 18.1(4) specifically provides for relief against a tribunal that acted or failed to act by reason of fraud or perjured evidence or that acted in “any way that was contrary to the law.” While the *JRPA* does not contain a similar basket clause, it could be argued that the same broad grounds of review continue to be available at common law.

4. Judicial review of federal administrative action

4.1 Levels of court and appeals

Until the 2003 amendments to the *FCA*, the Federal Court of Canada consisted of two divisions: the Appeal Division and the Trial Division. Since the amendments came into force July 2, 2003, these divisions have

become two separate courts: the Federal Court of Appeal and the Federal Court. With two exceptions, applications for judicial review of federal administrative action are made to the Federal Court. The first exception is set out in s. 28(1) of the *FCA*, which states that the Federal Court of Appeal has originating jurisdiction to review the decisions of federal boards, commissions, or other tribunals listed in s. 28. These include, for example,

- the Canadian Radio-television and Telecommunications Commission;
- the Pensions Appeals Board;
- the Canadian International Trade Tribunal;
- the National Energy Board; and
- the Canada Industrial Relations Board.

The second exception occurs in the rare instances a statute gives originating jurisdiction to the Federal Court of Appeal.

If a federal statute expressly provides for a right of appeal from a decision or order of a federal tribunal, that decision is not subject to judicial review to the extent it may be appealed (*FCA*, s. 18.5). For this reason, it is important to review the relevant statutory scheme before filing an application.

The Federal Courts' jurisdiction to review is exclusive: where the Federal Court of Appeal has jurisdiction to review a matter, the Federal Court is without jurisdiction (*FCA*, s. 28(3)). Similarly, where either of the two Federal Courts has jurisdiction, no other court may review the matter (*FCA*, ss. 18 and 28). In limited circumstances, a provincial superior court may exercise its inherent jurisdiction to do so, although it will usually defer to the Federal Courts' statutory jurisdiction.

A decision of the Federal Court may be appealed to the Federal Court of Appeal (*FCA*, ss. 27 and 52). Decisions of the Federal Court of Appeal may be appealed to the Supreme Court of Canada, with leave of either the Federal Court of Appeal or the Supreme Court (*Supreme Court Act*, ss. 37.1 and 40).

4.2 Time for application

An application for judicial review must be made to the appropriate Federal Court within 30 days after the impugned decision is communicated to the Deputy Attorney General or to the party directly affected (*FCA*, s. 18.1(2)). A party may seek to have the time for filing the application extended by making a motion to the court (*FCR*, r. 8; *FCA*, s. 18.1(2)). The time for filing the application cannot be extended upon consent of the parties; an order of the court is required.

In deciding whether to extend time, the court will generally consider

- whether the party seeking the extension had formulated an intention to apply for judicial review during the time limit for beginning the proceeding;
- whether the party seeking an extension has an arguable case;
- the cause and length of the delay; and
- whether the delay caused prejudice to the opposing parties.

In cases where no existing decision is being challenged (for example, where a party wishes to force a tribunal to render a decision or where it is seeking prohibition), there is no statutory time limitation. However, the doctrine of *laches* applies, and the court has jurisdiction to refuse to intervene on the basis of inordinate delay.

4.3 Parties and the role of tribunal counsel

As we have seen, the Attorney General of Canada, anyone directly affected by the impugned decision, or anyone granted public interest standing may bring an application for judicial review before the Federal Courts.

An applicant must name as a respondent

- every person directly affected by the impugned decision (other than the tribunal who rendered the decision); and
- every person whom a statute requires to be named (*FCR*, r. 303).

Where no such respondent exists (for example, where the relief sought is a declaration that a federal statute is invalid), the applicant must name the Attorney General of Canada as respondent.

In judicial reviews before the Federal Courts, the minister of the government department involved, not the department itself, is the proper respondent in a judicial review proceeding.

In a judicial review under the *FCA*, it is not appropriate to name as a party the tribunal that rendered the decision. While it may seek to intervene in a judicial review application, the scope of the administrative decision-maker's submissions is limited to the essential jurisdiction of the tribunal. Federally, at least, the courts have firmly precluded tribunals from making submissions addressing the merits of their own decisions.

4.4 Procedure

Procedure before the Federal Courts is governed by the *FCR*. Briefly, the procedural steps in a typical application for judicial review are the following:

- (1) **Issuance of the notice of application:** The form and content of the notice are governed by rr. 67–68 and 301. The application must be issued within 30 days after the impugned decision was communicated to the applicant (*FCA*, s. 18.1(2)).
- (2) **Service of the notice of application:** Personal service must be effected within 10 days after the notice of application is issued by the court (*FCR*, rr. 127 and 304(1)). The notice of application must also be served on the tribunal being reviewed, any person who participated in the proceeding before the tribunal, and the Attorney General of Canada (*FCR*, r. 304(1)(b)). Proof of service must be filed with the court 10 days after service is effected (*FCR*, r. 304(3)). To serve the Attorney General or any other Minister of the Crown, the applicant simply files the notice and two copies in the Federal Court Registry. The Registry will then effect service on the Attorney General and any Minister of the Crown (*FCR*, r. 133).
- (3) **Request for material in possession of the tribunal:** A party may request material that is in the possession of a tribunal whose order is subject to review by serving a written request on that tribunal. This request is often included in the notice of application. Unless the tribunal objects to the request, it has 20 days to transmit the material requested (*FCR*, rr. 317–318).
- (4) **Notice of appearance:** A respondent who intends to oppose the application for judicial review must file a notice of appearance within 10 days of being served with the notice of application (*FCR*, rr. 305 and 145).
- (5) **Supporting affidavits and documentary material:** An applicant must serve and file its supporting material within 30 days after the issuance of the notice of application. The respondent must serve and file its supporting material within 30 days after the service of the applicant's affidavits (*FCR*, rr. 306–307). The parties must complete any cross-examination on affidavits within 20 days after the filing of the respondent's affidavits or the expiration of time provided for the respondent to file affidavits (*FCR*, r. 308).
- (6) **Records:** The applicant's record, which includes, among other documents, the notice of application, supporting affidavits and exhibits, transcripts of cross-examinations, and a factum, must be served and filed within 20 days after the completion of cross-examination (or the expiration of time for cross-examining). The respondent's record must be served and filed within 20 days after service of the applicant's record (*FCR*, rr. 309–310).
- (7) **Requisition for hearing:** The applicant must serve and file a requisition for a hearing date within 10 days of service of the respondent's record (*FCR*, r. 314). If the applicant fails to file a notice of hearing within 180 days after the issuance of a notice of application, a status review will

automatically be scheduled. At the status hearing, the court may issue orders ranging from granting judgment to dismissing the proceeding (*FCR*, rr. 380–382).

With some exceptions, the timelines set out in the *FCR* may be extended by agreement of the parties. Where both parties consent, the limits may be extended one time, for no more than half of the period sought to be extended (*FCR*, r. 8)). For example, the parties may agree to extend the time for filing of the applicant's record from 20 days to 30 days.

With one exception, the provisions of the *FCA* regarding the jurisdiction of the Federal Court apply equally to the Federal Court of Appeal. The exception is that the Federal Court may convert an application for judicial review into an action. The Federal Court of Appeal does not have this power (*FCA*, s. 28(2)).

5. Judicial review of provincial administrative action

5.1 The court

The Divisional Court is made up of judges of the Superior Court of Justice and generally sits in panels of three judges. In urgent cases, matters are heard by one judge. The Divisional Court sits throughout the province, and the schedule of sittings as well as the court's practice directions are available on the Ontario courts website.

5.2 Parties and the role of tribunal counsel

The *JRPA* does not define the parties to a judicial review. Based on the common law, all persons, corporations, or associations directly affected are appropriate respondents. In addition, contrary to matters before the Federal Courts, the tribunal or person whose exercise of a statutory power is challenged may be a party to the application (*JRPA*, s. 9(2)).

The *JRPA* does not, however, speak to the scope of the administrative decision-maker's role in the judicial review or the extent to which its counsel may make argument. This is a matter for the court's discretion, which it exercises by weighing the importance of a fully informed adjudication of the issues against the importance of maintaining tribunal impartiality. Unlike in the federal context, Ontario tribunals have been permitted to make broad submissions regarding their decision-making processes and the merits of their own decisions.

Pursuant to s. 9(4) of the *JRPA*, the Attorney General for Ontario must be served with a copy of the notice of application. The Attorney General is entitled as of right to appear before the court on the application.

5.3 The Statutory Powers Procedures Act

The *Statutory Powers Procedure Act (SPPA)* applies to proceedings by a public decision-maker exercising a statutory power of decision conferred by an Ontario statute where that tribunal is required by law to conduct a hearing before making a decision. The *SPPA* does not apply to proceedings before a court of justice or to arbitrations conducted under the *Arbitration Act, 1991* or the *Labour Relations Act, 1995*.

The *SPPA* creates trial-like procedural requirements that constitute a minimum threshold of procedural fairness for the tribunals to which that statute applies. Depending on the circumstances, the common law, the *Charter*, and the decision-maker's specific statute or rules may impose a heightened duty of fairness.

The decisions of tribunals not subject to the *SPPA* also can be judicially reviewed, with the exception of decisions of the courts of justice, which may be appealed but cannot be judicially reviewed. The level of procedural fairness those tribunals must afford is dictated by the common law, the *Charter*, and tribunal-specific statutes, if any.

There is no federal equivalent to the *SPPA*. Federally, the level of procedural fairness required derives from the *Charter*, decision-maker-specific statutes or rules, and common-law principles.

5.4 Procedure

Applications for judicial review to the Divisional Court are governed by RR. 38 and 68 of the *Rules*. In urgent matters, a party may apply to the Ontario Superior Court of Justice for leave to make the application for judicial review to a single judge of the Superior Court of Justice (*JRPA*, s. 6(2)). In such cases, the proceedings are governed by R. 38. All other applications are made to the Divisional Court and are governed by R. 68 of the *Rules*, which incorporates some aspects of R. 38.

The steps in an application for judicial review made to the Divisional Court are as follows:

- (1) **Issuance of the notice of application (Form 68A):** Although the notice must state the grounds for review, it is not necessary to specify the exact nature of the relief sought (i.e., *certiorari*, *mandamus*, prohibition, etc.) (*JRPA*, s. 9). In Ontario, while some statutes require that applications for judicial review of specific decision-makers be brought within a particular timeframe, there is no universal time limitation. In any event, the Divisional Court may generally extend any limitation of time fixed by statute (*JRPA*, s. 5).
- (2) **Service of the notice of application and supporting affidavits:** The notice of application

must be served personally on all parties at least 10 days (20 days if it is served outside Ontario) before the date of the hearing. The supporting affidavits must be served with the notice of application. Proof of service must be filed with the court at least two days before the hearing (*Rules*, r. 39.01). If the notice of application is served upon the tribunal whose decision is impugned, that tribunal must file its record with the court forthwith (*JRPA*, s. 10). Unlike the Federal Courts, there is no need to specifically request the record from the decision-maker. When the notice of application for judicial review is served on the person or board whose decision is challenged, that body must automatically file the record of the proceedings with the Divisional Court (*JRPA*, s. 10). For tribunals governed by the *SPPA*, s. 20 of that statute sets out the content of the record of proceedings.

- (3) **Certificate of perfection:** The applicant must file a certificate of perfection with the application record. The certificate confirms that the applicant has filed all of the requisite material. Once the certificate of perfection is filed, the registrar places the application on a list for hearing (*Rules*, r. 68.05).
- (4) **Service and filing of the notice of appearance and supporting affidavits:** After being served with a notice of application, the respondent must serve and file a notice of appearance forthwith (*Rules*, r. 38.07(1)). If it intends to rely on any affidavits, these must be served and filed before the respondent can conduct cross-examination of the applicant's affidavits. A party who cross-examines on an affidavit cannot subsequently deliver any affidavit evidence without leave or consent (*Rules*, r. 39.02(2)).
- (5) **Cross-examination on affidavits:** (*Rules*, R. 39).
- (6) **Service and filing of the applicant's record and factum:** The applicant's record contains a copy of the notice of application, a copy of the reasons of the tribunal, all affidavits and other materials in support of the application, and all transcripts of cross-examination to which the applicant intends to refer. The record and factum must be served and filed within 30 days after the tribunal's record is filed with the court or, if no record is required, within 30 days after the application is commenced (*Rules*, r. 68.04).
- (7) **Service and filing of the respondent's record and factum:** This must be done within 30 days after service of the applicant's record (*Rules*, r. 68.04(4)).

In the Divisional Court, applications can be dismissed for delay for failure to file a record and factum or a certificate of perfection in the time set out in the *Rules*. A matter can also be dismissed for delay if the application is not perfected within one year after it was commenced (*Rules*, r. 68.06).

5.5 Appeals

An order of the Divisional Court disposing of the judicial review can be appealed to the Ontario Court of Appeal, with leave of the Court of Appeal (*CJA*, s. 6(1)). However, questions of fact alone cannot be appealed.

When, on the basis of urgency, a judge of the Superior Court of Justice agrees to hear the judicial review, that judge's order can also be appealed to the Ontario Court of Appeal, with leave (*JRPA*, s. 6(4)).

6. Civil remedies against public authorities

6.1 Civil proceedings against the government

Under the provisions of the *Crown Liability and Proceedings Act*, the federal government can be sued for damages resulting from the acts of its officers and servants (including ministers), both negligent and intentional, provided that the acts were committed following the passage of that *Act* on May 14, 1953. Crown liability is vicarious, not direct. In order for the Crown to be liable, the plaintiff must establish that the servant would be personally liable, i.e., the servant owed a duty of care to the plaintiff, breached that duty, and caused the loss.

In Ontario, the *Proceedings Against the Crown Act* governs the procedure for suing the province for damages in tort or contract. At least 60 days before the commencement of the action, the plaintiff must serve on the Crown a notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose, and the Attorney General may require such additional particulars as in his or her opinion are necessary to enable the claim to be investigated.

7. Judicial review and privacy legislation

The advent of privacy legislation has resulted in the creation of a number of new administrative decision-makers in the privacy context. For example, the *Personal Information Protection and Electronic Documents Act* (“*PIPEDA*”) creates the office of the Privacy Commissioner, an administrative actor whose decisions are subject to judicial review under the *FCA*. Under other privacy legislation, such as the *Access to Information Act*, a government institution's determination of a request for information may constitute an administrative decision that can be the subject of an application for judicial review.

Judicial review of administrative decision-making in the privacy context is based on the same general principles set out above. While it is beyond the scope of this chapter to discuss this issue in detail, it bears mentioning that the

Supreme Court of Canada has noted that the Privacy Commissioner, at least, is an “administrative investigator” rather than an adjudicator. The court noted that, as an investigator, the Privacy Commissioner may be adverse in interest to the party whose documents are at issue. This has influenced how the court has interpreted the scope of the Privacy Commissioner's powers on judicial review.

8. Judicial review by Aboriginal applicants

Aboriginal people and Aboriginal governments are affected by decisions of government and administrative tribunals on an almost daily basis. Judicial review is available to supervise the conduct of these decision-makers. As with non-Aboriginal applicants, decisions of the federal government, commissions, and tribunals are subject to review under the *FCA*. Similarly, decisions of bodies exercising statutory powers conferred upon them by Ontario statute are subject to review by the Ontario Divisional Court under the *JRPA* and the *SPPA*.

Aboriginal people have sought judicial review of decisions, such as

- discretionary decisions of the Minister of Indian and Northern Affairs in matters such as elections or funding agreements and financial management;
- ministerial decisions regarding fisheries and issuance of fishing licences;
- ministerial decisions regarding mining and issuance of stakes, permits, or other mining interest;
- decisions of federal ministers that failed to properly account for environmental impacts;
- *Canada Labour Code* adjudicator decisions;
- Human Rights Commission decisions under the *Canadian Human Rights Act*;
- decisions of the federal Access to Information Commissioner regarding the release of government documents relating to a First Nation;
- Minister of Indian Affairs' rejection of band by-laws under the *Indian Act*;
- Minister of Indian Affairs' decisions regarding a will;
- a provincial Ministry of Natural Resources forest management plan; and
- a decision of the Ontario Registrar of Cemeteries regarding an Aboriginal burial site.

8.1 Judicial review of band council and tribunal decisions

To the extent that a First Nation's Council (band council) is exercising powers recognized in the *Indian Act* for band councils, it is considered to be “a Federal board, commissions or other tribunals” under the *FCA*, and

judicial review of this body is within the exclusive jurisdiction of the Federal Court.

Claims within this jurisdiction are *ultra vires* the provincial superior courts and can be struck for lack of jurisdiction. Practitioners should be advised that as a result, not all remedies arising from a single set of facts are available in the same court. For example, a wrongful dismissal claim against a First Nation employer in the Superior Court of Justice may contain allegations about the procedural conduct of a band council in making the decision to terminate an employee. Complaints about the procedures of a band council are within the exclusive jurisdiction of the Federal Court and may be struck from the claim.

Decisions of band councils chosen through custom and not through the *Indian Act* are also within the jurisdiction of the *FCA*. As well, officers appointed by a band council pursuant to the First Nation's constitution are considered to be a federal board, commission, or other tribunal under the *FCA*. When individuals are given authority to act for a band from a source other than

a federal statute, the fact that the individuals are members of a band council does not mean they are acting as a federal board.

To judicially review a decision of a band council, applicants must proceed through ss. 18.1(3)–(4) of the *FCA*. Applicants may also seek extraordinary remedies such as *quo warranto*, *mandamus*, and *certiorari* against band councils (*FCA*, s. 18).

It should be noted that within Ontario, some First Nations also exercise statutory powers delegated by the province. For example, under *Sales of Unmarked Cigarettes on Indian Reserves*, O. Reg. 649/93, made under the *Tobacco Tax Act*, band councils can choose to allocate unmarked cigarettes for sale to tax-exempt Indians by retailers on the reserve. Under s. 211 of the *Child and Family Services Act*, “[a] band or native community may designate a body as an Indian or native child and family services authority.” It is possible that these types of statutory powers, delegated by the province, would be subject to judicial review under the provincial *JRPA*, rather than the *FCA*.

Chapter 67

Interpreting the Charter

1. Introduction

This chapter examines when the *Canadian Charter of Rights and Freedoms* (*Charter*) is engaged, the nature of the rights protected, the limits on those rights, and the remedial provisions. The focus is on the *Charter* in the context of civil and administrative justice rather than criminal justice.

2. Who is bound?

The *Charter* applies to government action as opposed to private action (*Charter*, s. 32(1)). While Parliament and the provincial legislatures are specifically mentioned, the *Charter* also applies to all matters within the authority of those entities. This includes provincial human rights commissions, provincially established public transit agencies, and likely municipalities as well. The *Charter* also binds Canadian officials operating outside Canada to the extent that they are involved in processes that violate Canada's international obligations.

Where laws have been enacted by legislatures, they are obviously government action. The common law is not considered to be government action; however, the common law can be challenged where it is inconsistent with *Charter* values.

The *Charter* has been found not to apply to the mandatory retirement practices of universities and hospitals, which, despite receipt of substantial government funding, are considered private bodies. Secondary picketing by labour unions has been found to be private action not subject to the *Charter*. School boards and colleges created and controlled by the government are considered to be government. In *Eldridge v. British Columbia (Attorney General)*, where a hospital was found to be implementing a government program, the *Charter* was engaged. The following passage from La Forest J.'s reasons in that case explains the distinction:

This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly "governmental" in nature—for example, the implementation of a specific statutory scheme or a government program—the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

3. Who is protected?

The rights and freedoms in the *Charter* generally identify who is intended to be protected. Freedom of expression and legal rights are written in the broadest terms so as to apply to "everyone" and to protect "persons." These rights benefit individuals (citizens and non-citizens) as well as corporations.

Democratic rights, mobility rights, and minority language educational rights are reserved to "citizens," while fewer rights are extended to "permanent residents." The right to life, liberty, and security of the person in s. 7 of the *Charter* is available to all persons physically present in Canada to whom Canada's laws apply, including refugee claimants, fugitives, and persons outside of Canada harmed by the actions of Canadian officials. The equality rights provision of the *Charter* recognizes "individuals" being equal before the law and having the right to equal protection. The term "anyone" in the remedy section of the *Charter* (s. 24(1)) includes corporations.

4. What is protected?

The discussion that follows is a brief summary of the rights and freedoms protected by the *Charter*.

4.1 Freedom of thought and expression

Section 2 of the *Charter* reads as follows:

2.— Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

The freedoms protected in this section are recognized in international treaties as being essential to human dignity. The most frequently litigated aspect of s. 2 of the *Charter* is that of freedom of expression in s. 2(b). It has been advanced in the protection of postering, commercial expression, access to government information, and all manner of political protests. The section protects all forms of expression that are capable of meaning other than expression through physical violence. Freedom of expression implies freedom to refrain from expression.

Freedom of conscience and religion in s. 2(a) of the *Charter* has been used to strike down laws mandating Sabbath observance and to permit religious officials to refrain from officiating over marriages that are contrary to their religious beliefs. The *Charter* also recognizes the ability of parents to raise children in accordance with their religious beliefs, although child protection proceedings brought in the best interest of the child can be justified under s. 1 of the *Charter*. Regulations requiring that photographs be taken of all driver's licence holders infringe freedom of religion but are justified under s. 1. Freedom of association, under s. 2(d) of the *Charter*, protects collective bargaining but does not establish a right to any particular process or result.

4.2 Democratic rights

Section 3 of the *Charter* enshrines the right to vote and stand for election for the House of Commons or a provincial legislature, but not to contest municipal or school board elections. Sections 4–5 set the minimum frequency for elections and sittings of Parliament and provincial legislatures. Section 3 has been applied successfully in the area of prisoner voting rights and in striking down minimum candidate requirements for party designation under the *Canada Elections Act*. Inequitable allocation of electoral riding boundaries may also trigger a breach of s. 3.

4.3 Mobility rights

Section 6 of the *Charter* reads as follows:

6.—(1) Every citizen of Canada has the right to enter, remain in and leave Canada.

—(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

—(3) The rights specified in subsection (2) are subject to

- (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
- (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

—(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically

disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

This right of a citizen to remain in Canada in s. 6(1) of the *Charter* has been asserted, with minimal success, in the face of extradition requests. The section affords no protection to permanent residents facing deportation. The rights in s. 6(2) have been used by permanent residents to engage in professions that statutes have reserved to citizens and to overcome laws restricting interprovincial law partnerships.

4.4 Life, liberty and security of the person

Section 7 of the *Charter* reads as follows:

7.— Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

This is perhaps the most frequently invoked section of the *Charter*. It is the foundation of the criminal justice rights that are particularized in ss. 8–14 of the *Charter*. While s. 7 has been held to afford substantive rights in addition to due process, a person seeking to prove a breach must identify a violation of a principle of fundamental justice. To avoid the adjudication of matters of public policy, a principle of fundamental justice must meet three criteria:

- (1) It must be a legal principle.
- (2) There must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate.
- (3) It must yield a manageable standard against which to measure deprivations of life, liberty, or security of the person.

(See *R. v. Malmo-Levine* at para. 113 and *R. v. D.B.* at para. 46.)

Section 7 has been applied in the sphere of health care to recognize a right to be free from unwanted medical treatment, a right to contract for private medical insurance in the face of lengthy waiting lists for treatment, and the right of access to abortion. It has also been used to protect the operation of a safe injection site for drug users. In child protection cases, it has supported a right to state-funded counsel and has been used to block the apprehension of children without a warrant in non-emergency circumstances. Section 7 is also available in refugee, extradition, parole, and human rights proceedings and in respect of a Minister's certificate of inadmissibility. Life, liberty, and security of the person interests are not applicable to corporations.

4.5 Criminal justice rights — ss. 8–14

These sections apply to criminal and regulatory prosecutions. However, some of these rights have application outside the criminal sphere as well.

Section 8 of the *Charter* provides that “[e]veryone has the right to be secure against unreasonable search or seizure.” It has been relied upon to vindicate solicitor-client privilege in the context of the execution of search warrants. This section has also been found to establish a right to privacy and to entitle a person who is not charged with an offence to access the material placed before a justice authorizing wiretaps and searches of the person’s property. It has been held not to establish a privacy interest over one’s garbage put out for curbside collection, however.

Section 9 of the *Charter* provides that “[e]veryone has the right not to be arbitrarily detained or imprisoned.” Section 10 provides for rights on arrest or detention, including the right to be informed of the reason, the right to counsel, and the right to challenge the validity of detention through *habeas corpus*. These rights apply to administrative prison transfers and to circumstances of non-criminal detention as well, including Ministerial certificates authorizing detention of foreign nationals, immigration detention (but not a secondary examination at an airport), and the confinement of persons with mental disorder. While s.12 (cruel and unusual treatment or punishment) has been asserted by persons facing the death penalty in the United States to block extradition, the Supreme Court has preferred to consider this question in the context of s. 7. Section 12 has been successfully applied to indeterminate sentences, mandatory minimum sentences, and some circumstances involving conditions in youth detention centres.

4.6 Equality rights

Section 15 of the *Charter* reads as follows:

15.—(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

—(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Supreme Court has interpreted this section broadly and has found that the enumerated heads listed are prohibited grounds of discrimination. Additional

analogous grounds that have been found to trigger s. 15(1) include unmarried spouses; same-sex spouses; natural (as opposed to adoptive) parents; receipt of social assistance; and native persons residing off-reserve. The Supreme Court stated in *Canada (Attorney General) v. Hislop* that this section has retroactive application to the date it came into force in April 1985.

In *Law v. Canada (Minister of Employment and Immigration)*, for a unanimous court, Iacobucci J. detailed the steps of analysis under s. 15. The analysis reads, in part, as follows:

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

In the case of *Withler v. Canada (Attorney General)*, the Supreme Court of Canada removed the requirement that the equality claimant identify a mirror comparator group. In *R. v. Kapp*, the Supreme Court clarified that the court’s use of the four contextual factors in *Law* to measure the impact of an impugned law on human dignity (under part (C) of the test noted above) was not intended to impose an additional burden on equality claimants.

Where the proposed analogous ground does not relate to a personal characteristic but to a personal circumstance, s. 15 cannot be invoked. For example, laws permitting the prosecution of war crimes committed outside of Canada or limiting compensation to injured workers or their dependants do not create new categories of impermissible differential treatment. In the absence of legislation funding the treatment of all medical conditions, the failure to fund treatment for a particular condition does not infringe this section.

Subsection 15(2) of the *Charter* preserves the government’s ability to enhance substantive equality of a

targeted disadvantaged group without being paralyzed by the need to assist all. It has been used to uphold an Aboriginal-only fishery and a program establishing a Métis land base.

4.7 Language rights — ss. 16–23

These provisions in the *Charter* entrench English and French as official languages. They establish rights respecting access to government services in either language where numbers warrant and to education in either language based on factors relating to demand and historic entitlements. They serve to provide access to courts to enforce the principle of equality of educational opportunity and even present opportunities for creative remedies including structural injunctions. These provisions are not subject to the override in s. 33 of the *Charter*. Nor are they subordinate to other rights in the *Charter*, such as the equality provision in s. 15. Where there are competing rights, all parts of the *Charter* must be read together.

5. Limits and override provisions

5.1 Internal limits upon rights

Some rights and freedoms protected by the *Charter* are unqualified, such as the freedom of conscience and religion guaranteed in s. 2(a). Other rights are subject to modifying words that act as internal limits. Sections 6 and 15 of the *Charter* contain internal limiting or saving provisions. Section 8, for example, uses the word “unreasonable” to describe the types of search and seizure that infringe the *Charter*. This implies that a reasonable search and seizure would not offend the *Charter*. The words modifying the right are generally the subject of their own jurisprudence.

5.2 Interpretive limits upon rights

While some rights and freedoms would appear to be absolute, courts have interpreted them so as to build in limits or exceptions. For example, freedom of expression under s. 2(b) of the *Charter* contains no express limits but has been interpreted so as not to protect expression through physical violence.

5.3 Section 1 of the Charter

After a limit or infringement of a *Charter* right or freedom is found, that limit or infringement may yet be excused if it meets the criteria of s. 1. Section 1 of the *Charter* reads as follows:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

While the burden of establishing an infringement of the *Charter* rests with the party alleging it, the onus of proving that the infringement is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation on a balance of probabilities. The test was established by the Supreme Court in *R. v. Oakes*, a case considering reverse onus provisions in the *Narcotics Control Act*, and is summarized as follows:

Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective, which the limitation is designed to promote, must be of sufficient importance to warrant overriding a constitutional right. It must bear on a “pressing and substantial concern”. Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights.

The requirement of minimal impairment was compared in the *Multani v. Commission Scolaire Marguerite-Bourgeoys* decision to the duty to accommodate in the human rights context. The third aspect of the proportionality test (that the effects not so severely trench on individual or group rights) was rephrased in the cases of *Dagenais v. Canadian Broadcasting Corp.* and *Thomson Newspapers v. Canada (Attorney General)* to measure “whether the benefits which accrue from the limitation are proportional to its deleterious effects.”

The Supreme Court has carefully avoided the rigid application of the test set out in *Oakes*. Whether a legislative objective is sufficiently important to justify infringing a right or freedom will depend on the facts of each case. A decision-maker will accordingly require a complete evidentiary record providing the factual and social contexts of the impugned law.

While considering government objectives in isolation is of limited value, examples of objectives that have been asserted in successfully defending impugned legislation include

- electoral fairness;
- protecting a particularly vulnerable group;
- preventing identity theft; and
- enabling unions to participate in the broader political, economic, and social debates in society and to contribute to democracy in the workplace.

Although budgetary considerations are generally insufficient to justify an infringement of the *Charter*, a fiscal crisis can suffice.

The phrase “prescribed by law” in s. 1 of the *Charter* includes statutes, regulations, and the common law. The policies of a government-operated transit agency have been considered to constitute law for the purpose of s. 1. A statutory limit may fail to meet the standard of being prescribed by law if it permits the exercise of discretion in enforcement or is considered too vague.

5.4 Override provision

Parliament and the provincial legislatures maintain the ability to override the rights and freedoms in ss. 2 and 7–15 in the *Charter* through the notwithstanding clause in s. 33 of the *Charter*. Although s. 33 has the effect of restoring legislative primacy, it is rarely used. The political price of enacting legislation that overrides the fundamental freedoms and legal rights could be significant. The section also contains a “sunset clause,” such that the exemption ceases to have effect after five years unless re-enacted by the legislature.

6. Charter remedies

Upon establishing a breach of the *Charter*, the remedies available can include changes to the law under s. 52 of the *Constitution Act, 1982* and individual remedies under s. 24 of the *Charter*. It is rare for both types of constitutional remedies to be available in the same case although it can occur.

6.1 Section 52

Section 52 of the *Constitution Act, 1982* is not technically part of the *Charter*. However, it contains the provision that deems laws that are inconsistent with the Constitution (which includes the *Charter*) to be of “no force or effect.” The full text of s. 52(1) reads as follows:

52.—(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Depending upon the authority of the body granting a remedy under s. 52, the consequences can vary dramatically. Where a tribunal has authority to apply the *Charter*, the remedy will be limited in its application to the parties before the tribunal. Where the remedy is granted by a provincial superior court or provincial court of appeal, it applies across that province (subject to any stay pending appeal). Where the source of the remedy is the Federal Court or the Federal Court of Appeal (in respect of the laws of the Parliament of Canada) or the Supreme Court of Canada (in respect of any law), it applies across the country.

The primary remedy available under s. 52 is a declaration the law is of no force or effect, often referred to as “striking down.” Consequent to striking down, a secondary choice arises of whether to sever, read in, read down, or simply remit the matter back to the legislature. Where new legislation is expected, the court may temporarily suspend the declaration of invalidity. Where a declaration of invalidity is suspended, courts can grant a constitutional exemption in favour of the litigants before it. Each of these concepts is considered below.

6.1.1 Striking down

The consequence of a law being found to be of “no force or effect” under s. 52 of the *Constitution Act, 1982* is that the law is struck down. This is the usual remedy sought under s. 52 and is akin to the orders made in pre-*Charter* constitutional litigation. Striking down can lead to a number of options, including severance, reading in, or reading down.

A form of remedy akin to striking down is a declaration of invalidity. A declaration may be sufficient in some cases to dispose of all issues before the court. For example, in a reference in which a government puts a constitutional question to a court, this may be all that the court is asked to provide.

6.1.2 Reading in and reading down

Where it can be safely assumed that the legislature itself would have remedied the infringement by amending the legislation in a certain manner, the court will do so in its place. The remedy of reading down involves the removal or ignoring of words that are found to offend the *Charter*. Reading in (or extension) remedies the situation where the statute offends the *Charter* by reason of its being under-inclusive. Words are read in by the court to overcome the omission. These remedies are available only where the nature and purpose of the legislation is not altered by the amendments. The remedies of reading in and reading down can be used in combination such that offending words can be removed and wording consistent with the *Charter* inserted in their place. Usually this consists of using no more than a handful of words in each case.

In *Vriend v. Alberta*, the Supreme Court extended the *Individual’s Rights Protection Act* to include the ground of sexual orientation as one of the prohibited grounds of discrimination. However, such remedies must be exercised with caution. In *Schachter v. Canada*, the leading case respecting s. 52 remedies, Chief Justice Lamer, speaking for the entire court on this issue, wrote the following:

Severance or reading in will be warranted only in the clearest of cases, that is, where each of the following criteria is met:

A. the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;

B. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and,

C. severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.

If the court misjudges what the legislature would have done in any particular case, it is ultimately the legislature that has the last word. While the courts are required to determine when legislative provisions are invalid, they are generally unsuited to select amongst valid options for replacing the legislation. This requires input from all stakeholders, opportunity for debate, and the consideration of policy options for which legislatures are best suited.

Akin to reading down is the use of the *Charter* as an interpretive tool to resolve genuine ambiguities in statutory interpretation. If one reading of a statute would result in an infringement of the *Charter* but an equally plausible interpretation would avoid the infringement, the interpretation consistent with the *Charter* is preferred. For example, in *A.C. v. Manitoba*, the Supreme Court ruled that child protection legislation should be interpreted in a way that allows an adolescent under the age of 16 to demonstrate sufficient maturity to have a particular medical treatment decision respected.

6.1.3 Severance

The remedy of severance involves the removal of an offending part of a statute. This is done where the court determines that it is not appropriate for any reason to read in or read down the statute. In the case of *M. v. H.*, the Supreme Court declined the invitation of some of the parties to extend the support obligations between unmarried opposite-sex spouses to unmarried same-sex spouses. The reason provided was that other parts of Ontario's *Family Law Act* that were not raised in the case, including the right to contract out of spousal support obligations, would remain unavailable to same-sex spouses. It was expected that the Legislature would have to make changes to other acts as well. The definition of spouse was severed from the legislation, and the declaration of invalidity was suspended for six months.

6.1.4 Suspending declarations of invalidity

Where a court determines that some or all of a legislative provision is invalid, it may then suspend its order for a period of time to permit the legislature to remedy the infringement. The primary reason for such action is deference to Parliament and the provincial legislatures. A second reason for making an order of temporary validity is that persons may be adversely affected if the order striking down legislation has immediate effect. For example, where the process leading to findings of not guilty by reason of insanity in criminal proceedings was found to infringe s. 7 of the *Charter*, the Supreme Court made an order of temporary validity for six months upon terms to give Parliament an opportunity to replace it. A third reason for an order of temporary validity is that the time required to comply with the declaration of invalidity may be significant. The order respecting the temporary validity of a statute may in such circumstances be extended.

In some cases, legislation will be found to have been enacted for a purpose that is considered unimportant or that is in itself offensive to the *Charter*. Such legislation does not pass the first branch of the *Oakes* test that the government objective be an important or pressing one. Where the court finds this, it serves no purpose to suspend a declaration of invalidity and return the matter to the legislature.

6.1.5 Constitutional exemption

While the suspension of a declaration of invalidity may be the most reasonable option for the purpose of the orderly development of the law, it may not address the rights of the particular litigants before the court who ought reasonably to benefit from the court's finding. In such cases, a constitutional exemption is appropriate. For example, in *R. v. Guignard*, the municipality was allowed six months to revise its sign by-law to conform to the *Charter*. The accused's conviction under the by-law was quashed, however, on the basis that his conviction under the temporarily valid law nevertheless breached the *Charter*.

6.2 Section 24

Section 24 of the *Charter* reads as follows:

24.—(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

—(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard

to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

This section provides a remedy to anyone whose rights and freedoms under the *Charter* have been infringed or denied. An application for relief under s. 24(1) can only be made by a person whose right has been infringed.

In order to grant an individual remedy under s. 24(1), the body considering the request must be considered a court of competent jurisdiction. A court of competent jurisdiction is a court or tribunal that has jurisdiction over the parties and the subject matter of the dispute and is empowered to make the orders sought.

The individual remedies available in response to breaches are necessarily varied. The section below considers some of these remedies. It also examines judicial restraint in granting remedies, considered central to the prerogative powers of the Crown.

6.2.1 Declaration of breach

The corresponding remedy to a declaration of invalidity under s. 52 of the *Constitution Act, 1982* is a declaration under s. 24(1) of the *Charter* that a constitutional litigant's rights have been breached. This is appropriate where the infringement of *Charter* rights occurs not by virtue of an impugned law but by virtue of unconstitutional government action carried out within the context of valid laws.

The purpose of the declaration of breach is to establish that a constitutional wrong has been committed. Consistent with the deference shown to legislatures in making and then temporarily suspending declarations of invalidity, it is then left up to the government to determine how to remedy the breach. In many cases, a declaration of breach will be an inadequate remedy.

6.2.2 Injunctions

The types of injunctions available under s. 24(1) of the *Charter* are divided into three categories: preventative, mandatory, and structural. A preventative injunction enjoins offensive conduct from recurring. A mandatory injunction requires that certain positive steps be taken. (See, for example, *Canada (Attorney General) v. PHS Community Services Society*, where the Supreme Court of Canada ordered the government to continue the exemption status of the Insite safe injection facility.) A structural injunction involves a combination of a mandatory injunction with direct or indirect judicial

supervision. After a court directs that certain actions take place, the court can then require periodic supervision of the progress of the mandatory injunction. Similarly, the court can appoint a monitor to ensure the ongoing compliance with the injunction. Structural injunctions are rare but were approved by the Supreme Court in the case of *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, which involved the enforcement of French-language education rights.

6.2.3 Crown prerogative

The prerogative power of the Crown is the residue of discretionary or arbitrary authority that at any given time is legally left in the hands of the Crown. In *Canada (Prime Minister) v. Khadr*, the Supreme Court illustrated the sensitivity required for handling the needs of the executive branch, such as the conducting of foreign relations, when fashioning remedies touching prerogative powers. While all government power must be exercised in accordance with the Constitution, the executive branch is better placed to make such decisions within a range of constitutional options and requires flexibility in deciding how its obligations are to be discharged. (*Khadr* at paras. 33–38)

6.2.4 Other s. 24(1) remedies

Ultimately, the range of remedies available under s. 24(1) is limited in practical terms only by the powers of the court or tribunal from which the remedy is sought. Examples of remedies that have been granted under s. 24(1) include orders staying criminal proceedings, imposing disclosure obligations, requiring the return of seized property, funding counsel at public expense, and granting damages and legal costs. Bad faith or wilfulness need not be established before a court may award damages to remedy a *Charter* breach (*Vancouver (City) v. Ward*).

6.2.5 Subsection 24(2)

Subsection 24(2) of the *Charter* provides for the exclusion of evidence in criminal cases where its admission would bring the administration of justice into disrepute. The Supreme Court's decision in *R. v. Grant* identifies three inquiries to be conducted by the court in making such a determination: (1) the seriousness of the *Charter*-infringing state conduct, (2) the impact of the breach on the *Charter*-protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits.

1. Introduction

The *Canadian Charter of Rights and Freedoms* (*Charter*) has pervaded and transformed our legal system. Yet its availability as a tool to remedy infringements and challenge laws is subject to procedural constraints. Some procedural limitations originate from our federal system of government and some derive from pre-existing divisions in the judicial system. Yet others arise from the interpretation of the *Charter* itself. The result is a range of procedural choices that are ideal in some cases and less so in others.

Choice of procedure is influenced by a number of factors including

- the remedy sought;
- the jurisdiction of the court or tribunal;
- the degree of urgency involved;
- the nature of the evidentiary record required; and
- the expected costs of the proceeding.

This chapter identifies the threshold issues of standing and mootness. It then considers the procedural options available to a constitutional litigant and the benefits and drawbacks of each, as well as notice and limitation issues.

2. Definitions

It is helpful to review the terms that are used to describe constitutional proceedings. Some are familiar from civil procedure and administrative law, such as actions, applications, appeals, and applications for judicial review. Some are particular to constitutional litigation. These include the term “direct challenge,” which is a court proceeding brought for the sole purpose of obtaining a declaration that particular legislation is invalid. In contrast, a “collateral challenge” is a constitutional challenge to laws or government conduct raised in the context of court or tribunal proceedings involving the determination of non-constitutional issues. Collateral challenges can arise within prosecutions, civil actions for damages, applications for judicial review, *habeas corpus* applications, and some tribunal proceedings. “References” are proceedings in which constitutional questions are put to appellate courts by governments seeking to test the constitutionality of present or proposed legislation.

3. Threshold issues

3.1 Standing

In order to challenge a statute in the absence of a claim for an individual remedy, the person doing so must first establish standing. The test for standing in constitutional cases from *Minister of Justice of Canada v. Borowski* has been stated as follows:

[T]o establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its validity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

Courts seeking to interpret *Charter* rights and government justifications for breaches do not function well in a factual vacuum. It is preferable to determine such questions in the context of a live issue between an individual and the state.

The granting of public interest standing is discretionary. The nominal plaintiff or applicant cannot be assured that the challenge will be heard.

3.2 Mootness

By the time a case reaches an appellate court or even a court of first instance, the facts giving rise to a constitutional claim may no longer be present. This can happen for many reasons. A refugee claimant may be granted landed immigrant status on humanitarian and compassionate grounds. A prisoner held in a special handling unit may be released from custody. A patient detained involuntarily under mental health legislation may be released or found capable in respect of a proposed treatment. As a result, the original constitutional litigant may no longer have a direct interest in the outcome of the proceeding.

Recognizing the difficulty created by the problem of mootness in constitutional matters and the need to answer questions where the breach of constitutional rights may be short-lived or otherwise unlikely to be litigated, courts have expanded the test of standing to deal with the issue of mootness. In *Borowski v. Canada (Attorney General)*, Sopinka J. described a two-stage process:

The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the

required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.

The court went on to describe the principles on which the discretion to hear a moot appeal are to be exercised. These were “the presence of an adversarial context, the concern for judicial economy, and the need for the court to be sensitive to its role as the adjudicative branch in our political framework.”

Strategies to overcome a change in the personal circumstances of a test litigant include

- selecting multiple constitutional plaintiffs;
- combining similar cases together; and
- inviting intervention from parties or groups who are similarly situated.

In this manner, the probability of having a litigant with an interest in the case by the time the case proceeds to trial or appeal is enhanced.

4. Provincial superior courts

4.1 Jurisdiction

The provincial superior courts, including the Superior Court of Justice in Ontario, were recognized rather than established in s. 96 of the *Constitution Act, 1867*. As courts of inherent jurisdiction, their powers are derived not only from statute but from royal grant. Although perhaps redundant, the *Ontario Courts of Justice Act (CJA)* provides that the Superior Court of Justice has “all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario” (*CJA*, s. 11(2)). Those powers include the ability to determine the constitutional validity of any law of Ontario or Canada in the context of a direct challenge or a collateral challenge.

4.2 Procedural options

Proceedings in the Superior Court of Justice can be brought by way of action or application. Actions are commenced by statement of claim followed by statements of defence and reply. They proceed to a trial based on *viva voce* evidence. The advantages of an action include the ability to obtain interim relief, have documentary and oral discovery, and recover damages. It should be noted that the Crown in Ontario is required only to produce a list of documents that may be relevant to the action, rather than an affidavit of documents. Actions tend to produce the most complete record for constitutional litigation but also tend to be the slowest and most expensive form of proceeding.

By comparison, applications are faster and less expensive than actions. They are heard based on a written record of affidavits and transcripts of examinations and cross-examinations. The issues are defined in a notice of application and then argued through written factums and oral submissions. Clause 14.05(3)(g.1) of the *Rules of Civil Procedure (Rules)* specifically contemplates that constitutional challenges may be commenced by notice of application. Interim relief is also available in the context of an application although damages are generally not. Where there are few factual issues in dispute and speed and expense are important considerations, an application is preferable. If the party challenging the legislation requires documentary discovery and oral discovery, however, the preferred procedure is an action.

The plaintiff's or applicant's choice of proceeding is not final. A respondent who objects to proceeding by way of application can bring a motion to have the application proceed by way of action (*Rules*, r. 38.10). Similarly, in an action where a plaintiff seeks relief in respect of the exercise of a statutory power, any party can move under s. 8 of the *Judicial Review Procedure Act (JRPA)* for the action to be heard as an application for judicial review. The *Rules* contemplate that incorrect procedural choices will be made and that where this occurs, the proceedings are not a nullity (*Rules*, r. 2.01).

4.3 Parties, limitations, and notice of claim

Where damages are sought by or against the Government of Ontario, the Crown should be named as Her Majesty the Queen in Right of the Province of Ontario. In direct challenges of Ontario legislation, the Attorney General for Ontario should be named as the respondent. Rule 5.03 of the *Rules* provides that each person whose presence is necessary in order to enable the court to adjudicate effectively and completely on the issues before it shall be joined as a party. If, for example, the ruling sought will have the effect of invalidating a collective agreement, all parties to the collective agreement should be made parties to the action or application. The *Rules* further provide that a person may intervene as a party or as friend of the court (*Rules*, R. 13).

The limitation period for seeking damages against the Crown in Ontario is two years, consistent with the majority of Ontario limitations. Courts have held, however, that where remedies are sought under the *Charter*, statutory limitations are not applicable but that the equitable doctrine of *laches* applies.

The Crown's special position in litigation in Ontario is established in the *Proceedings Against the Crown Act*. This *Act* provides, among other things, that notice must be served on the Attorney General 60 days prior to

commencing a proceeding against the provincial Crown in which damages are sought. Section 7 of the *Act* states as follows:

7.—(1) Subject to subsection (3), except in the case of a counterclaim or claim by way of set-off, no action for a claim shall be commenced against the Crown unless the claimant has, at least sixty days before the commencement of the action, served on the Crown a notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose, and the Attorney General may require such additional particulars as in his or her opinion are necessary to enable the claim to be investigated.

—(2) Where a notice of a claim is served under subsection (1) before the expiration of the limitation period applying to the commencement of an action for the claim and the sixty-day period referred to in subsection (1) expires after the expiration of the limitation period, the limitation period is extended to the end of seven days after the expiration of the sixty-day period.

—(3) No proceeding shall be brought against the Crown under clause 5 (1) (c) unless the notice required by subsection (1) is served on the Crown within ten days after the claim arose.

4.4 Notice of constitutional question

When seeking a remedy under s. 52 of the *Constitution Act, 1982* or under s. 24(1) of the *Charter* in the Superior Court of Justice, the plaintiff or applicant must serve a notice of constitutional question on the Attorney General of Ontario and the Attorney General of Canada. Section 109 of the *CJA* provides as follows:

109.—(1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.
2. A remedy is claimed under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

—(2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

—(2.1) The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.

—(2.2) The notice shall be served as soon as the circumstances requiring it become known and, in any

event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise.

—(3) Where the Attorney General of Canada and the Attorney General of Ontario are entitled to notice under subsection (1), they are entitled to notice of any appeal in respect of the constitutional question.

—(4) Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

—(5) Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceeding for the purpose of any appeal in respect of the constitutional question.

—(6) This section applies to proceedings before boards and tribunals as well as to court proceedings.

The prescribed form for a notice of constitutional question is Form 4F under the *Rules*. The addresses of the Attorneys General are set out in the form itself.

As indicated in s. 109(2.2), notice must be given at least 15 days prior to the date on which the question is to be argued. The court has discretion to relieve the parties from the obligation to give such notice in s. 109(2.2) of the *CJA*, but this discretion applies only to the length of the notice and not to whether notice is given. Similarly, the indication that the notice shall be served as soon as the circumstances requiring it become known suggests that notice should be given at the earliest possible time. Practical considerations dictate that notice be given early, since waiting until the last moment could lead to a request for an adjournment.

4.5 Consequences of failure to give notice of constitutional question

The consequence for failure to give notice of a constitutional question is that any resulting decision is invalid. Although some courts have suggested that the absence of notice merely results in the decision being voidable upon the showing of prejudice, this distinction may be of no consequence given the comments of the Supreme Court in *Eaton v. Brant County Board of Education* at para. 53, where the court wrote, “the absence of notice is in itself prejudicial to the public interest.”

The failure to give notice has the same consequences in circumstances where a remedy is sought under s. 24(1) of the *Charter*. It is important to keep this in mind even when seeking relief that has already been established in other *Charter* cases. For example, an order requiring that counsel be funded in respect of a treatment capacity appeal was quashed for failure to give notice because the

authority of the order was considered to be s. 7 of the *Charter*.

5. Divisional Court

5.1 Jurisdiction

Despite the fact that it is composed of panels of one or three judges of the Ontario Superior Court of Justice, the Divisional Court is a creation of statute without inherent jurisdiction. Its purpose is to hear applications for judicial review as well as a limited range of appeals. The case of *Re Service Employees Int'l Union and Broadway Manor* stands for the principle that as a statutory court, the Divisional Court cannot hear direct challenges of legislation based on the *Charter*. If the constitutionality of a statute is questioned in the context of a properly constituted appeal or application for judicial review, the Divisional Court will be able to consider the question in the context of the collateral challenge.

5.2 Procedural considerations

Appeals and applications for judicial review are based on the documentary record before the decision-maker or tribunal under review, subject to rare exceptions. In the case of an appeal from a tribunal, fresh evidence may be filed only where the applicable statute permits. This usually requires the proponent of the fresh evidence to establish that the evidence was not available earlier and that it is likely to determine the outcome of the appeal. In applications for judicial review, affidavit evidence may be admitted only to show the complete absence of evidence on a material point.

Damages are not available in applications for judicial review before the Divisional Court, although the result of some orders, such as orders reinstating an office holder or employee, might involve the payment of back pay. Interim relief is available in appeals from tribunal decisions to the Divisional Court by virtue of the automatic stay pending appeal under s. 25(1) of the *Statutory Powers Procedure Act (SPPA)*. Although s. 25(2) of the *SPPA* also provides that an application for judicial review does not act as a stay, interim relief is available in applications for judicial review by virtue of s. 4 of the *JRPA*.

5.3 Notice requirements

Applications for judicial review in the Divisional Court must be served on the Attorney General of Ontario (*JRPA*, s. 9(4)). Since the application is a new proceeding, a notice of constitutional question must also be served on the Attorney General of Ontario and the Attorney General of Canada (*CJA*, s. 109(1)) even where a similar notice was served before the tribunal under

review. Where the Divisional Court is sitting in appeal of a decision of a tribunal where a notice of constitutional question has been served, only the notice of the appeal (and not a fresh notice of constitutional question) need be served on the Attorney General of Ontario and the Attorney General of Canada.

6. The Federal Court

6.1 Jurisdiction

Also in contrast to the provincial superior courts, the Federal Court is not a court of inherent jurisdiction. It is established by statute pursuant to the power granted to the federal government in s. 101 of the *Constitution Act, 1867* to establish courts “for the better Administration of the Laws of Canada.” In *Northern Telecom Canada Ltd. v. Communication Workers of Canada (No. 2)*, the Supreme Court held that the term “Laws of Canada” is limited to acts of Parliament and therefore excludes the Constitution. Thus, the Federal Court lacks jurisdiction to hear direct challenges brought for the sole purpose of invalidating a statute based on the *Charter*.

Despite its inability to consider direct challenges, the Federal Court can determine constitutional issues that arise where relief is sought on non-constitutional grounds. It has concurrent original jurisdiction (together with the provincial superior courts) in matters involving the liability of the federal Crown (*Federal Courts Act (FCA)*, s. 17). It has exclusive jurisdiction to consider applications for judicial review in respect of the exercise of power by a federal board, commission, or other tribunal (*FCA*, s. 18(1)). This exclusive jurisdiction does not, however, remove the jurisdiction of the provincial superior courts to examine the constitutional validity of a decision or action of the federal Crown in the context of a claim for monetary damages.

In areas where the Federal Court has particular expertise, including immigration, tax, and intellectual property, it is the preferred forum (subject to the inability to consider direct challenges). In the case of *Reza v. Canada*, the applicant had exhausted all appeals in respect of a deportation order within the federal administrative process. He then applied in the Ontario Court (General Division) (now the Superior Court of Justice) seeking a declaration that provisions of the federal *Immigration Act* were unconstitutional and enjoining his deportation. A motion was brought to stay the application on the basis that Parliament had created a comprehensive scheme of review of immigration matters and the Federal Court was an effective and appropriate forum. The stay granted was ultimately upheld by the Supreme Court on the basis that the Federal Court was the preferred forum.

6.2 Procedural options

Subrule 61(1) of the *Federal Courts Rules (FCR)* provides that proceedings are to be brought by way of action except where an Act of Parliament provides otherwise. The exceptions to this rule include applications for judicial review (*FCR*, r. 300(a)). Such applications are brought in the Federal Court, unless the application is in respect of one of the 16 tribunals listed in s. 28(1) of the *FCA* that are reviewed in the Federal Court of Appeal.

Actions in the Federal Court proceed much in the same way as actions in the Superior Court of Justice, with exchange of pleadings (*FCR*, r. 171), discovery rights (*FCR*, rr. 222–233), and a trial based on *viva voce* evidence (*FCR*, rr. 274–291). There is no special provision for constitutional challenges to proceed by way of application. Where the wrong type of proceeding is commenced, remedial provisions are available such that the proceeding is not a nullity (*FCR*, r. 57). The *FCR* provide for leave to non-parties to intervene in actions, applications, and appeals (*FCR*, r. 109).

6.3 Parties and limitations

The *Crown Liability and Proceedings Act (CLPA)* addresses the manner in which claims are to be brought against the federal government. The *CLPA* provides that the superior court of the province in which the claim arises has concurrent jurisdiction with the Federal Court with respect to the subject matter of the claim (*CLPA*, s. 21). It also provides that the federal Crown is to be named in the proceedings as the Attorney General of Canada, although Crown agencies may also be named (*CLPA*, s. 23). The *CLPA* further incorporates by reference the limitation periods of the province in which the cause of action arises (*CLPA*, s. 32). The *CLPA* does not incorporate the notice requirements of the *Proceedings Against the Crown Act* or similar statutes in other provinces.

6.4 Notice of constitutional question

The delivery of notices of constitutional question in the federal sphere is governed by s. 57 of the *FCA*, which provides as follows:

57.—(1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).

—(2) The notice must be served at least 10 days before the day on which the constitutional question is to be argued, unless the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, orders otherwise.

—(3) The Attorney General of Canada and the attorney general of each province are entitled to notice of any appeal or application for judicial review made in respect of the constitutional question.

—(4) The Attorney General of Canada and the attorney general of each province are entitled to adduce evidence and make submissions to the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, in respect of the constitutional question.

—(5) If the Attorney General of Canada or the attorney general of a province makes submissions, that attorney general is deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question.

Comparing s. 109 of the *CJA* and s. 57 of the *FCA*, the material differences are which attorneys general must be served (Ontario and Canada under the *CJA* versus Canada and each province under the *FCA*) and the length of the notice (15 days under the *CJA* and 10 days under the *FCA*).

7. Administrative tribunals

7.1 Jurisdiction

Given the important roles that administrative tribunals play in our society, it is not surprising that the jurisdiction of many of them intersect with rights and freedoms guaranteed by the *Charter*. Determining when and how tribunals may apply the *Charter* has been a source of difficulty.

7.1.1 Remedies under s. 52

A tribunal's jurisdiction to interpret and apply the remedies under s. 52 of the *Constitution Act, 1982* must be derived from the tribunal's enabling statute. Such jurisdiction may be "express" or "implied" since relatively few statutes specifically state that the tribunal has the power to interpret and apply the *Charter*. The Alberta legislature has designated which tribunals may apply the *Charter* in an amendment to the *Administrative Procedures and Jurisdiction Act*. Ontario has legislated that the following tribunals cannot make decisions respecting constitutional validity:

- Social Benefits Tribunal (*Ontario Works Act, 1997*, s. 67(2)(a));
- Health Services Appeal and Review Board (*Ministry of Health Appeal and Review Boards Act, 1998*, s. 6(3)); and

- Consent and Capacity Board (*Health Care Consent Act, 1996, s. 70.1(1)*).

Therefore, a more careful review of enabling legislation is required. Implied jurisdiction must be discerned by looking at the statute as a whole. The following passage from *Nova Scotia (Workers' Compensation Board) v. Martin* sets out the test:

Absent an explicit grant, it becomes necessary to consider whether the legislator intended to confer upon the tribunal implied jurisdiction to decide questions of law arising under the challenged provision. Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself, particularly when depriving the tribunal of the power to decide questions of law would impair its capacity to fulfill its intended mandate. As is the case for explicit jurisdiction, if the tribunal is found to have implied jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision.

The Supreme Court has noted subsequently in *Trachemontagne v. Ontario (Director, Disability Support Program)* that the wording in the last sentence quoted from *Martin* was deliberate and that a tribunal's jurisdiction to determine constitutional validity is restricted to the very provision(s) in respect of which it has jurisdiction to decide questions of law. Even where a tribunal is presumed to have jurisdiction to determine the constitutionality of a provision under the *Charter*, a party may still rebut the presumption by pointing to an explicit withdrawal of authority to consider the *Charter* or to establish a legislative intention to exclude such jurisdiction. If the presumption is not rebutted, the tribunal may apply the remedies available under s. 52 of the *Constitution Act, 1982* to the extent that they are applicable to the parties before it.

A tribunal lacking jurisdiction to consider matters of constitutional validity may nevertheless have the ability to consider whether its enabling statute complies with provincial human rights legislation. In *Trachemontagne*, the Supreme Court considered two decisions of the Social Benefits Tribunal. The tribunal had accepted the legislature's withdrawal of disability benefits from persons with addictions who were not in treatment programs despite the prohibition against discrimination based on disability in the Ontario *Human*

Rights Code. Following the same steps as in the *Martin* case, the majority of the court found that despite its express withdrawal of the tribunal's ability to determine the constitutional validity of legislation, the legislature had conferred upon the tribunal the ability to decide questions of law in relation to the impugned provision, which implied the ability to determine whether the provision complied with the *Code*. It was permissible, therefore, given the legislative primacy of the *Code* and the absence of an express or implied exclusion of the ability to decide questions of law, for the tribunal to choose not to apply its enabling statute to the extent that it conflicted with the *Code*.

7.1.2 Remedies under s. 24

Subsection 24(1) of the *Charter* provides as follows:

24.—(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The term “court of competent jurisdiction” can include tribunals. The test in determining whether a tribunal can grant a remedy under s. 24(1) of the *Charter* begins, as with remedies under s. 52 of the *Constitution Act, 1982*, with whether the tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and may apply *Charter* remedies when resolving matters properly before it. Whether a particular remedy sought for a *Charter* breach may be granted becomes a matter of discerning legislative intent. Relevant considerations include the tribunal's statutory mandate, structure, and function (*R. v. Conway* at paras. 81–82).

7.1.3 Charter values

Whether or not a tribunal has jurisdiction to grant a remedy under s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982*, the *Charter* still has a role to play as an interpretive tool. Where there is a genuine ambiguity between two competing but equally plausible outcomes, legislation should be interpreted so as to be consistent with the requirements of the *Charter*, which is part of the supreme law of Canada.

7.2 Procedural and practical considerations

Because there are myriad tribunals, each with their own rules or procedures, it is difficult to comment generally on the use of the *Charter* before them. Tribunals that are subject to Ontario's *SPPA* may make interim orders (*SPPA*, s. 16.1).

A drawback to seeking a remedy from a tribunal under s. 52 of the *Constitution Act, 1982* is that the ruling is binding only on parties before the tribunal. The tribunal can only refrain from applying a statute in the particular circumstances before it. Unless the statutory mandate of a particular tribunal includes the principle of *stare decisis*, the ruling is not binding on other panels of the same tribunal. Where a tribunal's decision respecting the *Charter* is reviewed by an appellate court or on judicial review, the standard of review will be correctness, at which time the reviewing court will have the power to make a general declaration of invalidity. Interpretation and application of the *Charter* are questions of law, in respect of which a tribunal will receive minimal deference.

7.3 Notice of constitutional question

Notice of constitutional question must be served in respect of proceedings before tribunals in the same manner as courts. In the case of tribunals established under Ontario legislation, the notice is served under s. 109 of the *CJA*. Before federal tribunals, the notice must be served in accordance with s. 57 of the *FCA*.

8. References

The Ontario Cabinet is authorized under s. 8 of the *CJA* to refer constitutional questions to the Court of Appeal. The court may direct that any interested person be notified of the hearing and be entitled to make submissions to the court. The federal government is authorized to refer constitutional questions to the Supreme Court of Canada pursuant to s. 53 of the *Supreme Court Act*.

In terms of the record before the court, references are the equivalent of direct challenges to legislation. This can at times be a disadvantage to the court in considering the constitutional context of the questions placed before it. In the absence of a sufficient factual basis, the court may decline to answer a particular question. In *Reference re Same-Sex Marriage*, the Supreme Court declined to answer one of four questions put to it in a reference on the basis that to do so would be problematic in the absence of a proper evidentiary foundation.

9. Other procedural options

A final means for challenging a statute is to trigger the prosecution of a test litigant by breaching an impugned statute. Such a step must be taken with extreme caution, since it is contrary to one's professional obligations (and the general law as well) to counsel such a breach. The narrow exception to r. 2.02(5) of the *Rules of Professional Conduct* of the Law Society of Upper Canada is described in the commentary as follows:

A *bona fide* test case is not necessarily precluded by subrule 2.02(5) and, so long as no injury to the person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case.

Any breach of the law must be to the minimum extent necessary to bring about a prosecution. How that prosecution will proceed depends upon the criminal or regulatory process applicable to the offence in question. This process should be considered carefully before reaching the decision that a prosecution is the best way to challenge the statute.

Proving a Charter claim

1. Introduction

Evidentiary requirements in constitutional cases are no less exacting than in other cases. Constitutional cases reasonably proceed to full hearings and trials. Such cases can also be doubly complex, requiring that two types of facts be established: “adjudicative facts,” respecting the particular events giving rise to the claim, and “legislative facts,” relating to the validity of the applicable legislation. This chapter discusses how to prove legislative facts. A checklist of the elements to be proven in *Canadian Charter of Rights and Freedoms* (*Charter*) litigation follows and includes practical points to keep in mind.

2. Proving legislative facts

The choices available to prove legislative facts are broader than those available to prove adjudicative ones. Parties are not restricted to sworn testimony, affidavits, and formally proved documents (although these can certainly be used in proving legislative facts). The following additional forms of evidence can be used in constitutional litigation to establish legislative facts.

2.1 Hansard

Hansard is the record of the debates of the legislature and legislative committees. It records government speeches upon the introduction of legislation and debate respecting potential amendments. Mining this resource is helpful in determining legislative intention. It can also uncover other information, whether consideration was given to possible *Charter* infringements, and how the issue was dealt with.

Hansard can be canvassed not only in respect of provisions that are subject to challenge, but also in respect of the provisions of the *Charter* themselves. Constitutional debates can be considered to help establish the content of *Charter* rights, although in some cases the predictions of those debating the provisions can be proved wrong. In *Re British Columbia Motor Vehicle Act*, the Supreme Court considered but then rejected the position of the legislators that only procedural rather than substantive rights would be protected by s. 7 of the *Charter*.

2.2 Brandeis briefs

Named after the American constitutional advocate and Supreme Court justice Louis Brandeis, this is a vehicle for placing social science evidence before the court in

order to establish the social context of a particular law. The brief consists of studies and articles containing empirical data relevant to the need for a particular law. The Supreme Court approved its use in *M. v. H.* Brandeis briefs can be prepared in the form of an affidavit sworn by a person having general knowledge of the area and identifying each report, study, or article as an exhibit. It is not necessary for the deponent of the affidavit to confirm the accuracy of the exhibits nor would it be reasonable, in most cases, to subject the deponent to cross-examination.

2.3 Social science experts

Where more formal proof of social problems and need for certain legislation is required, experts can be retained to provide reports, give oral evidence, or swear affidavits. Experts can examine the social impact of legislation as well. The range of expertise that may assist the court is limitless. Examples include sociologists, economists, criminologists, psychologists, social historians, educators, demographers, statisticians, and pollsters. Articles and papers within the expertise of the expert can be explained and introduced as exhibits. The expert will be subject to cross-examination on the evidence and any supporting material relied upon. Note that s. 12 of the *Evidence Act* provides that leave is required for a party to introduce the evidence of more than three experts in a proceeding.

3. Factual issues checklist

3.1 Proceeding-specific facts

In collateral challenges, *Charter* issues arise in the context of a legal proceeding respecting other relief. The underlying facts in these proceedings must be proved whether or not the *Charter* is engaged. It is of little comfort to a constitutional litigant to establish each element of a *Charter* breach but then fail to prove a material fact relating to the merits of the underlying case or the jurisdiction of the tribunal.

3.2 Standing and mootness

Factual issues that arise in the context of standing include the identity of the claimant and the nature of the claimant's interest in the legislation in question. Evidence can be led respecting prior failed attempts to get the issue before the appellate courts. One might even seek evidence from a tribunal chair or counsel that the tribunal would benefit from judicial guidance on a

particular issue. If the test litigant's circumstances are likely to change, it can be helpful to adduce statistical information about those circumstances, the difficulties in bringing the issues before the court by any other means, and other grounds on which the court might exercise its discretion to hear the case.

3.3 Jurisdiction of the tribunal

A tribunal's constituting statute governs the tribunal's ability to determine questions of law, its jurisdiction to grant a remedy under s. 52 of the *Constitution Act, 1982*, and its jurisdiction to grant remedies under s. 24 of the *Charter*. Extraneous evidence of legislative intent is less helpful. Practical considerations relating to the overall legislative scheme or the availability of alternate means of obtaining *Charter* relief may be relevant. For example, in *Weber v. Ontario Hydro*, the inability to bring a civil action against an employer influenced the majority's conclusion that a labour arbitrator had jurisdiction to award damages for a *Charter* breach.

3.4 Delivery of notice of constitutional question

The failure to serve a notice of constitutional question is fatal to a claim for relief under the *Charter*. It is important to ensure that the court or tribunal is aware of the status of the service of notice and the positions of the potential government intervenors. This generally consists of filing the notice of constitutional question with appropriate proof of service. Where a response indicates that an Attorney General receiving notice does not intend to participate in the hearing, a copy of the response should be filed with the court or tribunal as well.

3.5 Government action under s. 32

It is the nature of the function rather than the identity of the actor that determines whether the *Charter* applies. To prove government action, evidence relating to the incorporation, funding, and governance of an organization is relevant. Where the organization is private, it is important to establish whether it is performing a government function. This may involve accessing the policies and procedures of the organization to establish whether they are derived from government policy. Such facts can be established in the discovery process or on cross-examination. Freedom of information legislation (i.e., the *Freedom of Information and Protection of Privacy Act*, *Municipal Freedom of Information and Protection of Privacy Act*, and *Access to Information Act*) can be used to access government policies and guidelines that may not be found in statutes or regulations. Statutes themselves need not be proven (*Interpretation Act*, s. 7).

3.6 Nature of the right

Jurisprudence establishing the nature and purpose of a right is available in respect of many rights guaranteed by the *Charter*. Case law interpreting the *Canadian Bill of Rights* and analogous parts of the *Charter* is also helpful, as is human rights jurisprudence in s. 15 guarantees. Other sources of evidence of *Charter* purpose include international treaties, United Nations conventions, law reform reports, texts and articles, and also legislative debates respecting the *Charter* and prior drafts of the *Charter* itself.

3.7 Existence of breach

The burden of proving infringement of a right under the *Charter* rests with the party alleging the breach on a balance of probabilities. This will involve varying levels of complexity. Consider the example of lifetime welfare bans. Proving a breach of s. 7 of the *Charter* may be straightforward where the applicant banned from receipt of social assistance has no other means of support. Proving that the same law infringes s. 15(1) of the *Charter* because it has a disproportionate impact on persons who are disabled may involve demographic, economic, sociological, and statistical evidence. Similarly, a law that is neutral in its language and in its intended impact may be implemented in a discriminatory fashion. Statistical evidence, anecdotal evidence, and access to government policies will be required to establish a problem with implementation.

In response to an allegation of breach, the constitutional defendant can elicit evidence directed to establishing the internal limits on the individual rights. In the case of s. 7, it can be asserted that the denial of liberty or security of the person was in accordance with principles of fundamental justice. In the case of s. 8, evidence can be led to show that a search or seizure was reasonable. Unequal treatment can be shown to be part of an affirmative action program protected by s. 15(2) of the *Charter*.

3.8 Section 1 defence

Where an infringement of the *Charter* has been proven, the burden shifts to the government to justify the infringement under s. 1 on a balance of probabilities. The requirements of this defence are set out in *R. v. Edwards Books and Art Ltd.*:

- A. The legislative objectives giving rise to the limitation must be a pressing and substantial concern of sufficient importance to warrant overriding a constitutional right.
- B. The means chosen to attain those objectives must be proportional or appropriate to the ends in three respects:

- (i) the limiting measures must be carefully designed, or rationally connected, to the objective;
- (ii) they must impair the right as little as possible; and
- (iii) the benefits which accrue from the limitation must be proportional to its deleterious effects.

3.8.1 Legislative objective

When they are included in an Act, preambles and purpose provisions are certainly helpful in establishing legislative objectives. Otherwise, the statute as a whole and the legislative provisions in question can be considered to determine legislative objectives. Legislative history, excerpts from Hansard, law reform commission reports, texts and articles, and evidence respecting the social and economic context of a provision can all assist in establishing an objective. If the purpose of an enactment breaching rights under the *Charter* is to overcome a fiscal crisis, some disclosure of budgetary information is reasonably required.

3.8.2 Rational connection

Whether the provisions are rationally connected to the important legislative objective involves a consideration of the objective and the means chosen to achieve it. This comparison often invites arguments respecting whether there is an ulterior purpose to the impugned provisions. Competing theories on the actual legislative objective can be supported in the same manner as the objective advanced by the government. Similarly, in the absence of empirical evidence, arguments based on common sense respecting the effect of legislation will not satisfy the rational connection test where they can be countered by equally plausible arguments.

3.8.3 Minimal impairment

The test of minimal impairment invites consideration of other means that might be chosen to achieve the legislative objective that will not impair rights to the same extent as the means selected. This invites consideration of conceivable amendments to the provision in question as well as of similar legislation in other jurisdictions. Where the law of a foreign jurisdiction must be proved formally, expert evidence is required. This is generally not required in the case of statutes since the issue is not the actual law of the other jurisdiction but the availability of other approaches that can achieve the policy aims presented in the Canadian context.

3.8.4 Whether benefits are proportional to deleterious effects

When comparing the benefit of the provisions to the harm caused by the infringement, the advantages and disadvantages of the legislation must be considered together and weighed. This can be a creative exercise since the effects of any particular provision may be both helpful and harmful to a particular interest. Where there are competing *Charter* interests at stake, they are not to be ranked but instead are to be balanced.

3.9 Remedies

Once it has been established that the *Charter* breach is not saved by s.1, the burden in establishing the appropriate remedy reverts back to the constitutional plaintiff. Both sides will wish to introduce and/or challenge evidence respecting the issue of remedies. By this stage in the proceeding, considerable evidence relevant to a remedy should already be available, since remedies are not to be considered in isolation. Consider the following passage from the Supreme Court decision in *Schachter v. Canada*:

I find it appropriate at the outset to register the Court's dissatisfaction with the state in which this case came to us. Despite the fact that *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, was handed down in between the trial and appeal of this matter, the appellants chose to concede a s. 15 violation and to appeal only on the issue of remedy. This precludes this Court from examining the s. 15 issue on its merits, whatever doubts might or might not exist about the finding below. Further, the appellants' choice not to attempt a justification under s. 1 at trial deprives the Court of access to the kind of evidence that a s. 1 analysis would have brought to light.

All of the above essentially leaves the Court in a factual vacuum with respect to the nature and extent of the violation, and certainly with respect to the legislative objective embodied in the impugned provision. This puts the Court in a difficult position in attempting to determine what remedy is appropriate in the present context.

3.9.1 Appropriateness of severance, reading in, or reading down

The remedies of severance, reading in, or reading down essentially involve courts making small amendments to legislation in order to bring it into compliance with the *Charter*. Such amendments can only reasonably be made if the court is able to conclude that this is consistent with the intention of the legislature. This is a further juncture at which evidence of legislative objective can be considered.

3.9.2 Suspending the declaration of invalidity

Suspending the declaration of invalidity requires consideration of the impact of the declaration of invalidity upon the public and persons affected by the legislation. Evidence of hardship upon the affected group could be introduced to support both immediate operation of the decision or the argument that it be suspended. Evidence can also be introduced respecting the length of time that may be required for the legislature to address the constitutional deficiencies.

3.9.3 Constitutional exemption

Hardship upon the constitutional claimant can also be raised in support of a constitutional exemption. The evidence supporting this relief will generally be available to the court already.

3.9.4 Injunctions

The three types of injunctive remedies are prohibitive, mandatory, and structural. Each of these will involve evidence of the *status quo*, the balance of harm that would result depending on whether an injunction is granted, and the issue of irreparable harm. In support of a structural injunction, a constitutional claimant may wish to adduce evidence respecting failure to comply with court orders requiring that legislation be changed or be implemented differently. The evidentiary burden in establishing non-compliance with court orders (which is akin to contempt) is not to be taken lightly. A party should be careful in establishing the record to ensure there is no ambiguity.

3.9.5 Damages

A party claiming damages for breach of the *Charter* does not need to establish bad faith or wilfulness (*Vancouver (City) v. Ward*). Damages are otherwise expected to be proved in the same manner as they would be in any personal injury claim or commercial dispute. This includes medical reports, *viva voce* testimony, medical experts, business records, accounting experts, actuaries, and the like. Note that such reports are independently admissible only if the appropriate notices are provided under the *Evidence Act*.

3.9.6 Costs

Courts recognize the benefits to the public of meritorious *Charter* challenges by awarding costs in appropriate cases. There is precedent, in limited circumstances, for a public interest litigant's costs to be funded as a case proceeds. Costs can even be awarded to an unsuccessful public interest litigant. Costs are proved in the same manner as they would in any proceeding. This generally involves the delivery of a bill of costs backed up by time records and invoices.

Arguments and calculations of costs should be prepared in advance. While it may be attractive to seek to reduce the number of issues in respect of which a party must be prepared by proposing that costs be deferred or assessed, it is always prudent to be prepared at the conclusion of any hearing to make cost submissions.

Aboriginal and treaty rights; Constitution Act, 1982, Section 35

1. Introduction

Although Aboriginal and treaty rights have been recognized to varying degrees since prior to Confederation, constitutional recognition and affirmation of these rights only began in 1982. The law in this area is new, continually changing, and relatively complex. This chapter will provide a brief overview of s. 35 of the *Constitution Act, 1982*.

An understanding of the legal issues and procedures surrounding s. 35 forms only part of the broader issues of Aboriginal and treaty rights. The historical and political context in which Aboriginal and treaty rights arise is equally, if not more, important. Practitioners, therefore, are strongly cautioned to acquire a very firm grasp of all aspects of an Aboriginal and/or treaty rights issue before advising clients or pursuing any legal action. This is particularly important where a practitioner is advising an individual Aboriginal client regarding rights that are collective in nature and where success or failure may have a prejudicial impact on the larger Aboriginal community.

Section 35 provides as follows:

35.—(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

—(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

—(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

—(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Many substantive and procedural differences arise between rights under the *Canadian Charter of Rights and Freedoms (Charter)*, found within ss. 1–34, and those under s. 35, which is outside of the *Charter*. Some of the differences are as follows:

- Rights recognized under s. 35 are not limited by s. 1 of the *Charter*; specifically, the rights are not subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
- The rights are not limited to being a shield against government action. They can be used as a sword in establishing Aboriginal and treaty rights, or a defence in defending against limitation of those rights. They are effective against any body, government or private, that limits those rights.
- Aboriginal and treaty rights are not enforceable under s. 24 of the *Charter*, which permits application to any court of competent jurisdiction if any *Charter* right has been infringed or denied and gives the courts very broad remedial jurisdiction.
- The rights are not capable of being overridden by s. 33 of the *Charter* (the “notwithstanding clause”).
- Aboriginal and treaty rights, and other rights or freedoms pertaining to Aboriginal people in Canada, cannot be limited by any provision of the *Charter*. Section 25 states:

25.— The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

 - (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
 - (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

2. What is protected?

Subsection 35(1) applies to Aboriginal and treaty rights in existence when the *Constitution Act, 1982* (rights) came into effect. Although it does not revive extinguished rights, rights that were merely regulated remain in existence and are protected by s. 35. Moreover, an existing Aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The phrase “existing aboriginal rights” must be interpreted flexibly so as to permit their logical evolution over time.

The Supreme Court of Canada in *R. v. Van der Peet* established a two-stage “test” to identify Aboriginal rights:

- (1) The precise nature of the activity must be identified.
- (2) The activity must have been “an integral part of the specific distinctive culture” of the Aboriginal group prior to contact with Europeans.

Stage two of the test has subsequently been modified in *Delgamuukw v. British Columbia* for Aboriginal title

claims (a subset of Aboriginal rights) such that the claimant must establish exclusive use and occupation of the territory “at the time of assertion of British sovereignty.” It has also been modified for Métis claims of Aboriginal rights. Since Métis are the result of contact between First Nations people and Europeans, the relevant time period was altered in *R. v. Powley* to the time when “Europeans effectively established political and legal control in a particular area.”

In *R. v. Badger*, the Supreme Court of Canada set out principles for the interpretation of treaties and the rights that arise from them:

- Treaties represent an exchange of solemn promises between the Crown and the various Indian nations.
- The honour of the Crown is always at stake. The Crown must be assumed to intend to fulfill its promises. No appearance of “sharp dealing” will be sanctioned.
- Any ambiguities or doubtful expressions in the wording of the treaty must be resolved in favour of the Indians. Any limitation of rights must be narrowly construed.
- The onus of establishing strict proof of extinguishment of a treaty or Aboriginal right lies upon the Crown.

The court also stressed and confirmed earlier court decisions that the context in which treaties were negotiated was important and that oral agreements would be recognized. Thus, “the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.” Moreover, “the verbal promises made on behalf of the federal government at the times the treaties were concluded are of great significance in their interpretation.”

In *R. v. Marshall*, the Supreme Court added the following principles for interpreting treaties. First, extrinsic evidence is available to show that a written document does not include all of the terms of the agreement. Second, extrinsic evidence of the historical and cultural context of a treaty may be received even if the treaty document purports to contain all of the terms, even absent any ambiguity on the face of the treaty. Third, where a treaty was concluded orally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written ones.

The Supreme Court of Canada in *R. v. Simon* also held that treaty rights include rights incidental to the activity covered by the treaty. Thus, in *Simon* the treaty right to

hunt included the right to possess a hunting rifle and ammunition, and in *R. v. Sundown*, the treaty right to hunt included the right to erect a hunting cabin in a provincial park.

3. Limits upon rights

While Aboriginal and treaty rights are not subject to a s. 1 *Charter* test, there are a number of limitations.

In *R. v. Sparrow*, the Supreme Court of Canada held that, reference in s. 35 to “existing” Aboriginal and treaty rights, meant “unextinguished,” and the onus of proof of extinguishment lies upon the Crown. There must be “strict proof of the fact of extinguishment” and evidence of a clear and plain intention on the part of the government to extinguish Aboriginal or treaty rights. Moreover, the fact that the rights were in any way regulated does not amount to extinguishment. Thus, in *Sparrow*, federal regulation of fisheries did nothing to extinguish Aboriginal rights to fish.

It is also important to note that (1) as a result of s. 91(24) of the *Constitution Act, 1867*, which gives Parliament authority over “Indians and Lands reserved for Indians,” only the federal government has the Constitutional authority to extinguish Aboriginal and/or treaty rights, and (2) extinguishment through legislation is no longer possible after 1982.

If unable to establish extinguishment, the Crown (or other party trying to deny the Aboriginal and/or treaty right) must prove the infringement or limitation of the right is justified according to the evolving tests set out by the Supreme Court of Canada, beginning in *Sparrow*. In determining whether regulations under the federal *Fisheries Act* violated the Aboriginal rights of a member of the Musqueam First Nation who was fishing for food in a traditional fishery, the Supreme Court in *Sparrow* set out a two-stage test for infringement and justification:

- (1) The individual or group asserting the Aboriginal right has the onus of proving that the legislation or regulation in question constitutes a *prima facie* infringement. Considerations include
 - (a) whether the limitation is unreasonable;
 - (b) whether the regulation poses undue hardship; and
 - (c) whether the regulation denies the holders of the right their preferred means of exercising that right.
- (2) If *prima facie* infringement is established, the Crown bears the burden of justification, which includes two questions:
 - (a) Is there a valid legislative objective, for example, conservation or safety?

- (b) If a valid legislative objective exists, is it in keeping with the honour of the Crown and the fiduciary relationship between Aboriginal peoples and the Crown? Considerations would include whether a priority allocation was provided to Aboriginal people, whether there has been minimal infringement, whether fair compensation was provided where appropriate, and whether there has been appropriate consultation.

The test of valid legislative objective has been broadened in cases of Aboriginal title to include consideration of competing economic interests and development. In cases of commercial resource use where there are no internal limitations, a priority allocation did not necessarily have to be given to Aboriginal peoples.

4. Consultation

The test to determine whether there has been appropriate consultation and fair compensation has been considered by the Supreme Court of Canada in several cases. In *Haida Nation v. British Columbia (Minister of Forests)* and *Weyerhaeuser and Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, the court held that the duty to consult and accommodate is triggered when the Crown has knowledge of an Aboriginal right or title and that the duty to consult can be enforced prior to the judicial determination of the existence and scope of the Aboriginal or treaty rights in question. The duty to consult also arises at the strategic planning stage and cannot be delayed until any point afterwards. The court stated that the scope and content of the duty to consult depends upon the content of the rights asserted and the circumstances but that it can include revenue sharing of a resource that is being exploited.

The Supreme Court of Canada in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* recently provided three conditions that must be met in order for the duty to consult to arise:

1. The Crown has actual or constructive knowledge of a potential Aboriginal claim or right. This threshold is not high; only a credible claim is required.
2. Crown conduct or decision-making is contemplated.
3. The contemplated conduct has the potential to adversely affect an Aboriginal claim or right.

In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, the Supreme Court required the federal government to consult with affected First Nations where lands were to be “taken up” pursuant to a treaty. Also, in *Beckman v. Little Salmon/Carmacks First Nation*, the top court mandated consultation where there was already a signed modern-day land claims agreement.

The court in *Little Salmon/Carmacks* also clarified that individual Aboriginal people do not have a right to be consulted. The duty is owed to the First Nation or Aboriginal community. An individual has no standing to seek judicial review of a government decision because he or she was not personally consulted.

The issue of whether the duty to consult extends beyond government bodies to boards and tribunals has been debated for many years. The Supreme Court of Canada in *Carrier Sekani* stated that tribunals are governed by legislation and that the legislation may provide sufficient jurisdiction for a tribunal to determine whether consultation should take place, the tribunal itself should conduct the consultation, or neither or both. Where a tribunal is given the authority to decide questions of law, there is an implied power to decide constitutional issues, including the issue of consultation. However, where that authority exists and a tribunal finds that consultation is required, the tribunal is not obligated to conduct the consultation itself.

5. Use of s. 35 and remedies

Judicial consideration of Aboriginal and/or treaty rights most often arises in the context of either criminal (or quasi-criminal) charges or land-use disputes.

5.1 Criminal and quasi-criminal prosecutions

Early cases involving s. 35 resulted from Aboriginal defences to hunting, fishing, and trapping charges under federal and provincial laws. These “defensive” cases have grown to include broader areas such as timber harvesting, gaming/gambling, customs duties, and income tax. The remedy in these cases relies upon the supremacy of the Constitution, as found in s. 52 of the *Constitution Act, 1982*:

52.—(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Where a breach of Aboriginal or treaty rights has been successfully made out by the accused, and the Crown has failed to justify the limitation, the charging section of the applicable legislation will be found to have no force or effect against the accused on the charge, and an acquittal will be entered.

5.2 Land-use disputes

Aboriginal groups and governments may also rely upon Aboriginal rights and, less often, treaty rights to assert claims to land and also to prevent development, sale, or other use inconsistent with the Aboriginal interest in subject land. The Supreme Court of Canada in

Delgamuukw first addressed the content of Aboriginal title, an element of Aboriginal rights, covered by s. 35 of the *Constitution Act, 1982*. The court stated that Aboriginal title provides exclusive use and occupation of the subject land for a variety of purposes, which need not be aspects of the group's traditional practices and culture. The uses of Aboriginal title land must only be consistent with the group's attachment to the land. For instance, the erection of a parking lot over a ceremonial site would not be a consistent use.

Since claims of infringement of Aboriginal and treaty rights related to land use (including Aboriginal title) do not generally involve legislation, s. 52 is not generally of assistance in seeking remedies. Rather, Aboriginal applicants usually seek equitable remedies, based upon the breaches of fiduciary duty, which typically coincide with a claim for Aboriginal title. They have included claims for permanent and temporary injunctions (restraining development or sale of land); transfer of land back to the Aboriginal claimant; compensation for loss of use, sale, or other alienation of land; sharing of royalties received from resource development; consultation and negotiation for transfer of land and/or co-management; and declarations of the existence of Aboriginal title.

Chief Justice Lamer, in *Delgamuukw* specifically approved of compensation for infringements of Aboriginal title:

In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.

Aboriginal claimants, particularly in British Columbia, have had great difficulty in obtaining interim injunctions preventing the commercial development or harvesting of lands where they claim Aboriginal title. This is mainly because they sought interlocutory injunctions against the Crown and developers to stop development pending resolution of the Aboriginal title or rights claim. The court in *Haida* noted the difficulty that Aboriginal claimants have in making out a case for interlocutory injunctions, since "the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to 'lose' outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns."

Because the court found in *Haida* and *Taku River* that the duty to consult and accommodate is triggered prior to the Aboriginal claimant obtaining a judicial declaration of the existence of the Aboriginal right in question, a similar strategy of claiming remedies based upon the duty to consult has been more successful.

For example, subsequent to *Haida*, the duty to consult has been used by the Musqueam Indian Band to suspend provincial sale of lands for two years and require the province to enter into a meaningful consultation process in order that avenues of accommodation could be explored. In the case of *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, the Crown had issued a tree farming licence to a company over lands to which the Huu-Ay-Aht First Nation claimed an Aboriginal right; the court granted the First Nation a declaration that the Crown had an obligation to consult with it in good faith.

6. Procedural issues

As with all proceedings against the Crown, Aboriginal claimants must comply with the requirements contained in the *Proceedings Against the Crown Act* and relevant limitations statutes. Likewise, if the claimant is seeking a remedy under s. 52 of the *Constitution Act, 1982* in the Superior Court of Justice, the plaintiff or applicant must serve a notice of constitutional question on the Attorney General of Ontario and the Attorney General of Canada (*Courts of Justice Act*, s. 109).

Practitioners should also be aware of the issuance of royal fiats in relation to actions against the Crown in Right of Ontario. In the Ontario Court of Appeal case of *S.M. v. Ontario*, the cause of action was alleged to have occurred prior to the September 1, 1963, enactment of the *Proceedings Against the Crown Act, 1962-63*, which authorized proceedings against the Crown by way of action for claims that formerly had to proceed by way of petition of right. The Ontario Court of Appeal found that neither the 1962-63 *Act*, nor any subsequent amendments or re-enactments, dispensed with the requirement to proceed by way of petition of right for causes of action that occurred prior to September 1, 1963. For many Aboriginal claimants, particularly where Aboriginal title is at issue, at least some causes of action will pre-date 1963, and therefore a request should be made through the Crown Law Office that a royal fiat be issued by the Lieutenant Governor of the province in relation to any causes of action that may pre-date September 1, 1963.



The Law Society of
Upper Canada | Barreau
du Haut-Canada

Rules of Professional Conduct

~Effective November 1, 2000~

Adopted by Convocation June 22, 2000
Amendments Current to September 22, 2011

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Rule 1 Citation and Interpretation

1.01 CITATION

1.01 These rules may be cited as the *Rules of Professional Conduct*.

1.02 DEFINITIONS

1.02 In these rules, unless the context requires otherwise,

“affiliated entity” means any person or group of persons other than a person or group authorized to practice law in or outside Ontario;

[New – May 2001]

“affiliation” means the joining on a regular basis of a lawyer or group of lawyers with an affiliated entity in the delivery or promotion and delivery of the legal services of the lawyer or group of lawyers and the non-legal services of the affiliated entity;

[New – May 2001]

“associate” includes:

- (a) a licensee who is an employee of the law firm in which the licensee practices law or provides legal services; and
- (b) a non-licensee employee of a multi-discipline practice providing services that support or supplement the practice of law in which the non-licensee provides his or her services.

[Amended – September 2010]

“client” includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client’s work;

Commentary

A solicitor and client relationship is often established without formality. For example, an express retainer or remuneration is not required for a solicitor and client relationship to arise. Also, in some circumstances, a lawyer may have legal and ethical responsibilities similar to those arising from a solicitor and client relationship. For example, a lawyer may meet with a prospective client in circumstances that impart confidentiality, and, although no solicitor and client relationship is ever actually established, the lawyer may have a disqualifying conflict of interest if he or she were later to act against the prospective client. It is, therefore, in a lawyer’s own interest to carefully manage the establishment of a solicitor and client relationship.

“conduct unbecoming a barrister or solicitor” means conduct, including conduct in a lawyer’s personal or private capacity, that tends to bring discredit upon the legal profession including, for example,

- (a) committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer,
- (b) taking improper advantage of the youth, inexperience, lack of education, unsophistication, ill health, or unbusinesslike habits of another, or
- (c) engaging in conduct involving dishonesty or conduct which undermines the administration of justice;

[Amended – May 2008]

Commentary

Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. If the conduct, whether within or outside the professional sphere, is such that knowledge of it would be likely to impair the client's trust in the lawyer, the Society may be justified in taking disciplinary action.

Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

“consent” means

- (a) a consent in writing, provided that where more than one person consents, each may sign a separate document recording his or her consent, or
- (b) an oral consent, provided that each person giving the oral consent receives a separate letter recording his or her consent;

“independent legal advice” means a retainer where

- (a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction,
- (b) the client's transaction involves doing business with
 - (i) another lawyer,
 - (ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded, or
 - (iii) a client of the other lawyer,
- (c) the retained lawyer has advised the client that the client has the right to independent legal representation,

- (d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from the other lawyer,
- (e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and
- (f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view;

“independent legal representation” means a retainer where

- (a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client’s transaction, and
- (b) the retained lawyer will act as the client’s lawyer in relation to the matter;

Commentary

Where a client elects to waive independent legal representation but to rely on independent legal advice only, the retained lawyer has a responsibility that should not be lightly assumed or perfunctorily discharged.

“interprovincial law firm” means a law firm that carries on the practice of law in more than one province or territory of Canada;

“law firm” includes one or more lawyers practising

- (a) in a sole proprietorship,
- (b) in a partnership,
- (c) as a clinic under the Legal Aid Services Act 1998,
- (d) in a government, a Crown corporation, or any other public body, or
- (e) in a corporation or other body;

“lawyer” means a person licensed by the Society to practise law as a barrister and solicitor in Ontario and includes a candidate enrolled in the Society’s Licensing Process for lawyers;

“legal practitioner” means a person

- (a) who is a licensee; or

Rule 1

(b) who is not a licensee but who is a member of the bar of a Canadian jurisdiction, other than Ontario, and who is authorized to practise law as a barrister and solicitor in that other jurisdiction;

[New – June 2009]

“licensee” means a lawyer or a paralegal;

“limited scope retainer” means the provision of legal services by a lawyer for part, but not all, of a client’s legal matter by agreement between the lawyer and the client;

[New – September 2011]

“paralegal” means a person licensed by the Society to provide legal services in Ontario;

“professional misconduct” means conduct in a lawyer’s professional capacity that tends to bring discredit upon the legal profession including

- (a) violating or attempting to violate one of the rules in the *Rules of Professional Conduct* or a requirement of the *Law Society Act* or its regulations or by-laws,
- (b) knowingly assisting or inducing another legal practitioner to violate or attempt to violate the rules in the *Rules of Professional Conduct*, the *Paralegal Rules of Conduct* or a requirement of the *Law Society Act* or its regulations or by-laws,
- (c) knowingly assisting or inducing a non-licensee partner or associate of a multi-discipline practice to violate or attempt to violate the rules in the *Rules of Professional Conduct* or a requirement of the *Law Society Act* or its regulations or by-laws,
- (d) misappropriating or otherwise dealing dishonestly with a client’s or a third party’s money or property,
- (e) engaging in conduct that is prejudicial to the administration of justice,
- (f) stating or implying an ability to influence improperly a government agency or official, or
- (g) knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

[Amended – June 2009]

“Society” means The Law Society of Upper Canada;

“tribunal” includes courts, boards, arbitrators, mediators, administrative agencies, and bodies that resolve disputes, regardless of their function or the informality of their procedures.

1.03 INTERPRETATION**Standards of the Legal Profession**

- 1.03 (1) These rules shall be interpreted in a way that recognizes that
- (a) a lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public, and other legal practitioners honourably and with integrity,
 - (b) a lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario,

[Amended – June 2009]

Commentary

A lawyer should, where appropriate, advise a client of the client's French language rights relating to the client's matter, including where applicable

- (a) subsection 19 (1) of the *Constitution Act*, 1982 on the use of French or English in any court established by Parliament,
- (b) section 530 of the *Criminal Code* about an accused's right to a trial before a court that speaks the official language of Canada that is the language of the accused,
- (c) section 126 of the *Courts of Justice Act* that requires that a proceeding in which the client is a party be conducted as a bilingual (English and French) proceeding, and
- (d) subsection 5(1) of the *French Language Services Act* for services in French from Ontario government agencies and legislative institutions.

[New – June 2001]

- (c) a lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations, and institutions,
- (d) the rules are intended to express to the profession and to the public the high ethical ideals of the legal profession,
- (e) the rules are intended to specify the bases on which lawyers may be disciplined, and
- (f) rules of professional conduct cannot address every situation, and a lawyer should observe the rules in the spirit as well as in the letter.

Rule 1

General Principles

(2) In these rules, words importing the singular number include more than one person, party, or thing of the same kind and a word interpreted in the singular number has a corresponding meaning when used in the plural.

Rule 2 Relationship to Clients

2.01 COMPETENCE

Definitions

2.01 (1) In this rule

“competent lawyer” means a lawyer who has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client including

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises,

[Amended – June 2007]

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client on appropriate courses of action,

(c) implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including,

- (i) legal research,
- (ii) analysis,
- (iii) application of the law to the relevant facts,
- (iv) writing and drafting,
- (v) negotiation,
- (vi) alternative dispute resolution,
- (vii) advocacy, and
- (viii) problem-solving ability,

(d) communicating at all stages of a matter in a timely and effective manner that is appropriate to the age and abilities of the client,

(e) performing all functions conscientiously, diligently, and in a timely and cost-effective manner,

(f) applying intellectual capacity, judgment, and deliberation to all functions,

(g) complying in letter and in spirit with the Rules of Professional Conduct,

Rule 2

- (h) recognizing limitations in one's ability to handle a matter or some aspect of it, and taking steps accordingly to ensure the client is appropriately served,
- (i) managing one's practice effectively,
- (j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills, and
- (k) adapting to changing professional requirements, standards, techniques, and practices.

Commentary

As a member of the legal profession, a lawyer is held out as knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with legal matters to be undertaken on the client's behalf.

A lawyer who is incompetent does the client a disservice, brings discredit to the profession, and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's partners and associates.

A lawyer should not undertake a matter without honestly feeling competent to handle it or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is to be distinguished from the standard of care that a tribunal would invoke for purposes of determining negligence.

A lawyer must be alert to recognize any lack of competence for a particular task and the disservice that would be done to the client by undertaking that task. If consulted in such circumstances, the lawyer should either decline to act or obtain the client's instructions to retain, consult, or collaborate with a lawyer who is competent for that task. The lawyer may also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in such a situation, the lawyer should not hesitate to seek the client's instructions to consult experts.

A lawyer should clearly specify the facts, circumstances, and assumptions upon which an opinion is based. Unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications. If the circumstances do not justify an exhaustive investigation with consequent expense to the client, the lawyer should so state in the opinion.

When a lawyer considers whether to provide legal services under a limited scope retainer, he or she must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement to provide such services does not exempt a lawyer from the duty to provide competent representation. As in any retainer, the lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also subrule 2.02(6.1) to 6.3).

[Amended – September 2011]

A lawyer should be wary of bold and confident assurances to the client, especially when the lawyer's employment may depend upon advising in a particular way.

In addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, policy, or social implications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, where and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

In a multi-discipline practice, a lawyer must be particularly alert to ensure that the client understands that he or she is receiving legal advice from a lawyer supplemented by the services of a non-licensee. If other advice or service is sought from non-licensee members of the firm, it must be sought and provided independently of and outside the scope of the retainer for the provision of legal services and will be subject to the constraints outlined in the relevant by-laws and regulations governing multi-discipline practices. In particular, the lawyer should ensure that such advice or service of non-licensees is provided from a location separate from the premises of the multi-discipline practice.

Whenever it becomes apparent that the client has misunderstood or misconceived the position or what is really involved, the lawyer should explain, as well as advise, so that the client is apprised of the true position and fairly advised about the real issues or questions involved.

The requirement of conscientious, diligent, and efficient service means that a lawyer should make every effort to provide service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

[Amended - June 2009]

Competence

(2) A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule.

Incompetent professional practice may give rise to disciplinary action under this rule.

In addition to this rule, the *Law Society Act* provides that the Society may conduct a review of a lawyer's practice to determine if the lawyer is meeting standards of professional competence. A review will be conducted in circumstances defined in the by-laws under the *Law Society Act*.

A lawyer may also be subject to a hearing at which it will be determined whether the lawyer is failing or has failed to meet standards of professional competence.

Rule 2

The Act provides that a lawyer fails to meet standards of professional competence if there are deficiencies in (a) the lawyer's knowledge, skill, or judgment, (b) the lawyer's attention to the interests of clients, (c) the records, systems, or procedures of the lawyer's professional business, or (d) other aspects of the lawyer's professional business, and the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected.

2.02 QUALITY OF SERVICE**Honesty and Candour**

2.02 (1) When advising clients, a lawyer shall be honest and candid.

Commentary

The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law, and the lawyer's own experience and expertise.

The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

When Client an Organization

(1.1) Notwithstanding that the instructions may be received from an officer, employee, agent, or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising his or her duties and in providing professional services, the lawyer shall act for the organization.

Commentary

A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors, and employees. While the organization or corporation will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organization that are to be served and protected. Further, given that an organization depends upon persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

In addition to acting for the organization, the lawyer may also accept a joint retainer and act for a person associated with the organization. An example might be a lawyer advising about liability insurance for an officer of an organization. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interest and should comply with the rules about the avoidance of conflicts of interest (rule 2.04).

[New – March 2004]

Encouraging Compromise or Settlement

(2) A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing useless legal proceedings.

(3) The lawyer shall consider the use of alternative dispute resolution (ADR) for every dispute, and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.

Threatening Criminal Proceedings

(4) A lawyer shall not advise, threaten, or bring a criminal or quasi-criminal prosecution in order to secure a civil advantage for the client.

Dishonesty, Fraud etc. by Client

(5) When acting for a client, a lawyer shall not

(a) knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct;

(b) advise the client on how to violate the law and avoid punishment.

(5.0.1) When retained by a client, a lawyer shall make reasonable efforts to ascertain the purpose and objectives of the retainer and to obtain information about the client necessary to fulfill this obligation.

(5.0.2) A lawyer shall not use his or her trust account for purposes not related to the provision of legal services.

[Amended – April 2011]

Commentary

A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client. A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activity such as mortgage fraud or money laundering. Vigilance is required because the means for these and other criminal activities may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate. The requirement in subrule (5.0.1) is especially important where a lawyer has suspicions or doubts about whether he or she might be assisting a client in crime or fraud.

Rule 2

To obtain information about the client and about the subject matter and objectives of the retainer, the lawyer may, for example, need to verify who are the legal or beneficial owners of property and business entities, verify who has the control of business entities, and clarify the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.

A client or another person may attempt to use a lawyer's trust account for improper purposes, such as hiding funds, money laundering or tax sheltering. These situations highlight the fact that when handling trust funds, it is important for a lawyer to be aware of his or her obligations under these subrules and the Law Society's By-laws that regulate the handling of trust funds.

A *bona fide* test case is not necessarily precluded by subrule 2.02(5) and, so long as no injury to the person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case.

[Amended – April 2011]

Dishonesty, Fraud, etc. when Client an Organization

(5.1) When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization intends to act dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrule (5), the lawyer for the organization shall

- (a) advise the person from whom the lawyer takes instructions that the proposed conduct would be dishonest, fraudulent, criminal, or illegal,
- (b) if necessary because the person from whom the lawyer takes instructions refuses to cause the proposed wrongful conduct to be abandoned, advise the organization's chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct would be dishonest, fraudulent, criminal or illegal,
- (c) if necessary because the chief legal officer or the chief executive officer of the organization refuses to cause the proposed conduct to be abandoned, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct would be dishonest, fraudulent, criminal, or illegal, and
- (d) if the organization, despite the lawyer's advice, intends to pursue the proposed course of conduct, withdraw from acting in the matter in accordance with rule 2.09.

(5.2) When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization has acted or is acting dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrule (5), the lawyer for the organization shall

- (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped,
- (b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer, or the chief executive officer refuses to cause the wrongful conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped, and
- (c) if the organization, despite the lawyer's advice, continues with the wrongful conduct, withdraw from acting in the matter in accordance with rule 2.09.

Commentary

The past, present, or proposed misconduct of an organization may have harmful and serious consequences not only for the organization and its constituency but also for the public, who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences to the public at large. Rules 2.02 (5.1) and (5.2) address some of the professional responsibilities of a lawyer acting for an organization, which includes a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is dishonest, fraudulent, criminal or illegal. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (rule 2.03).

Rules 2.02 (5.1) and (5.2) speak of conduct that is dishonest, fraudulent, criminal or illegal, and this conduct would include acts of omission as well as acts of commission. Indeed, often it is the omissions of an organization, for example, to make required disclosure or to correct inaccurate disclosures that would constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, would invoke these rules.

Once a lawyer acting for an organization learns that the organization has acted, is acting, or intends to act in a wrongful manner, then the lawyer may advise the chief executive officer and shall advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, then the lawyer reports the matter "up the ladder" of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer's advice, continues with the wrongful conduct, then the lawyer shall withdraw from acting in the particular matter in accordance with rule 2.09. In some but not all cases, withdrawal would mean resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.

Rule 2

These rules recognize that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organizations' and the public's interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization not only about the technicalities of the law but about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable, and consistent with the organization's responsibilities to its constituents and to the public.

[New – March 2004]

Client Under a Disability

(6) When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as his or her age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time. When a client is or comes to be under a disability that impairs his or her ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

A lawyer who is asked to provide legal services under a limited scope retainer to a client under a disability should carefully consider and assess in each case how, under the circumstances, it is possible to render those services in a competent manner.

[Amended – September 2011]

Legal Services Under a Limited Scope Retainer

2.02 (6.1) Before providing legal services under a limited scope retainer, a lawyer shall advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer can provide, and, where appropriate, whether the services can be provided within the financial means of the client.

[New - September 2011]

(6.2) When providing legal services under a limited scope retainer, a lawyer shall confirm the services in writing and give the client a copy of the written document when practicable to do so.

[New - September 2011]

Commentary

Reducing to writing the discussions and agreement with the client about the limited scope retainer assists the lawyer and client in understanding the limitations of the service to be provided and any risks of the retainer. In certain circumstances, such as when the client is in custody, it may not be possible to give him or her a copy of the document. In this type of situation, the lawyer should keep a record of the limited scope retainer in the client file and, when practicable, provide a copy of the document to the client. A lawyer who is providing legal services under a limited scope retainer should be careful to avoid acting such that it appears that the lawyer is providing services to the client under a full retainer.

A lawyer who is providing legal services under a limited scope retainer should consider how communications from opposing counsel in a matter should be managed. See rule 6.03(7.1)

[New - September 2011]

(6.3) Subrule (6.2) does not apply to a lawyer if the legal services are

- (a) legal services or summary advice provided as a duty counsel under the *Legal Aid Services Act, 1998* or through any other duty counsel or other advisory program operated by a not-for-profit organization;
- (b) summary advice provided in community legal clinics, student clinics or under the *Legal Aid Services Act, 1998*;
- (c) summary advice provided through a telephone-based service or telephone hotline operated by a community-based or government funded program;
- (d) summary advice provided by the lawyer to a client in the context of an introductory consultation, where the intention is that the consultation, if the client so chooses, would develop into a retainer for legal services for all aspects of the legal matter; or
- (e) *pro bono* summary legal services provided in a non-profit or court-annexed program.

[New - September 2011]

Rule 2

Commentary

The consultation referred to in subrule (6.3)(d) may include advice on preventative, protective, pro-active or procedural measures relating to the client's legal matter, after which the client may agree to retain the lawyer.

[New - September 2011]

Medical-Legal Reports

(7) A lawyer who receives a medical-legal report from a physician or health professional that is accompanied by a proviso that it not be shown to the client shall return the report immediately to the physician or health professional unless the lawyer has received specific instructions to accept the report on this basis.

Commentary

The lawyer can avoid some of the problems anticipated by the rule by having a full and frank discussion with the physician or health professional, preferably in advance of the preparation of a medical-legal report, which discussion will serve to inform the physician or health professional of the lawyer's obligation respecting disclosure of medical-legal reports to the client.

(8) A lawyer who receives a medical-legal report from a physician or health professional containing opinions or findings that if disclosed might cause harm or injury to the client shall attempt to dissuade the client from seeing the report, but if the client insists, the lawyer shall produce the report.

(9) Where a client insists on seeing a medical-legal report about which the lawyer has reservations for the reasons noted in subrule (8), the lawyer shall suggest that the client attend at the office of the physician or health professional to see the report in order that the client will have the benefit of the expertise of the physician or health professional in understanding the significance of the conclusion contained in the medical-legal report.

Title Insurance in Real Estate Conveyancing

(10) A lawyer shall assess all reasonable options to assure title when advising a client about a real estate conveyance and shall advise the client that title insurance is not mandatory and is not the only option available to protect the client's interests in a real estate transaction.

Commentary

A lawyer should advise the client of the options available to protect the client's interests and minimize the client's risks in a real estate transaction. The lawyer should be cognizant of when title insurance may be an appropriate option. Although title insurance is intended to protect the client against title risks, it is not a substitute for a lawyer's services in a real estate transaction.

The lawyer should be knowledgeable about title insurance and discuss with the client the advantages, conditions, and limitations of the various options and coverages generally available to the client through title insurance. Before recommending a specific title insurance product, the lawyer should be knowledgeable about the product and take such training as may be necessary in order to acquire the knowledge.

(11) A lawyer shall not receive any compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product to his or her client.

(12) A lawyer shall disclose to the client that no commission or fee is being furnished by any insurer, agent, or intermediary to the lawyer with respect to any title insurance coverage.

Commentary

The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance of any hidden fees by the lawyer, including the lawyer's law firm, any employee or associate of the firm, or any related entity.

(13) If discussing TitlePLUS insurance with the client, a lawyer shall fully disclose the relationship between the legal profession, the Society, and the Lawyers' Professional Indemnity Company (LawPRO).

Reporting on Mortgage Transactions

(14) Where a lawyer acts for a lender and the loan is secured by a mortgage on real property, the lawyer shall provide a final report on the transaction, together with the duplicate registered mortgage, to the lender within 60 days of the registration of the mortgage, or within such other time period as instructed by the lender.

(15) The final report required by subrule (14) must be delivered within the times set out in that subrule even if the lawyer has paid funds to satisfy one or more prior encumbrances to ensure the priority of the mortgage as instructed and the lawyer has obtained an undertaking to register a discharge of the encumbrance or encumbrances but the discharge remains unregistered.

[New - February 2007]

2.03 CONFIDENTIALITY

Confidential Information

2.03 (1) A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

Rule 2

Commentary

A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

This rule must be distinguished from the evidentiary rule of lawyer and client privilege concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

Generally, the lawyer should not disclose having been consulted or retained by a particular person about a particular matter unless the nature of the matter requires such disclosure.

A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure.

A lawyer should avoid indiscreet conversations, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shop-talk between lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened.

Although the rule may not apply to facts that are public knowledge, nevertheless, the lawyer should guard against participating in or commenting on speculation concerning the client's affairs or business.

In some situations, the authority of the client to disclose may be implied. For example, some disclosure may be necessary in court proceedings, in a pleading or other court document. Also, it is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to non-legal staff, such as secretaries and filing clerks. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees, and students the importance of non-disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent their disclosing or using any information that the lawyer is bound to keep in confidence.

A lawyer may have an obligation to disclose information under subrule 4.06(3)(Security of Court Facilities). If client information is involved in those situations, the lawyer should be guided by the provisions of rule 2.03.

The rule prohibits disclosure of confidential information because confidentiality and loyalty are fundamental to the relationship between a lawyer and client and legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. However, there are some very exceptional situations identified in the following subrules where disclosure without the client's permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare, and, even in these situations, the lawyer should not disclose more information than is required.

Justified or Permitted Disclosure

- (2) When required by law or by order of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required.
- (3) Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being, the lawyer may disclose, pursuant to judicial order where practicable, confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required.

Commentary

A lawyer employed or retained to act for an organization, including a corporation, confronts a difficult problem about confidentiality when he or she becomes aware that the organization may commit a dishonest, fraudulent, criminal, or illegal act. This problem is sometimes described as the problem of whether the lawyer should “blow the whistle” on his or her employer or client. Although the *Rules of Professional Conduct* make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (rule 2.02 (5)) and provide a rule for how a lawyer should respond to conduct by an organization that was, is or may be dishonest, fraudulent, criminal, or illegal (rules 2.02 (5.1) and (5.2)), it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions. Assuming the exceptions do not apply, there are, however, several steps that a lawyer should take when confronted with the difficult problem of proposed misconduct by an organization. The lawyer should recognise that his or her duties are owed to the organization and not to the officers, employees, or agents of the organization (rule 2.02 (1.1)) and the lawyer should comply with subrules 2.02 (5.1) and (5.2), which set out the steps the lawyer should take in response to proposed, past or continuing misconduct by the organization.

[Amended – March 2004]

- (4) Where it is alleged that a lawyer or the lawyer's associates or employees are
- (a) guilty of a criminal offence involving a client's affairs,

- (b) civilly liable with respect to a matter involving a client's affairs, or
- (c) guilty of malpractice or misconduct,

a lawyer may disclose confidential information in order to defend against the allegations, but the lawyer shall not disclose more information than is required.

- (5) A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but the lawyer shall not disclose more information than is required.

Literary Works

- (6) If a lawyer engages in literary works, such as a memoir or an autobiography, the lawyer shall not disclose confidential information without the client's or former client's consent.

Commentary

The fiduciary relationship between lawyer and client forbids the lawyer from using any confidential information covered by the ethical rule for the benefit of the lawyer or a third person or to the disadvantage of the client.

2.04 AVOIDANCE OF CONFLICTS OF INTEREST

Definition

- 2.04 (1) In this rule

A "conflict of interest" or a "conflicting interest" means an interest

- (a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or
- (b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

Commentary

Conflicting interests include, but are not limited to, the financial interest of a lawyer or an associate of a lawyer, including that which may exist where lawyers have a financial interest in a firm of non-lawyers in an affiliation, and the duties and loyalties of a lawyer to any other client, including the obligation to communicate information. For example, there could be a conflict of interest if a lawyer, or a family member, or a law partner had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client. The definition of conflict of interest, however, does not capture financial interests that do not compromise a lawyer's duties to the client. For example, a lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest, because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

Where a lawyer is acting for a friend or family member, the lawyer may have a conflict of interest because the personal relationship may interfere with the lawyer's duty to provide objective, disinterested professional advice to the client.

[Amended - May 2001, March 2004, October 2004]

Avoidance of Conflicts of Interest

- (2) A lawyer shall not advise or represent more than one side of a dispute.
- (3) A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

Commentary

A client or the client's affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest.

A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.

As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf should not be subject to other interests, duties, or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs. In some instances, each client's case may gather strength from joint representation. In the result, the client's interests may sometimes be better served by not engaging another lawyer, for example, when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

A conflict of interest may arise when a lawyer acts not only as a legal advisor but in another role for the client. For example, there is a dual role when a lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation. Lawyers may also serve these dual roles for partnerships, trusts, and other organizations. A dual role may raise a conflict of interest because it may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, it may obscure legal advice from business and practical advice, it may invalidate the protection of lawyer and client privilege, and it has the potential of disqualifying the lawyer or the law firm from acting for the organization. Before accepting a dual role, a lawyer should consider these factors and discuss them with the client. The lawyer should also consider rule 6.04 (Outside Interests and Practice of Law).

If a lawyer has a sexual or intimate personal relationship with a client, this may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. Before accepting a retainer from or continuing a retainer with a person with whom the lawyer has such a relationship, a lawyer should consider the following factors:

- a. The vulnerability of the client, both emotional and economic;
- b. The fact that the lawyer and client relationship may create a power imbalance in favour of the lawyer or, in some circumstances, in favour of the client;
- c. Whether the sexual or intimate personal relationship will jeopardize the client's right to have all information concerning the client's business and affairs held in strict confidence. For example, the existence of the relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship;
- d. Whether such a relationship may require the lawyer to act as a witness in the proceedings;
- e. Whether such a relationship will interfere in any way with the lawyer's fiduciary obligations to the client, his or her ability to exercise independent professional judgment, or his or her ability to fulfill obligations owed as an officer of the court and to the administration of justice.

There is no conflict of interest if another lawyer of the firm who does not have a sexual or intimate personal relationship with the client is the lawyer handling the client's work.

While subrule 2.04(3) does not require that a lawyer advise the client to obtain independent legal advice about the conflicting interest, in some cases, especially those in which the client is not sophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine, and uncoerced.

[Amended – March 2004, October 2004]

Acting Against Client

- (4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter
- (a) in the same matter,
 - (b) in any related matter, or

- (c) save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information unless the client and those involved in or associated with the client consent.

Commentary

It is not improper for the lawyer to act against a client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person and where previously obtained confidential information is irrelevant to that matter.

- (5) Where a lawyer has acted for a former client and obtained confidential information relevant to a new matter, the lawyer's partner or associate may act in the new matter against the former client if
- (a) the former client consents to the lawyer's partner or associate acting, or
 - (b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including
 - (i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur,
 - (ii) the extent of prejudice to any party,
 - (iii) the good faith of the parties,
 - (iv) the availability of suitable alternative counsel, and
 - (v) issues affecting the public interest.

Commentary

The term “client” is defined in rule 1.02 to include a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. Therefore, if a member of a law firm has obtained from a former client confidential information that is relevant to a new matter, no member of the law firm may act against the former client in the new matter unless the requirements of subrule (5) have been satisfied. In its effect, subrule (5) extends with necessary modifications the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a former client.

Joint Retainer

- (6) Except as provided in subrule (8.2), where a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

- (a) the lawyer has been asked to act for both or all of them,
- (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
- (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

[Amended – February 2007]

Commentary

Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992 S.O. 1992 c. 30* to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that if subsequently only one of them were to communicate new instructions, for example, instructions to change or revoke a will:

- (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
- (b) in accordance with rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; but
- (c) the lawyer would have a duty to decline the new retainer, unless;
 - (i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended their close personal relationship, as the case may be;
 - (ii) the other spouse or partner had died; or
 - (iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

[Amended – February, 2005]

(6.1) Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer shall disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or “flip” where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

[New – February 2007]

(7) Except as provided in subrule (8.2), where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

[Amended – February 2007]

Commentary

Although all the parties concerned may consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights, or obligations will diverge as the matter progresses.

(8) Except as provided in subrule (8.2), where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

[Amended – February 2007]

(8.1) In subrule (8.2), "lending client" means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

(8.2) If a lawyer is jointly retained by a client and by a lending client in respect of a mortgage or loan from the lending client to that client, including any guarantee of that mortgage or loan, the lending client’s consent is deemed to exist upon the lawyer’s receipt of written instructions from the lending client to act and the lawyer is not required to

- (a) provide the advice described in subrule (6) to the lending client before accepting the employment,
- (b) provide the advice described in subrule (7) if the lending client is the other client as described in that subrule, or

- (c) obtain the consent of the lending client as described in subrule (8), including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

Subrules (8.1) and (8.2) are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g. mortgage loan instructions) and the consent is generally deemed by such clients to exist when the lawyer is requested to act.

Subrule (8.2) applies to all loans where a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

[New – February 2007]

- (9) Save as provided by subrule (10), where clients have consented to a joint retainer and an issue contentious between them or some of them arises, the lawyer shall

- (a) not advise them on the contentious issue, and
- (b) refer the clients to other lawyers, unless
- (i) no legal advice is required, and
- (ii) the clients are sophisticated,

in which case, the clients may settle the contentious issue by direct negotiation in which the lawyer does not participate.

Commentary

The rule does not prevent a lawyer from arbitrating or settling or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer. Where, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

- (10) Where clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them and a contentious issue does arise, the lawyer may advise the one client about the contentious matter and shall refer the other or others to another lawyer.

Affiliations Between Lawyers and Affiliated Entities

(10.1) Where there is an affiliation, before accepting a retainer to provide legal services to a client jointly with non-legal services of an affiliated entity, a lawyer shall disclose to the client

- (a) any possible loss of solicitor and client privilege because of the involvement of the affiliated entity, including circumstances where a non-lawyer or non-lawyer staff of the affiliated entity provide services, including support services, in the lawyer's office,
- (b) the lawyer's role in providing legal services and in providing non-legal services or in providing both legal and non-legal services, as the case may be,
- (c) any financial, economic or other arrangements between the lawyer and the affiliated entity that may affect the independence of the lawyer's representation of the client, including whether the lawyer shares in the revenues, profits or cash flows of the affiliated entity; and
- (d) agreements between the lawyer and the affiliated entity, such as agreements with respect to referral of clients between the lawyer and the affiliated entity, that may affect the independence of the lawyer's representation of the client.

(10.2) Where there is an affiliation, after making the disclosure as required by subrule (10.1), a lawyer shall obtain the client's consent before accepting a retainer under subrule (10.1).

(10.3) Where there is an affiliation, a lawyer shall establish a system to search for conflicts of interest of the affiliation.

Commentary

Lawyers practising in an affiliation are required to control the practice through which they deliver legal services to the public. They are also required to address conflicts of interest in respect of a proposed retainer by a client as if the lawyer's practice and the practice of the affiliated entity were one where the lawyers accept a retainer to provide legal services to that client jointly with non-legal services of the affiliated entity. The affiliation is subject to the same conflict of interest rules as apply to lawyers and law firms. This obligation may extend to inquiries of offices of affiliated entities outside of Ontario where those offices are treated economically as part of a single affiliated entity.

In reference to clause (a) of subrule (10.1), see also subsection 3(2) of By-Law 7.1 (Operational Obligations and Responsibilities).

[Amended – January 2008]

Prohibition Against Acting for Borrower and Lender

(11) Subject to subrule (12), a lawyer or two or more lawyers practising in partnership or association shall not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

(12) Provided that there is no violation of this rule, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction if

- (a) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction,
- (b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price,
- (c) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business,
- (d) the consideration for the mortgage or loan does not exceed \$50,000, or
- (e) the lender and borrower are not at “arm’s length” as defined in the *Income Tax Act (Canada)*.

[Amended - May 2001]

Multi-discipline Practice

(13) A lawyer in a multi-discipline practice shall ensure that non-licensee partners and associates observe this rule for the legal practice and for any other business or professional undertaking carried on by them outside the legal practice.

[Amended - June 2009]

Unrepresented Persons

(14) When a lawyer is dealing on a client’s behalf with an unrepresented person, the lawyer shall

- (a) urge the unrepresented person to obtain independent legal representation,
- (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer, and
- (c) make clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client and accordingly his or her comments may be partisan.

Short-term limited legal services

(15) In this subrule and subrules (16) to (19)

“*pro bono* client” means a client to whom a lawyer provides short-term limited legal services;

“short-term limited legal services” means *pro bono* summary legal services provided by a lawyer to a client under the auspices of Pro Bono Law Ontario’s Law Help Ontario program for matters in the Superior Court of Justice or in Small Claims Court, with the expectation by the lawyer and the client that the lawyer will not provide continuing legal representation in the matter.

(16) A lawyer engaged in the provision of short-term limited legal services may provide legal services to a *pro bono* client unless

- (a) the lawyer knows or becomes aware that the interests of the *pro bono* client are directly adverse to the immediate interests of another current client of the lawyer, the lawyer's firm or Pro Bono Law Ontario; or
- (b) the lawyer has or, while providing the short-term limited legal services, obtains confidential information relevant to a matter involving a current or former client of the lawyer, the lawyer's firm or Pro Bono Law Ontario whose interests are adverse to those of the *pro bono* client.

(17) A lawyer who is a partner, an associate, an employee or an employer of a lawyer providing short-term limited legal services to a *pro bono* client may act for other clients of the law firm whose interests are adverse to the *pro bono* client so long as adequate and timely measures are in place to ensure that no disclosure of the *pro bono* client's confidential information is made to the lawyer acting for the other clients.

(18) A lawyer who is unable to provide short-term limited legal services to a *pro bono* client because of the operation of subrule (16) (a) or (b) shall cease to provide short term limited legal services to the *pro bono* client as soon as the lawyer actually becomes aware of the adverse interest or as soon as he or she has or obtains the confidential information referred to in subrule (16) and the lawyer shall not seek the *pro bono* client's waiver of the conflict.

(19) In providing short-term limited legal services, a lawyer shall

- (a) ensure, before providing the legal services, that the appropriate disclosure of the nature of the legal services has been made to the client; and
- (b) determine whether the client may require additional legal services beyond the short-term limited legal services and if additional services are required or advisable, encourage the client to seek further legal assistance.

Commentary

Short term limited legal service programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures of Pro Bono Law Ontario (PBLO) and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the *pro bono* services described in subrule (15) are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. The time required to screen for conflicts may mean that qualifying individuals for whom these brief legal services are available are denied access to legal assistance.

Subrules (15) to (19) apply in circumstances in which the limited nature of the legal services being provided by a lawyer significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for a client receiving short-term limited legal services only if the lawyer has actual knowledge of a conflict of interest between the *pro bono* client and an existing or former client of the lawyer, the lawyer's firm or PBLO. For example, a conflict of interest of which the lawyer has no actual knowledge but which is imputed to the lawyer because of the lawyer's membership in or association or employment with a firm would not preclude the lawyer from representing the client seeking short-term limited legal services.

The lawyer's knowledge would be based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of the consultation and in the client's application to PBLO for legal assistance.

The personal disqualification of a lawyer participating in PBLO's program does not create a conflict for the other lawyers participating in the program, as the conflict is not imputed to them.

Confidential information obtained by a lawyer representing a *pro bono* client, as defined in subrule (15), will not be imputed to the lawyer's licensee partners, associates and employees or non-licensee partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term limited legal services, and may act in future for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term limited legal services.

Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the client to the lawyer's partners, associates, employees or employer (in the practice of law). Subrule (17) extends, with necessary modifications, the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a current client of the firm in providing short term limited legal services. Measures that the lawyer providing the short-term limited legal services should take to ensure the confidentiality of information of the client's information include:

- having no involvement in the representation of or any discussions with others in the firm about another client whose interests conflict with those of the *pro bono* client;
- identifying relevant files, if any, of the *pro bono* client and physically segregating access to them to those working on the file or who require access for specifically identified or approved reasons; and
- ensuring that the firm has distributed a written policy to all licensees, non-licensee partners and associates and support staff, explaining the screening measures that are in place.

Subrule (18) precludes a lawyer from obtaining a waiver in respect of conflicts of interest that arise in providing short-term legal services.

[New – April 22, 2010]

2.04.1 LAWYERS ACTING FOR TRANSFEROR AND TRANSFEREE IN TRANSFERS OF TITLE

2.04.1 (1) Subject to subrule (3), an individual lawyer shall not act for or otherwise represent both the transferor and the transferee in a transfer of title to real property.

(2) Subrule (1) does not prevent a law firm of two or more lawyers from acting for or otherwise representing a transferor and a transferee in a transfer of title to real property so long as the transferor and transferee are represented by different lawyers in the firm and there is no violation of rule 2.04.

(3) So long as there is no violation of rule 2.04, an individual lawyer may act for or otherwise represent both the transferor and the transferee in a transfer of title to real property if

(a) the Land Registration Reform Act permits the lawyer to sign the transfer on behalf of the transferor and the transferee,

(b) the transferor and transferee are “related persons” as defined in section 251 of the Income Tax Act (Canada), or

(c) the lawyer practices law in a remote location where there are no other lawyers that either the transferor or the transferee could without undue inconvenience retain for the transfer

[Effective March 31, 2008]

2.05 CONFLICTS FROM TRANSFER BETWEEN LAW FIRMS

Definitions

2.05 (1) In this rule

“client” includes anyone to whom a lawyer owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them,

[Amended - June 2007]

“confidential information” means information obtained from a client that is not generally known to the public, and

Commentary

The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

“matter” means a case or client file but does not include general “know-how” and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

Application of Rule

- (2) This rule applies where a lawyer transfers from one law firm (“former law firm”) to another (“new law firm”), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that
- (a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client (“former client”),
 - (b) the interests of those clients in that matter conflict, and
 - (c) the transferring lawyer actually possesses relevant information respecting that matter.
- (3) Subrules (4) to (7) do not apply to a lawyer employed by the federal, a provincial, or a territorial Attorney General or Department of Justice who, after transferring from one department, ministry, or agency to another, continues to be employed by that Attorney General or Department of Justice.

Commentary

The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification.

Lawyers and support staff - This rule is intended to regulate lawyers and articled students who transfer between law firms. It also imposes a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff, to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer’s firm and confidences of clients of other law firms in which the person has worked.

Government employees and in-house counsel - The definition of “law firm” includes one or more lawyers practising in a government, a Crown corporation, any other public body, and a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.

Law firms with multiple offices - The rule treats as one “law firm” such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm, and a legal aid program with many community law offices. The more autonomous each unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent or to establish that it is in the public interest that it continue to represent its client in the matter.

[Amended – June 2007]

Law Firm Disqualification

(4) Where the transferring lawyer actually possesses relevant information respecting the former client that is confidential and that, if disclosed to a member of the new law firm, may prejudice the former client, the new law firm shall cease its representation of its client in that matter unless

[Amended – June 2007]

- (a) the former client consents to the new law firm's continued representation of its client, or
- (b) the new law firm establishes that it is in the interests of justice that it act in the matter, having regard to all relevant circumstances, including,
 - (i) the adequacy and timing of the measures taken to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur,
 - (ii) the extent of prejudice to any party,
 - (iii) the good faith of the parties,
 - (iv) the availability of suitable alternative counsel, and
 - (v) issues affecting the public interest.

Commentary

The circumstances enumerated in subrule (4)(b) are drafted in broad terms to ensure that all relevant facts will be taken into account. While clauses (ii) to (iv) are self-explanatory, clause (v) addresses governmental concerns respecting issues of national security, cabinet confidences, and obligations incumbent on Attorneys General and their agents in the administration of justice.

(5) For greater certainty, subrule (4) is not intended to interfere with the discharge by an Attorney General or his or her counsel or agent (including those occupying the offices of Crown Attorney, Assistant Crown Attorney, or part-time Assistant Crown Attorney) of their constitutional and statutory duties and responsibilities.

(6) Where the transferring lawyer actually possesses relevant information respecting the former client but that information is not confidential information which, if disclosed to a member of the new law firm, may prejudice the former client,

- (a) the lawyer shall execute an affidavit or solemn declaration to that effect, and
- (b) the new law firm shall

Rule 2

2.05 Conflicts from Transfer between Law Firms

- (i) notify its client and the former client, or if the former client is represented in that matter by a lawyer, notify that lawyer of the relevant circumstances and its intended action under this rule, and
- (ii) deliver to the persons referred to in (i) a copy of any affidavit or solemn declaration executed under (a).

[Amended - June 2007]

Transferring Lawyer Disqualification

(7) A transferring lawyer described in the opening clause of subrule (4) or (6) shall not, unless the former client consents,

- (a) participate in any manner in the new law firm's representation of its client in that matter, or
- (b) disclose any confidential information respecting the former client.

[Amended - June 2007]

(8) No member of the new law firm shall, unless the former client consents, discuss with a transferring lawyer described in the opening clause of subrule (4) or (6) the new law firm's representation of its client or the former law firm's representation of the former client in that matter.

[Amended - June 2007]

Determination of Compliance

(9) Anyone who has an interest in, or who represents a party in, a matter referred to in this rule may apply to a tribunal of competent jurisdiction for a determination of any aspect of this rule.

Due Diligence

(10) A lawyer shall exercise due diligence in ensuring that each member and employee of the lawyer's law firm, each non-lawyer partner and associate, and each other person whose services the lawyer has retained

[Amended - June 2007]

- (a) complies with this rule, and
- (b) does not disclose
 - (i) confidential information of clients of the firm, and
 - (ii) confidential information of clients of another law firm in which the person has worked.

Commentary

MATTERS TO CONSIDER

When a law firm considers hiring a lawyer or articulated student (“transferring lawyer”) from another law firm, the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time. The transferring lawyer and the new law firm need to identify, first, all cases in which

- (a) the new law firm represents a client in a matter that is the same as or related to a matter in respect of which the former law firm represents its client,
- (b) the interests of these clients in that matter conflict, and
- (c) the transferring lawyer actually possesses relevant information respecting that matter.

[Amended – June 2007]

The law firm must then determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the former client that is confidential and that, if disclosed to a member of the new law firm, may prejudice the former client. If this element exists, the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the interests of justice, based on relevant circumstances.

[Amended - June 2007]

In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm need to be very careful to ensure that they do not, during the interview process itself, disclose client confidences.

MATTERS TO CONSIDER BEFORE HIRING A POTENTIAL TRANSFEREE

After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether a conflict exists.

A. Where a conflict does exist

If the new law firm concludes that the transferring lawyer does actually possess relevant information respecting a former client that is confidential and that, if disclosed to a member of the new law firm, may prejudice the former client if the transferring lawyer is hired, the new law firm will be prohibited from continuing to represent its client in the matter unless

- (a) the new law firm obtains the former client's consent to its continued representation of its client in that matter, or
- (b) the new law firm complies with subrule (4)(b), and, in determining whether continued representation is in the interests of justice, both clients' interests are the paramount consideration.

If the new law firm seeks the former client's consent to the new law firm continuing to act, it will in all likelihood be required to satisfy the former client that it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur. The former client's consent must be obtained before the transferring lawyer is hired.

Alternatively, if the new law firm applies under subrule (9) for a determination that it may continue to act, it bears the onus of establishing the matters referred to in subrule (4)(b). Ideally, this process should be completed before the transferring person is hired.

[Amended – June 2007]

B. Where no conflict exists

Although subrule 2.05(6) does not require that the notice required by that subrule be in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute about whether notice has been given and about its timeliness and content.

The new law firm might, for example, seek the former client's consent to the transferring lawyer acting for the new law firm's client in the matter because, in the absence of such consent, the transferring lawyer may not act.

If the former client does not consent to the transferring lawyer acting, it would be prudent for the new law firm to take reasonable measures to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring lawyer did in fact possess confidential information which, if disclosed, may prejudice the former client.

A transferring lawyer who possesses no such confidential information puts the former client on notice by executing an affidavit or solemn declaration and delivering it to the former client. A former client who disputes the allegation of no such confidential information may apply under subrule (9) for a determination of that issue.

C. Where the new law firm is not sure whether a conflict exists

There may be some cases where the new law firm is not sure whether the transferring lawyer actually possesses confidential information respecting a former client that, if disclosed to a member of the new law firm, may prejudice the former client. In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring lawyer.

REASONABLE MEASURES TO ENSURE NON-DISCLOSURE OF CONFIDENTIAL INFORMATION

As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information:

- (a) where the transferring lawyer actually possesses confidential information respecting a former client that, if disclosed to a member of the new law firm, may prejudice the former client, and

[Amended – June 2007]

(b) where the new law firm is not sure whether the transferring lawyer actually possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

It is not possible to offer a set of “reasonable measures” that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken “to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information.”

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes “reasonable measures.” For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm, or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer “measures” are necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above, lawyers in separate units, offices, or departments do not “work together” with other lawyers in other units, offices or departments, this shall be taken into account in the determination of what screening measures are “reasonable.”

The guidelines at the end of this Commentary, adapted from the Canadian Bar Association's Task Force report entitled Conflict of Interest Disqualification: *Martin v. Gray* and Screening Methods (February 1993), are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

In cases where a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that, if disclosed to a member of the new “law firm,” may prejudice the former client, the interests of the new client (Her Majesty or the corporation) must continue to be represented. Normally, this will be effected by instituting satisfactory screening measures, which could include referring the conduct of the matter to counsel in a different department, office or legal services unit. As each factual situation will be unique, flexibility will be required in the application of subrule (4)(b), particularly clause (v). Only in those situations where the entire firm must be disqualified pursuant to subrule (4) will it be necessary to refer conduct of the matter to outside counsel.

GUIDELINES

1. The screened lawyer should have no involvement in the new law firm's representation of its client.

[Amended – June 2007]

2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.

4. The current matter should be discussed only within the limited group that is working on the matter.

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5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.

6. No member of the new law firm should show the screened lawyer any documents relating to the current representation.

7. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

8. Undertakings should be provided by the appropriate law firm members setting out that they have adhered to and will continue to adhere to all elements of the screen.

9. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised

(a) that the screened lawyer is now with the new law firm, which represents the current client, and

(b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.

10. The screened lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support staff working on the matter.

11. The screened lawyer should use associates and support staff different from those working on the current matter.

12. In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.

[Amended – June 2007]

2.06 DOING BUSINESS WITH A CLIENT

Definitions

2.06 (1) In this rule

“related persons” means related persons as defined in the *Income Tax Act (Canada)* and “related person” has a corresponding meaning, and

“syndicated mortgage” means a mortgage having more than one investor.

Investment by Client where Lawyer has an Interest

(2) Subject to subrule (2.1), where a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, the lawyer, before accepting any retainer

- (a) shall disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later,
- (b) shall recommend independent legal representation and shall require that the client receive independent legal advice, and
- (c) where the client requests the lawyer to act, the lawyer shall obtain the client's written consent.

[Amended – May 2001]

(2.1) When a client intends to pay for legal services by transferring to his, her or its lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer shall recommend but need not require that the client receive independent legal advice before accepting a retainer.

[New – May 2001; Amended – March 2004]

Commentary

If the lawyer does not choose to make disclosure of the conflicting interest or cannot do so without breaching a confidence, the lawyer must decline the retainer.

The lawyer should not uncritically accept the client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained.

If the investment is by borrowing from the client, the transaction may fall within the requirements of subrules 2.06(4) or (6).

Certificate of Independent Legal Advice

(3) A lawyer retained to give independent legal advice shall, before any advance of funds has been made by the client,

- (a) provide the client with a written certificate that the client has received independent legal advice, and

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- (b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

Borrowing from Clients

- (4) A lawyer shall not borrow money from a client unless
- (a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or
- (b) the client is a related person as defined by the Income Tax Act (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the case and by independent legal advice or independent legal representation.

Commentary

The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted.

Whether a person lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is to be considered a client within this rule is to be determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice in respect of the loan or investment, the lawyer will be considered bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

- (5) In any transaction, other than a transaction within the provisions of subrule (4), in which money is borrowed from a client by a lawyer's spouse or by a corporation, syndicate, or partnership in which either the lawyer or the lawyer's spouse has, or both of them together have, directly or indirectly, a substantial interest, the lawyer shall ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

- (6) A lawyer engaged in the private practice of law in Ontario shall not directly, or indirectly through a corporation, syndicate, partnership, trust, or other entity in which the lawyer or a related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities
- (a) hold a syndicated mortgage or loan in trust for investor clients unless each investor client receives
- (i) a complete reporting letter on the transaction,

- (ii) a trust declaration signed by the person in whose name the mortgage or any security instrument is registered, and
 - (iii) a copy of the duplicate registered mortgage or security instrument,
- (b) arrange or recommend the participation of a client or other person as an investor in a syndicated mortgage or loan where the lawyer is an investor unless the lawyer can demonstrate that the client or other person had independent legal advice in making the investment, or
- (c) sell mortgages or loans to, or arrange mortgages or loans for, clients or other persons except in accordance with the skill, competence, and integrity usually expected of a lawyer in dealing with clients.

Commentary

ACCEPTABLE MORTGAGE OR LOAN TRANSACTIONS

A lawyer may engage in the following mortgage or loan transactions in connection with the practice of law:

- (a) a lawyer may invest in mortgages or loans personally or on behalf of a related person or a combination thereof,
- (b) a lawyer may deal in mortgages or loans as an executor, administrator, committee, trustee of a testamentary or inter vivos trust established for purposes other than mortgage or loan investment or under a power of attorney given for purposes other than exclusively for mortgage or loan investment, and
- (c) a lawyer may collect, on behalf of clients, mortgage or loan payments that are made payable in the name of the lawyer under a written direction to that effect given by the client to the mortgagor or borrower provided that such payments are deposited into the lawyer's trust account.

A lawyer may introduce a borrower (whether or not a client) to a lender (whether or not a client) and the lawyer may then act for either, and when subrule 2.04 (12) applies, the lawyer may act for both.

Disclosure

- (7) Where a lawyer sells or arranges mortgages for clients or other persons, the lawyer shall disclose in writing to each client or other person the priority of the mortgage and all other information relevant to the transaction that is known to the lawyer that would be of concern to a proposed investor.

No Advertising

(8) A lawyer shall not promote, by advertising or otherwise, individual or joint investment by clients or other persons who have money to lend, in any mortgage in which a financial interest is held by the lawyer, a related person, or a corporation, syndicate, partnership, trust or other entity in which the lawyer or related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities.

Guarantees by a Lawyer

(9) Except as provided by subrule (10), a lawyer shall not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

(10) A lawyer may give a personal guarantee in the following circumstances:

- (a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent, or child,
- (b) the transaction is for the benefit of a non-profit or charitable institution where the lawyer as a member or supporter of such institution is asked, either individually or together with other members or supporters of the institution, to provide a guarantee, or
- (c) the lawyer has entered into a business venture with a client and the lender requires personal guarantees from all participants in the venture as a matter of course and
 - (i) the lawyer has complied with rule 2.04 (Avoidance of Conflicts of Interest) and this rule (Doing Business with a Client), and
 - (ii) the lender and participants in the venture who are or were clients of the lawyer have received independent legal representation.

[Amended - June 2007]

2.07 PRESERVATION OF CLIENT'S PROPERTY**Preservation of Client's Property**

2.07 (1) A lawyer shall care for a client's property as a careful and prudent owner would when dealing with like property and shall observe all relevant rules and law about the preservation of a client's property entrusted to a lawyer.

Commentary

The duties concerning safekeeping, preserving, and accounting for clients' monies and other property are set out in the by-laws made under the *Law Society Act*.

These duties are closely related to those regarding confidential information. The lawyer should keep the client's papers and other property out of sight as well as out of reach of those not entitled to see them and should, subject to any rights of lien, promptly return them to the client upon request or at the conclusion of the lawyer's retainer.

Notification of Receipt of Property

(2) A lawyer shall promptly notify the client of the receipt of any money or other property of the client, unless satisfied that the client is aware that they have come into the lawyer's custody.

Identifying Client's Property

(3) A lawyer shall clearly label and identify the client's property and place it in safekeeping distinguishable from the lawyer's own property.

(4) A lawyer shall maintain such records as necessary to identify a client's property that is in the lawyer's custody.

Accounting and Delivery

(5) A lawyer shall account promptly for a client's property that is in the lawyer's custody and upon request shall deliver it to the order of the client.

(6) Where a lawyer is unsure of the proper person to receive a client's property, the lawyer shall apply to a tribunal of competent jurisdiction for direction.

Commentary

The lawyer should be alert to claim on behalf of a client any privilege in respect of property seized or attempted to be seized by an external authority. In this regard, the lawyer should be familiar with the nature of the client's privilege and with such relevant statutory provisions as are found in the *Income Tax Act (Canada)*.

2.08 FEES AND DISBURSEMENTS**Reasonable Fees and Disbursements**

2.08 (1) A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.

(2) A lawyer shall not charge a client interest on an overdue account save as permitted by the *Solicitors Act* or as otherwise permitted by law.

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Commentary

What is a fair and reasonable fee will depend upon such factors as

- (a) the time and effort required and spent,
- (b) the difficulty and importance of the matter,
- (c) whether special skill or service has been required and provided,
- (d) the amount involved or the value of the subject-matter,
- (e) the results obtained,
- (f) fees authorized by statute or regulation,
- (g) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency.

The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such agency or other person.

Breach of this rule and misunderstandings about fees and financial matters bring the legal profession into disrepute and reflect adversely upon the general administration of justice. A lawyer should try to avoid controversy with a client about fees and should be ready to explain the basis for the charges (especially if the client is unsophisticated or uninformed about how a fair and reasonable fee is determined). A lawyer should inform a client about his or her rights to have an account assessed under the *Solicitors Act*.

Where possible to do so, a lawyer should give the client a fair estimate of fees and disbursements, pointing out any uncertainties involved, so that the client may be able to make an informed decision. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should forestall misunderstandings or disputes by giving the client an immediate explanation.

It is in keeping with the best traditions of the legal profession to provide services pro bono and to reduce or waive a fee where there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. A lawyer should provide public interest legal services and should support organizations that provide services to persons of limited means.

Contingency Fees and Contingency Fee Agreements

(3) Subject to subrule (1) except in family law or criminal or quasi-criminal matters, a lawyer may enter into a written agreement in accordance with the *Solicitors Act* and the regulations thereunder, that provides that the lawyer's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the lawyer's services are to be provided.

[Amended – November 2002, October 2004]

Commentary

In determining the appropriate percentage or other basis of the contingency fee, the lawyer and the client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The lawyer and client may agree that in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer, which agreement under the *Solicitors Act* must receive judicial approval. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee in all of the circumstances is fair and reasonable.

[New - October 2002, Amended October 2004]

Statement of Account

(4) In a statement of an account delivered to a client, a lawyer shall clearly and separately detail the amounts charged as fees and as disbursements.

Joint Retainer

(5) Where a lawyer is acting for two or more clients, the lawyer shall divide the fees and disbursements equitably between them, unless there is an agreement by the clients otherwise.

Division of Fees and Referral Fees

(6) Where the client consents, fees for a matter may be divided between licensees who are not in the same firm, provided that the fees are divided in proportion to the work done and the responsibilities assumed.

(7) Where a lawyer refers a matter to another licensee because of the expertise and ability of the other licensee to handle the matter and the referral was not made because of a conflict of interest, the referring lawyer may accept and the other licensee may pay a referral fee provided that

- (a) the fee is reasonable and does not increase the total amount of the fee charged to the client, and

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- (b) the client is informed and consents.
- (8) A lawyer shall not
- (a) directly or indirectly share, split, or divide his or her fees with any person who is not a licensee, or
 - (b) give any financial or other reward to any person who is not a licensee for the referral of clients or client matters.

[Amended - April 2008]

Commentary

This rule does not prohibit an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold.

[New - May 2001]

Exception for Multi-discipline Practices and Interprovincial and International Law Firms

- (9) Subrule (8) does not apply to
- (a) multi-discipline practices of lawyer and non-licensure partners where the partnership agreement provides for the sharing of fees, cash flows or profits among members of the firm, and
 - (b) sharing of fees, cash flows or profits by lawyers who are
 - (i) members of an interprovincial law firm, or
 - (ii) members of a law partnership of Ontario and non-Canadian lawyers who otherwise comply with this rule.

[Amended – June 2009]

Commentary

An affiliation is different from a multi-discipline practice established in accordance with the by-laws under the *Law Society Act*, an interprovincial law partnership or a partnership between Ontario lawyers and foreign lawyers. An affiliation is subject to subrule 2.08(8). In particular, an affiliated entity is not permitted to share in the lawyer's revenues, cash flows or profits, either directly or indirectly through excessive inter-firm charges, for example, by charging inter-firm expenses above their fair market value.

[New - May 2001]

Appropriation of Funds

(10) The lawyer shall not appropriate any funds of the client held in trust or otherwise under the lawyer's control for or on account of fees except as permitted by the by-laws under the *Law Society Act*.

2.09 WITHDRAWAL FROM REPRESENTATION**Withdrawal from Representation**

2.09 (1) A lawyer shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances.

Commentary

Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

No hard and fast rules can be laid down about what will constitute reasonable notice before withdrawal. Where the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril.

Optional Withdrawal

(2) Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

A lawyer who is deceived by the client will have justifiable cause for withdrawal, and the refusal of the client to accept and act upon the lawyer's advice on a significant point might indicate a loss of confidence justifying withdrawal. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

Non-payment of Fees

(3) Subject to the rules about criminal proceedings and the direction of the tribunal, where, after reasonable notice, the client fails to provide funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

Withdrawal from Criminal Proceedings

(4) Where a lawyer has agreed to act in a criminal case and where the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another licensee and to allow such other licensee adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer

[Amended – June 2007]

- (a) notifies the client, preferably in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause,
- (b) accounts to the client for any monies received on account of fees and disbursements,
- (c) notifies Crown counsel in writing that the lawyer is no longer acting,
- (d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting.

Commentary

A lawyer who has withdrawn because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn.

(5) Where a lawyer has agreed to act in a criminal case and where the date set for trial is not far enough removed to enable the client to obtain another licensee or to enable another licensee to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests, the lawyer who agreed to act may not withdraw because of non-payment of fees.

(6) Where the lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees and there is not a sufficient interval between a notice to the client of the lawyer's intention to withdraw and the date when the case is to be tried to enable the client to obtain another licensee and to enable such licensee to prepare adequately for trial, the first lawyer, unless instructed otherwise by the client, should attempt to have the trial date adjourned and may withdraw from the case only with the permission of the court before which the case is to be tried.

[Amended – June 2007]

Commentary

Where circumstances arise that in the opinion of the lawyer require an application to the court for leave to withdraw, the lawyer should promptly inform Crown counsel and the court of the intention to apply for leave in order to avoid or minimize any inconvenience to the court and witnesses.

Mandatory Withdrawal

- (7) Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if
- (a) discharged by the client,
 - (b) the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the tribunal and, following explanation, the client persists in such instructions,
 - (c) the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another,
 - (d) it becomes clear that the lawyer's continued employment will lead to a breach of these rules,
 - (d.1) the lawyer is required to do so pursuant to subrules 2.02 (5.1) or (5.2) (dishonesty, fraud, etc. when client an organization), or
 - (e) the lawyer is not competent to handle the matter.

[Amended – March 2004]

Commentary

When a law firm is dissolved it will usually result in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients will prefer to retain the services of the lawyer whom they regarded as being in charge of their business before the dissolution. However, the final decision rests with the client, and the lawyers who are no longer retained by that client should act in accordance with the principles here set out, and, in particular, should try to minimize expense and avoid prejudice to the client.

Manner of Withdrawal

- (8) When a lawyer withdraws, the lawyer shall try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor legal practitioner.
- (9) Upon discharge or withdrawal, a lawyer shall

- (a) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled,
- (b) give the client all information that may be required in connection with the case or matter,
- (c) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation,
- (d) promptly render an account for outstanding fees and disbursements, and
- (e) co-operate with the successor legal practitioner so as to minimize expense and avoid prejudice to the client.

[Amended – June 2009]

Commentary

The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute.

A lawyer acting for several clients in a case or matter who ceases to act for one or more of them should co-operate with the successor legal practitioner or practitioners to the extent required by the rules and should seek to avoid any unseemly rivalry, whether real or apparent.

[Amended – June 2009]

Where upon the discharge or withdrawal of the lawyer, the question of a right of lien for unpaid fees and disbursements arises, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce the lien if to do so would prejudice materially the client's position in any uncompleted matter.

Duty of Successor Licensee

- (10) Before agreeing to represent a client, a successor licensee shall be satisfied that the former licensee approves, has withdrawn, or has been discharged by the client.

[Amended – June 2007]

Commentary

It is quite proper for the successor licensee to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former licensee, especially if the latter withdrew for good cause or was capriciously discharged. But if a trial or hearing is in progress or imminent or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor licensee acting for the client.

[Amended – June 2007]

Rule 3 The Practice of Law

3.01 MAKING LEGAL SERVICES AVAILABLE

Making Services Available

3.01 (1) A lawyer shall make legal services available to the public in an efficient and convenient way.

Commentary

A lawyer may assist in making legal services available by participating in the Legal Aid Plan and lawyer referral services and by engaging in programmes of public information, education or advice concerning legal matters.

Right to Decline Representation - A lawyer may decline a particular representation (except when assigned as counsel by a tribunal), but that discretion should be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, a lawyer should not decline representation merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. A lawyer declining representation should assist in obtaining the services of another licensee qualified in the particular field and able to act.

When a lawyer offers assistance to a client or prospective client in finding another licensee, the assistance should be given willingly and, except where a referral fee is permitted by rule 2.08(7), without charge.

Restrictions

- (2) In offering legal services, a lawyer shall not use means
- (a) that are false or misleading,
 - (b) that amount to coercion, duress, or harassment,
 - (c) that take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover,
 - (d) that are intended to influence a person who has retained another lawyer for a particular matter to change his or her lawyer for that matter, unless the change is initiated by the person or the other lawyer, or
 - (e) that otherwise bring the profession or the administration of justice into disrepute.

Rule 3

Commentary

A person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering his or her assistance to such a person. Rather, the rule prohibits the lawyer from using unconscionable or exploitive means that bring the profession or the administration of justice into disrepute.

3.02 MARKETING**Marketing Legal Services**

3.02 (1) In this Rule, "marketing" includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.

- (2) A lawyer may market legal services if the marketing
- (a) is demonstrably true, accurate and verifiable,
 - (b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive, and
 - (c) is in the best interests of the public and is consistent with a high standard of professionalism.

Commentary

Examples of marketing that may contravene this rule include:

- a. stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;
- b. suggesting qualitative superiority to other lawyers;
- c. raising expectations unjustifiably;
- d. suggesting or implying the lawyer is aggressive;
- e. disparaging or demeaning other persons, groups, organizations or institutions;
- f. taking advantage of a vulnerable person or group;
- g. using testimonials or endorsements which contain emotional appeals.

Advertising of Fees

- (3) A lawyer may advertise fees charged by the lawyer for legal services if
 - (a) the advertising is reasonably precise as to the services offered for each fee quoted,
 - (b) the advertising states whether other amounts, such as disbursements and taxes, will be charged in addition to the fee, and
 - (c) the lawyer adheres to the advertised fee.

3.03 ADVERTISING NATURE OF PRACTICE

Certified Specialist

3.03 (1) A lawyer may advertise that the lawyer is a specialist in a specified field only if the lawyer has been so certified by the Society.

Commentary

Lawyer's advertisements may be designed to provide information to assist a potential client to choose a lawyer who has the appropriate skills and knowledge for the client's particular legal matter.

In accordance with s. 20(1) of the Society's By-law 15 on Certified Specialists, the lawyer who is not a certified specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist.

In a case where a firm practises in more than one jurisdiction, some of which certify or recognize specialization, an advertisement by such a firm which makes reference to the status of a firm member as a specialist, in media circulated concurrently in the other jurisdiction(s) and the certifying jurisdiction, shall not be considered as offending this rule if the certifying authority or organization is identified.

A lawyer may advertise areas of practice, including preferred areas of practice or that his or her practice is restricted to a certain area of law. An advertisement may also include a description of the lawyer's or law firm's proficiency or experience in an area of law. In all cases, the representations made must be accurate (that is, demonstrably true) and must not be misleading.

3.04 Interprovincial Law Firms

Interprovincial Law Firms

3.04 (1) Lawyers may enter into agreements with lawyers in other Canadian jurisdictions to form an interprovincial law firm, so long as they comply with the requirements of this rule.

Rule 3

Requirements

- (2) A lawyer who is a member of an interprovincial law firm and qualified to practise in Ontario shall comply with all the requirements of the Society.
- (3) A lawyer who is a member of an interprovincial law firm and qualified to practise in Ontario shall ensure that the books, records, and accounts pertaining to the practice in Ontario are available in Ontario on demand by the Society's auditors or their designated agents.
- (4) A lawyer who is a member of an interprovincial law firm and qualified to practise in Ontario shall ensure that his or her partners, associates, or employees who are not qualified to practise in Ontario are not held out as and do not represent themselves as qualified to practise in Ontario.

[Amended - November 2008]

Rule 4 Relationship to the Administration of Justice

4.01 THE LAWYER AS ADVOCATE

Advocacy

4.01 (1) When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary

The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing where justice can be done. Maintaining dignity, decorum, and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators, and others who resolve disputes, regardless of their function or the informality of their procedures.

Role in Adversary Proceedings - In adversary proceedings the lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (save as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters derogatory to the client's case.

In adversary proceedings that will likely affect the health, welfare, or security of a child, a lawyer should advise the client to take into account the best interests of the child, where this can be done without prejudicing the legitimate interests of the client.

When acting as an advocate, a lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case.

When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations where the full proof and argument inherent in the adversary system cannot be achieved, the lawyer must take particular care to be accurate, candid, and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

Duty as Defence Counsel - When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences including so-called technicalities not known to be false or fraudulent.

Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, or to the form of the indictment, or to the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence which, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

The lawyer should never waive or abandon the client's legal rights, for example, an available defence under a statute of limitations, without the client's informed consent.

In civil matters, it is desirable that the lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, or from attempts to gain advantage from slips or oversights not going to the merits, or from tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

In civil proceedings, the lawyer has a duty not to mislead the tribunal about the position of the client in the adversary process. Thus, a lawyer representing a party to litigation who has made an agreement or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties notwithstanding the judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

- (2) When acting as an advocate, a lawyer shall not
- (a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party,
 - (b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,
 - (c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence, or inducement affecting the impartiality of the officer,
 - (d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate,

- (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct,
- (f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority,
- (g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal,
- (h) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent,
- (i) dissuade a witness from giving evidence or advise a witness to be absent,
- (j) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another,
- (k) needlessly abuse, hector, or harass a witness,
- (l) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge, and
- (m) needlessly inconvenience a witness.

Commentary

A lawyer representing an accused or potential accused may communicate with a complainant or potential complainant, for example, to obtain factual information, to arrange for restitution or an apology from the accused, or to defend or settle any civil claims between the accused and the complainant. However, where the complainant or potential complainant is vulnerable, the lawyer must take care not to take unfair or improper advantage of the circumstances. Where the complainant or potential complainant is unrepresented, the lawyer should be governed by the rules about unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused or potential accused and, accordingly, the lawyer's comments may be partisan. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

Duty as Prosecutor

- (3) When acting as a prosecutor, a lawyer shall act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary

When engaged as a prosecutor, the lawyer's prime duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.

Discovery Obligations

- (4) Where the rules of a tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate
- (a) shall explain to his or her client
 - (i) the necessity of making full disclosure of all documents relating to any matter in issue, and
 - (ii) the duty to answer to the best of his or her knowledge, information, and belief, any proper question relating to any issue in the action or made discoverable by the rules of court or the rules of the tribunal,
 - (b) shall assist the client in fulfilling his or her obligations to make full disclosure, and
 - (c) shall not make frivolous requests for the production of documents or make frivolous demands for information at the examination for discovery.

Disclosure of Error or Omission

- (5) A lawyer who has unknowingly done or failed to do something that if done or omitted knowingly would have been in breach of this rule and who discovers it, shall, subject to rule 2.03 (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

Commentary

If the client desires that a course be taken that would involve a breach of this rule, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done the lawyer should, subject to rule 2.09 (Withdrawal from Representation), withdraw or seek leave to do so.

Courtesy

(6) A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings in the course of litigation.

Commentary

Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative, or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit discipline.

Undertakings

(7) A lawyer shall strictly and scrupulously carry out an undertaking given to the tribunal or to another legal practitioner in the course of litigation.

[Amended – June 2009]

Commentary

Unless clearly qualified, the lawyer's undertaking is a personal promise and responsibility.

Agreement on Guilty Plea

(8) Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise.

(9) Where, following investigation,

(a) a lawyer for an accused or potential accused advises his or her client about the prospects for an acquittal or finding of guilt,

(b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea,

(c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged, and

(d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea,

the lawyer may enter into an agreement with the prosecutor about a guilty plea.

Commentary

The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

4.02 THE LAWYER AS WITNESS

Submission of Affidavit

4.02 (1) Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not submit his or her own affidavit to the tribunal.

Submission of Testimony

(2) Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not testify before the tribunal unless permitted to do so by the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

Commentary

A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination, or challenge. The lawyer should not in effect appear as 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 another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect to receive special treatment because of professional status.

Appeals

(3) A lawyer who is a witness in proceedings shall not appear as advocate in any appeal from the decision in those proceedings.

4.03 INTERVIEWING WITNESSES

Interviewing Witnesses

4.03 Subject to the rules on communication with a represented party set out in subrules 6.03(7),(8) and (9), a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer shall disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

[Amended – November 2007]

4.04 COMMUNICATION WITH WITNESSES GIVING EVIDENCE

Communication with Witnesses Giving Evidence

4.04 Subject to the direction of the tribunal, the lawyer shall observe the following rules respecting communication with witnesses giving evidence:

- (a) during examination-in-chief, the examining lawyer may discuss with the witness any matter that has not been covered in the examination up to that point,
- (b) during examination-in-chief by another legal practitioner of a witness who is unsympathetic to the lawyer's cause, the lawyer not conducting the examination-in-chief may discuss the evidence with the witness,
- (c) between completion of examination-in-chief and commencement of cross-examination of the lawyer's own witness, the lawyer ought not to discuss the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief,
- (d) during cross-examination by an opposing legal practitioner, the witness's own lawyer ought not to have any conversation with the witness about the witness's evidence or any issue in the proceeding,
- (e) between completion of cross-examination and commencement of re-examination, the lawyer who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination,
- (f) during cross-examination by the lawyer of a witness unsympathetic to the cross-examiner's cause, the lawyer may discuss the witness's evidence with the witness,
- (g) during cross-examination by the lawyer of a witness who is sympathetic to that lawyer's cause, any conversations ought to be restricted in the same way as communications during examination-in-chief of one's own witness, and
- (h) during re-examination of a witness called by an opposing legal practitioner, if the witness is sympathetic to the lawyer's cause the lawyer ought not to discuss the evidence to be given by that witness during re-examination. The lawyer may, however, properly discuss the evidence with a witness who is adverse in interest.

[Amended – June 2009]

Commentary

If any question arises whether the lawyer's behaviour may be in violation of this rule, it will often be appropriate to obtain the consent of the opposing legal practitioner or leave of the tribunal before engaging in conversations that may be considered improper.

This rule applies with necessary modifications to examinations out of court.

[Amended – June 2009]

4.05 RELATIONS WITH JURORS

Communications Before Trial

4.05 (1) When acting as an advocate, before the trial of a case, a lawyer shall not communicate with or cause another to communicate with anyone that the lawyer knows to be a member of the jury panel for that trial.

Commentary

A lawyer may investigate a prospective juror to ascertain any basis for challenge, provided that the lawyer does not directly or indirectly communicate with the juror or with any member of the juror's family. But a lawyer should not conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of either a member of the jury panel or a juror.

Disclosure of Information

(2) When acting as an advocate, a lawyer shall disclose to the judge and opposing counsel any information of which the lawyer is aware that a juror or prospective juror

- (a) has or may have an interest, direct or indirect, in the outcome of the case,
- (b) is acquainted with or connected in any manner with the presiding judge, any counsel or any litigant, or
- (c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness,

unless the judge and opposing counsel have previously been made aware of the information.

(3) A lawyer should promptly disclose to the court any information that the lawyer has about improper conduct by a member of a jury panel or by a juror toward another member of the jury panel, another juror, or to the members of a juror's family.

Communication During Trial

(4) Except as permitted by law, when acting as an advocate, a lawyer shall not during a trial of a case communicate with or cause another to communicate with any member of the jury.

(5) A lawyer who is not connected with a case before the court shall not communicate with or cause another to communicate with any member of the jury about the case.

Commentary

The restrictions on communications with a juror or potential juror should also apply to communications with or investigations of members of his or her family.

4.06 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

Encouraging Respect for the Administration of Justice

4.06 (1) A lawyer shall encourage public respect for and try to improve the administration of justice.

Commentary

The obligation outlined in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet for the same reason, a lawyer should not hesitate to speak out against an injustice.

The admission to and continuance in the practice of law implies on the part of a lawyer a basic commitment to the concept of equal justice for all within an open, ordered, and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it.

Criticizing Tribunals - Although proceedings and decisions of tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate, or unsupported by a *bona fide* belief in its real merit, bearing in mind that in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism. Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, where a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to and should support the tribunal, both because its members cannot defend themselves and because in doing so the lawyer is contributing to greater public understanding of and therefore respect for the legal system.

A lawyer, by training, opportunity, and experience is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions, and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be *bona fide* and reasoned.

Seeking Legislative or Administrative Changes

(2) A lawyer who seeks legislative or administrative changes shall disclose the interest being advanced, whether the lawyer's interest, the client's interest, or the public interest.

Commentary

The lawyer may advocate legislative or administrative changes on behalf of a client although not personally agreeing with them, but the lawyer who purports to act in the public interest should espouse only those changes that the lawyer conscientiously believes to be in the public interest.

Security of Court Facilities

(3) A lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility shall inform the local police force and give particulars.

Commentary

Where possible, the lawyer should suggest solutions to the anticipated problem such as (a) the necessity for further security, and (b) that judgment ought to be reserved.

Where possible, the lawyer should also notify other lawyers who are known to be involved in proceedings at the court facility where the dangerous situation is likely to develop. Beyond providing a warning of danger, this notice is desirable because it may allow them to suggest security measures that do not interfere with an accused's or a party's right to a fair trial.

If client information is involved in those situations, the lawyer should be guided by the provisions of rule 2.03 (Confidentiality).

4.07 LAWYERS AS MEDIATORS

Role of Mediator

4.07 A lawyer who acts as a mediator shall, at the outset of the mediation, ensure that the parties to it understand fully that

- (a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue, and

(b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by the solicitor-client privilege.

Commentary

In acting as a mediator, generally a lawyer should not give legal advice as opposed to legal information to the parties during the mediation process.

Generally, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of rule 2.04 (Avoidance of Conflicts of Interest) and its commentaries and the common law authorities.

Generally a lawyer-mediator should suggest and encourage the parties to seek the advice of separate counsel before and during the mediation process if they have not already done so.

Where in the mediation process the lawyer-mediator prepares a draft contract for the consideration of the parties, the lawyer-mediator should expressly advise and encourage them to seek separate independent legal representation concerning the draft contract.

Rule 5 Relationship to Students, Employees, and Others

5.01 SUPERVISION

Application

5.01 (1) In this rule, a non-lawyer does not include an articulated student.

Direct Supervision required

- (2) A lawyer shall in accordance with the By-Laws
- (a) assume complete professional responsibility for his or her practice of law, and
 - (b) shall directly supervise non-lawyers to whom particular tasks and functions are assigned.

Commentary

By-Law 7.1 governs the circumstances in which a lawyer may assign certain tasks and functions to a non-lawyer within a law practice. Where a non-lawyer is competent to do work under the supervision of a lawyer, a lawyer may assign work to the non-lawyer. The non-lawyer must be directly supervised by the lawyer. A lawyer is required to review the non-lawyer's work at frequent intervals to ensure its proper and timely completion.

A lawyer may permit a non-lawyer to perform tasks assigned and supervised by the lawyer as long as the lawyer maintains a direct relationship with the client or, if the lawyer is in a community legal clinic funded by Legal Aid Ontario, as long as the lawyer maintains a direct supervisory relationship with each client's case in accordance with the supervision requirements of Legal Aid Ontario and assumes full professional responsibility for the work.

A lawyer who practices alone or operates a branch or part-time office should ensure that all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work and that legal advice is not given by unauthorized persons, whether in the lawyer's name or otherwise.

A lawyer should ensure that the non-lawyer is identified as such when communicating orally or in writing with clients, licensees, public officials, or with the public generally whether within or outside the offices of the law practice.

The following examples, which are not exhaustive, illustrate situations where it may be appropriate to assign work to non-lawyers subject to direct supervision.

Real Estate – A lawyer may permit a non-lawyer to attend to all matters of routine administration, assist in more complex transactions, draft statements of account and routine documents and correspondence and attend to registrations. The lawyer must not assign to a non-lawyer the ultimate responsibility for review of a title search report or of documents before signing or for review and signing of a letter of requisition, review and signing of a title opinion or review and signing of a reporting letter to the client.

In real estate transactions using the system for the electronic registration of title documents (“e-reg”™), only a lawyer may sign for completeness of any document that requires compliance with law statements.

Corporate and Commercial – A lawyer may permit a non-lawyer to attend to all matters of routine administration and to assist in more complex matters and to draft routine documents and correspondence relating to corporate, commercial, and securities matters such as drafting corporate minutes and documents pursuant to corporation statutes, security instruments, security registration documents and contracts of all kinds, closing documents and statements of account, and to attend on filings.

Wills, Trusts and Estates – A lawyer may permit a non-lawyer to attend to all matters of routine administration, to assist in more complex matters, to collect information, draft routine documents and correspondence, to prepare income tax returns, to calculate such taxes, to draft executors’ accounts and statements of account, and to attend to filings.

[New- November 2007]

Electronic Registration of Title Documents

(3) When a lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents (“e-reg”™), the lawyer

- (a) shall not permit others, including a non-lawyer employee, to use the lawyer’s diskette, and
- (b) shall not disclose his or her personalized e-reg™ pass phrase to others.

(4) When a non-lawyer employed by a lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents, the lawyer shall ensure that the non-lawyer

- (a) does not permit others to use the diskette, and
- (b) does not disclose his or her personalized e-reg™ pass phrase to others.

Commentary

The implementation across Ontario of a system for the electronic registration of title documents imposes special responsibilities on lawyers and others using the system. Each person in a law office who accesses the e-regTM system must have a personalized specially encrypted diskette and personalized e-regTM pass phrase. The integrity and security of the system is achieved, in part, by its maintaining a record of those using the system for any transactions. Moreover, under the system, only lawyers entitled to practise law may make certain prescribed statements. Statements professing compliance with law without registration of supporting documents may be made only by lawyers in good standing. Only lawyers entitled to practise law may approve electronic documents containing these statements. It is, therefore, important that lawyers should maintain and ensure the security and the exclusively personal use of the personalized specially encrypted diskette used to access the system and the personalized electronic registration pass phrase. When in a real estate practice it is permissible for a lawyer to delegate responsibilities to a non-lawyer who has a personalized specially encrypted diskette and a personalized electronic registration pass phrase, the lawyer should ensure that the non-lawyer maintains and understands the importance of maintaining the security of the personalized specially encrypted diskette and the pass phrase.

In real estate transactions using the e-regTM system, a lawyer who approves the electronic registration of title documents by a non-lawyer is responsible for the content of any document that contains the electronic signature of the non-lawyer.

[Amended – November 2007]

Title Insurance

- (5) A lawyer shall not permit a non-lawyer to
- (a) provide advice to the client concerning any insurance, including title insurance, without supervision,
 - (b) present insurance options or information regarding premiums to the client without supervision,
 - (c) recommend one insurance product over another without supervision, and
 - (d) give legal opinions regarding the insurance coverage obtained.

[New - March 31, 2008]

Signing E-RegTM Documents

- (6) A lawyer who electronically signs a document using the system for the electronic registration of title documents – e-regTM – assumes complete professional responsibility for the document.

[New - March 31, 2008]

5.02 STUDENTS

Recruitment Procedures

5.02 (1) A lawyer shall observe the procedures of the Society about the recruitment of articling students and the engagement of summer students.

Duties of Principal

(2) A lawyer acting as a principal to a student shall provide the student with meaningful training and exposure to and involvement in work that will provide the student with knowledge and experience of the practical aspects of the law, together with an appreciation of the traditions and ethics of the profession.

Duties of Articling Student

(3) An articling student shall act in good faith in fulfilling and discharging all the commitments and obligations arising from the articling experience.

5.03 SEXUAL HARASSMENT

Definition

5.03 (1) In this rule, sexual harassment is one incident or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature

- (a) when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the recipient(s) of the conduct,
- (b) when submission to such conduct is made implicitly or explicitly a condition for the provision of professional services,
- (c) when submission to such conduct is made implicitly or explicitly a condition of employment,
- (d) when submission to or rejection of such conduct is used as a basis for any employment decision (including, but not limited to, allocation of files, matters of promotion, raise in salary, job security, and benefits affecting the employee), or
- (e) when such conduct has the purpose or the effect of interfering with a person's work performance or creating an intimidating, hostile, or offensive work environment.

Commentary

Types of behaviour that constitute sexual harassment include, but are not limited to,

- (a) sexist jokes causing embarrassment or offence, or that are by their nature clearly embarrassing or offensive,
- [Amended - January 2009]*
- (b) leering,
 - (c) the display of sexually offensive material,
 - (d) sexually degrading words used to describe a person,
 - (e) derogatory or degrading remarks directed towards members of one sex or one's sexual orientation,
 - (f) sexually suggestive or obscene comments or gestures,
 - (g) unwelcome inquiries or comments about a person's sex life,
 - (h) unwelcome sexual flirtations, advances, or propositions,
 - (i) persistent unwanted contact or attention after the end of a consensual relationship,
 - (j) requests for sexual favours,
 - (k) unwanted touching,
 - (l) verbal abuse or threats, and
 - (m) sexual assault.

Sexual harassment can occur in the form of behaviour by men towards women, between men, between women, or by women towards men.

Prohibition on Sexual Harassment

- (2) A lawyer shall not sexually harass a colleague, a staff member, a client, or any other person.

5.04 DISCRIMINATION**Special Responsibility**

5.04 (1) A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.

[Amended – June 2007]

Commentary

The Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

Rule 5.04 will be interpreted according to the provisions of the Ontario Human Rights Code and related case law.

The Ontario Human Rights Code defines a number of grounds of discrimination listed in rule 5.04. For example,

Age is defined as an age that is eighteen years or more.

[Amended - January 2009]

Disability is broadly defined in s. 10 of the Code to include both physical and mental disabilities.

[Amended - January 2009]

Family status is defined as the status of being in a parent-and-child relationship.

Marital status is defined as the status of being married, single, widowed, divorced, or separated and includes the status of living with a person in a conjugal relationship outside marriage.

[Amended - January 2009]

Record of offences is defined such that a prospective employer may not discriminate on the basis of a pardoned criminal offence (a pardon must have been granted under the Criminal Records Act (Canada) and not revoked) or provincial offences.

The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

There is no statutory definition of discrimination. Supreme Court of Canada jurisprudence defines discrimination as including

- (a) Differentiation on prohibited grounds that creates a disadvantage. Lawyers who refuse to hire employees of a particular race, sex, creed, sexual orientation, etc. would be differentiating on the basis of prohibited grounds.

[Amended - January 2009]

- (b) Adverse effect discrimination. An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly "neutral" rule or policy creates an adverse effect on a group protected by rule 5.04, there is a duty to accommodate. For example, while a requirement that all articling students have a driver's licence to permit them to travel wherever their job requires may seem reasonable, that requirement should only be imposed if driving a vehicle is an essential requirement for the position. Such a requirement may have the effect of excluding from employment persons with disabilities that prevent them from obtaining a licence.

[Amended - January 2009]

Human rights law in Ontario includes as discrimination, conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of the prohibited grounds. The Ontario Human Rights Code requires that the affected individuals or groups must be accommodated unless to do so would cause undue hardship.

A lawyer should take reasonable steps to prevent or stop discrimination by any staff or agent who is subject to the lawyer's direction or control.

Ontario human rights law excepts from discrimination special programs designed to relieve disadvantage for individuals or groups identified on the basis of the grounds noted in the Code.

In addition to prohibiting discrimination, rule 5.04 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, or disability. Harassment by superiors, colleagues, and co-workers is also prohibited.

[Amended - January 2009]

Harassment is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" on the basis of any ground set out in rule 5.04. This could include, for example, repeatedly subjecting a client or colleague to jokes based on race or creed.

Services

- (2) A lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule.

Employment Practices

- (3) A lawyer shall ensure that his or her employment practices do not offend this rule.

Commentary

Discrimination in employment or in the provision of services not only fails to meet professional standards, it also violates the Ontario Human Rights Code and related equity legislation.

In advertising a job vacancy, an employer may not indicate qualifications by a prohibited ground of discrimination. However, where discrimination on a particular ground is permitted because of an exception under the Ontario Human Rights Code, such questions may be raised at an interview. For example, if an employer has an anti-nepotism policy, the employer may inquire about the applicant's possible relationship to another employee as that employee's spouse, child or parent. This is in contrast to questions about applicant's marital status by itself. Since marital status has no relevance to employment within a law firm, questions about marital status should not be asked.

[Amended - January 2009]

An employer should consider the effect of seemingly "neutral" rules. Some rules, while applied to everyone, can bar entry to the firm or pose additional hardships on employees of one sex or of a particular creed, ethnic origin, marital or family status, or on those who have (or develop) disabilities. For example, a law office may have a written or unwritten dress code. It would be necessary to revise the dress code if it does not already accept that a head covering worn for religious reasons must be considered part of acceptable business attire. The maintenance of a rule with a discriminatory effect breaches rule 5.04 unless changing or eliminating the rule would cause undue hardship.

If an applicant cannot perform all or part of an essential job requirement because of a personal characteristic listed in the Ontario Human Rights Code, the employer has a duty to accommodate. Only if the applicant cannot do the essential task with reasonable accommodation may the employer refuse to hire on this basis. A range of appropriate accommodation measures may be considered. An accommodation is considered reasonable unless it would cause undue hardship.

The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the application of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the accommodation of differences that arise from the personal characteristics cited in rule 5.04.

The nature of accommodation as well as the extent to which the duty to accommodate might apply in any individual case are developing areas of human rights law. However, the following principles are well established.

If a rule, requirement, or expectation creates difficulty for an individual because of factors related to the personal characteristics noted in rule 5.04, the following obligations arise:

The rule, requirement or expectation must be examined to determine whether it is "reasonable and *bona fide*." If the rule, requirement, or expectation is not imposed in good faith and is not strongly and logically connected to a business necessity, it cannot be maintained. There must be objectively verifiable evidence linking the rule, requirement, or expectation with the operation of the business.

If the rule, requirement, or expectation is imposed in good faith and is strongly logically connected to a business necessity, the next step is to consider whether the individual who is disadvantaged by the rule can be accommodated.

The duty to accommodate operates as both a positive obligation and as a limit to obligation. Accommodation must be offered to the point of undue hardship. Some hardship must be tolerated to promote equality; however, if the hardship occasioned by the particular accommodation at issue is "undue," that accommodation need not be made.

Rule 6 Relationship to the Society and Other Lawyers

6.01 RESPONSIBILITY TO THE PROFESSION GENERALLY

Integrity

6.01 (1) A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession.

Commentary

Integrity is the fundamental quality of any person who seeks to practise as a lawyer. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the lawyer may be.

Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect credit on the legal profession, inspire the confidence, respect and trust of clients and the community, and avoid even the appearance of impropriety.

[Amended – June 2007]

Meeting Financial Obligations

(2) A lawyer shall promptly meet financial obligations incurred in the course of practice on behalf of clients unless, before incurring such an obligation, the lawyer clearly indicates in writing to the person to whom it is to be owed that it is not to be a personal obligation.

[Amended - January 2009]

Commentary

In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed, or undertaken on behalf of clients unless, the lawyer clearly indicates otherwise in advance.

[Amended - January 2009]

When a lawyer retains a consultant, expert, or other professional, the lawyer should clarify the terms of the retainer in writing, including specifying the fees, the nature of the services to be provided, and the person responsible for payment. If the lawyer is not responsible for the payment of the fees, the lawyer should help in making satisfactory arrangements for payment if it is reasonably possible to do so.

Rule 6

If there is a change of lawyer, the lawyer who originally retained a consultant, expert, or other professional should advise him or her about the change and provide the name, address, telephone number, fax number, and e-mail address of the new lawyer.

Duty to Report Misconduct

(3) A lawyer shall report to the Society, unless to do so would be unlawful or would involve a breach of solicitor-client privilege,

- (a) the misappropriation or misapplication of trust monies,
- (b) the abandonment of a law or legal services practice,
- (c) participation in serious criminal activity related to a licensee's practice,
- (d) the mental instability of a licensee of such a serious nature that the licensee's clients are likely to be severely prejudiced, and
- (e) any other situation where a licensee's clients are likely to be severely prejudiced.

[Amended – June 2007]

Commentary

Unless a licensee who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules or the rules governing paralegals. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer).

Nothing in this paragraph is meant to interfere with the traditional solicitor-client relationship. In all cases the report must be made *bona fide* without malice or ulterior motive.

[Amended – June 2007]

Often, instances of improper conduct arise from emotional, mental, or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports the Ontario Lawyers' Assistance Program (OLAP), and other support groups in their commitment to the provision of confidential counselling. Therefore, lawyers acting in the capacity of counsellors for OLAP and other support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity, or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

[Amended - October 2006]

Encouraging Client to Report Dishonest Conduct

(4) A lawyer shall attempt to persuade a client who has a claim against an apparently dishonest licensee to report the facts to the Society before pursuing private remedies.

(5) If the client refuses to report his or her claim against an apparently dishonest licensee to the Society, the lawyer shall inform the client of the policy of the Compensation Fund and shall obtain instructions in writing to proceed with the client's claim without notice to the Society.

(6) A lawyer shall inform a client of the provision of the *Criminal Code of Canada* dealing with the concealment of an indictable offence in return for an agreement to obtain valuable consideration (section 141).

(7) If the client wishes to pursue a private agreement with the apparently dishonest lawyer, the lawyer shall not continue to act if the agreement constitutes a breach of section 141 of the *Criminal Code of Canada*.

[Amended – June 2007]

Duty to Report Certain Offences

(8) If a lawyer is charged with an offence described in By-law 8 of the Society, he or she shall inform the Society of the charge and of its disposition in accordance with the By-law.

[Amended – June 2007]

Commentary

By-law 8 relates to the reporting of serious criminal charges under the *Criminal Code* and charges under other Acts that bring into question the honesty of a lawyer or that relate to a lawyer's practice of law. Such a charge may be a red flag that clients may need protection. The Society must be in a position to determine what, if any, action is required by it if a lawyer is charged with an offence described in By-law 8 and what, if any, action is required if the lawyer is found guilty.

[Amended - June 2007]

6.02 RESPONSIBILITY TO THE SOCIETY

Communications from the Society

6.02 A lawyer shall reply promptly to any communication from the Society.

6.03 RESPONSIBILITY TO LAWYERS AND OTHERS

Courtesy and Good Faith

6.03 (1) A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

Commentary

The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their function properly.

Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward other legal practitioners or the parties. The presence of personal animosity between legal practitioners involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.

A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice, or charges of other legal practitioners, but should be prepared, when requested, to advise and represent a client in a complaint involving another legal practitioner.

[Amended – June 2009]

(2) A lawyer shall agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of the client.

(3) A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other legal practitioners not going to the merits or involving the sacrifice of a client's rights.

(4) A lawyer shall not use a tape recorder or other device to record a conversation between the lawyer and a client or another legal practitioner, even if lawful, without first informing the other person of the intention to do so.

[Amended - June 2009]

Communications

(5) A lawyer shall not in the course of professional practice send correspondence or otherwise communicate to a client, another legal practitioner, or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

(6) A lawyer shall answer with reasonable promptness all professional letters and communications from other legal practitioners that require an answer, and a lawyer shall be punctual in fulfilling all commitments.

Communications with a represented person

(7) Subject to subrules (7.1) and (8), if a person is represented by a legal practitioner in respect of a matter, a lawyer shall not, except through or with the consent of the legal practitioner,

[Amended – September 2011]

(a) approach or communicate or deal with the person on the matter, or

(b) attempt to negotiate or compromise the matter directly with the person.

[Amended – June 2009]

(7.1) Subject to subrule (8), if a person is receiving legal services from a legal practitioner under a limited scope retainer on a particular matter, a lawyer may, without the consent of the legal practitioner, approach, communicate or deal directly with the person on the matter, unless the lawyer receives written notice of the limited nature of the legal services being provided by the legal practitioner and the approach, communication or dealing falls within the scope of the limited scope retainer.

[New – September 2011]

Second Opinions

(8) A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by a legal practitioner with respect to that matter.

[Amended - June 2009]

Commentary

Subrule (7) applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by a legal practitioner concerning the matter to which the communication relates. A lawyer may communicate with a represented person concerning matters outside the representation. This subrule does not prevent parties to a matter from communicating directly with each other.

The prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of the other legal practitioner by closing his or her eyes to the obvious.

Where notice as described in subrule (7.1) has been provided to a lawyer for an opposing party, the lawyer is required to communicate with the legal practitioner who is representing the person under a limited scope retainer, but only to the extent of the matter or matters within the scope of the retainer as identified by the legal practitioner. The lawyer may communicate with the person on matters outside of the limited scope retainer.

[New – September 2011]

Subrule (8) deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second opinion, the obligation to be competent and to render competent services requires that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first legal practitioner involved. The lawyer should advise the client accordingly, and if necessary consult the first legal practitioner unless the client instructs otherwise.

[Amended - June 2009]

Communications with a represented corporation or organization

(9) A lawyer retained to act on a matter involving a corporation or organization that is represented by a legal practitioner in respect of that matter shall not, without the legal practitioner's consent or unless otherwise authorized or required by law, communicate, facilitate communication with or deal with a person

- (a) who is a director or officer, or another person who is authorized to act on behalf of the corporation or organization,
- (b) who is likely involved in decision-making for the corporation or organization or who provides advice in relation to the particular matter,
- (c) whose act or omission may be binding on or imputed to the corporation or organization for the purposes of its liability, or

(d) who supervises, directs or regularly consults with the legal practitioner and who makes decisions based on the legal practitioner's advice.

(9.1) If a person described in subrule (9) (a), (b), (c) or (d) is represented in the matter by a legal practitioner, the consent of the legal practitioner is sufficient to allow a lawyer to communicate, facilitate communication with or deal with the person.

(9.2) In subrule (9), "organization" includes a partnership, limited partnership, association, union, fund, trust, co-operative, unincorporated association, sole proprietorship and a government department, agency, or regulatory body.

Commentary

The purpose of subrules 6.03 (9), (9.1) and (9.2) is to protect the lawyer-client relationship of corporations and other organizations by specifying persons with whom a lawyer may not communicate, facilitate communication or deal if the lawyer represents a client in a matter involving a corporation or organization and the corporation or organization is represented by a legal practitioner. They apply to litigation as well as to transactional and other non-litigious matters. A lawyer may communicate with a person in a corporation or other organization, other than those referred to in subrule (9), even if the corporation or organization is represented by a legal practitioner. These subrules are intended to advance the public policy of promoting efficient discovery and favours the revelation of the truth by addressing the circumstances in which a corporation or organization is allowed to prevent the disclosure of relevant evidence. They are not intended to protect a corporation or organization from the revelation of prejudicial facts.

Generally, subrule 6.03 (9) precludes contact only with those actively involved in a matter. For example, in a litigation matter, it does not preclude contact with mere witnesses. Further, communications with persons within the corporation or organization are not barred merely by virtue of the possibility that their information might constitute "admissions" in the evidentiary sense. To proscribe contact with any person within a corporation or organization on the basis that he or she may make a statement that might be admitted in evidence against the corporation or organization would be overly protective of the corporation or organization and too restrictive of an opposing counsel's ability to contact and interview potential witnesses. Fairness does not require the presence of a corporation's or organization's legal practitioner whenever a person within the corporation or organization may make a statement admissible in evidence against it.

Subrule 6.03 (9) prohibits communications by a lawyer for another person or entity concerning the matter in question with persons likely involved in the decision-making process about the matter. These individuals are so closely identified with the interests of the corporation or organization as to be indistinguishable from it. They would have the authority to commit the corporation or organization to a position with regard to the subject matter of the representation. This person would have such authority as a corporate officer or because for some other reason the law cloaks him or her with authority, including making decisions affecting the outcome of the matter, including litigation decisions, or because his or her duties include answering the type of inquiries posed. These individuals include those to whom the organization's legal practitioner looks for decisions with respect to the matter.

Thus, subject to the exceptions set out in it, subrule 6.03 (9) would prohibit contact with those persons who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.

A lawyer is not prohibited from communicating with a person in a litigation matter unless the person's act or omission is believed, on reasonable grounds, to be so central and obvious to a determination of liability that the person's conduct may be imputed to the corporation or organization. If it is not reasonably likely that the person is an active participant for liability purposes or a decision-maker respecting the outcome of the matter, nothing in subrule 6.03 (9) precludes informal contact with such a person.

An individual who regularly consults with the corporation's or organization's legal practitioner concerning a matter will not necessarily be a person who also directs the legal practitioner. In some large corporations and organizations, some management personnel may direct or control counsel for some matters but not others. The mere fact that a person holds a management position does not trigger the protections of the rule.

A person who is simply interviewed or questioned by a corporation's or organization's legal practitioner about a matter to gather factual information does not "regularly consult" with the legal practitioner. While a person's duties within a corporation or organization may include answering litigation-related inquiries, this rule does not prohibit an inquiry of this person by opposing counsel that is related to the person's knowledge of the historical aspects leading up to the alleged injury or damage which give rise to the subject matter of the representation.

The prohibition on communications with a represented corporation or organization applies only where the lawyer knows that the entity is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise where it is reasonable to believe that the entity with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing his or her eyes to the obvious.

Subrule 6.03 (9) does not prevent a lawyer from communicating with employees or agents concerning matters outside the representation.

As a practical matter, to avoid eliciting privileged or confidential information and ensure that the communications are proper, the lawyer should identify himself or herself as representing an interested party in the matter when approaching a potential witness or other person in the corporation or organization. The lawyer should also advise the person whom he or she is hoping to interview that they are free to decline to respond. See also rule 4.03 (Interviewing Witnesses).

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of rule 2.04 (Avoidance of Conflicts of Interest), and particularly subrules 2.04(6) through (10). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

If the representation by the legal practitioner described in subrule (9.1) is only with respect to the personal interests of the individual, consent of the corporation's or organization's counsel would be required with respect to the corporation's or organization's interests.

Unions – Subrule 6.03 (9) is not intended to prohibit a lawyer for a union from contacting employees of a represented corporation or organization in circumstances where proper representation of the union's interests requires communication with certain employees who are the holders of information. For example, a lawyer retained by a union with respect to a termination grievance in which the union alleges that the employer, who is represented, has breached the collective agreement, is not prohibited from contacting employees who may have information on the termination or events leading up to the termination.

Similarly, a management-side labour lawyer would not offend the subrule if the lawyer contacted an employee who is a member of a bargaining unit represented by a legal practitioner.

Governments –The concept of the individual who may “bind the organization” may not apply in the government context in the same way as in the corporate environment. For government departments, ministries and similar groups, the rule is intended to cover individuals who participate in a significant way in decision-making or who provide advice in relation to a particular matter.

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In government, because of its complexity and despite its hierarchy, it may not always be clear to whom a lawyer is authorized to communicate on a particular matter and who is involved in the decision-making process. The roles of these individuals may not be discrete, as different officials at different levels in different departments provide advice and recommendations. For example, in a contract negotiation, employees from one ministry may be directly involved, but those from another ministry may also have sensitive information relevant to the matter that may require protection under subrule 6.03 (9).

In addition, the legal branch at the particular ministry is usually considered to always be “retained”. There may be circumstances where the only appropriate action is to contact the legal branch. In all cases, appropriate judgment must be exercised

In general, the subrule is not intended to:

- a. constrain lawyers who wish to contact government officials for a discussion of policy or similar matters on behalf of a client;
- b. affect access to information requests under such legislation as the *Freedom of Information and Protection of Privacy Act* (Ontario) or the federal *Access to Information Act*, including situations where a litigant has named the provincial or federal Crown, respectively, as a defendant; or
- c. affect the exercise of the duties of public servants under the *Public Service of Ontario Act, 2006* with respect to disclosure of information.

Municipalities – Similar to government, in the municipal context, it is recognized that no one individual has the authority to bind the municipality. Each councillor is representative of the entire council for the purposes of decision-making. Subrule 6.03 (9), for example, would not permit the lawyer for an applicant on a controversial planning matter that is before the Ontario Municipal Board to contact individual members of council on the matter without the consent of the municipal solicitor.

The subrule is not intended to:

- a. prevent lawyers appearing before council on a client’s behalf and making representations to a public meeting held pursuant to the *Planning Act*;
- b. affect access to information requests under such legislation as the *Municipal Freedom of Information and Protection of Privacy Act*, including situations where a litigant has named the municipality as a defendant; or
- c. restrain communications by persons having dealings or negotiations, including lobbying, with municipalities with the elected representatives (councillors) or municipal staff.

[Amended – November 2010]

Undertakings

(10) A lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given.

Commentary

Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally. The use of such words as “on behalf of my client” or “on behalf of the vendor” does not relieve the lawyer giving the undertaking of personal responsibility.

In real estate transactions using the system for the electronic registration of title documents (“e-reg”TM), the lawyers acting for the parties (with their consent) will sign and be bound by a Document Registration Agreement that will contain undertakings. When entering into a Document Registration Agreement, a lawyer should have regard to and strictly comply with his or her obligations under subrule (10).

[Amended - November 2007]

6.04 OUTSIDE INTERESTS AND THE PRACTICE OF LAW**Maintaining Professional Integrity and Judgment**

6.04 (1) A lawyer who engages in another profession, business, or occupation concurrently with the practice of law shall not allow such outside interest to jeopardize the lawyer's professional integrity, independence, or competence.

(2) A lawyer shall not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

Commentary

The term “outside interest” covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation, or writing on legal subjects, as well as activities not so connected such as, for example, a career in business, politics, broadcasting or the performing arts. In each case the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society.

Where the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence as, for example, where the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

6.05 THE LAWYER IN PUBLIC OFFICE**Standard of Conduct**

6.05 (1) A lawyer who holds public office shall, in the discharge of official duties, adhere to standards of conduct as high as those that these rules require of a lawyer engaged in the practice of law.

Commentary

The rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether the lawyer attained the office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards.

Generally, the Society will not be concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action.

Conflict of Interest

(2) A lawyer who holds public office shall not allow professional or personal interests to conflict with the proper discharge of official duties.

Commentary

The lawyer holding part-time public office must not accept any private legal business where duty to the client will, or may, conflict with official duties. If some unforeseen conflict arises, the lawyer should terminate the professional relationship, explaining to the client that official duties must prevail. The lawyer who holds a full-time public office will not be faced with this sort of conflict but must nevertheless guard against allowing independent judgment in the discharge of official duties to be influenced either by the lawyer's own interest, that of some person closely related to or associated with the lawyer, that of former or prospective clients, or former or prospective partners or associates.

Subject to any special rules applicable to the particular public office, the lawyer holding the office who sees that there is a possibility of a conflict of interest should declare the possible conflict at the earliest opportunity, and not take part in any consideration, discussion or vote concerning the matter in question.

(3) If there may be a conflict of interest, a lawyer who holds or who held public office shall not represent clients or advise them in contentious cases that the lawyer has been concerned with in an official capacity.

Appearances before Official Bodies

(4) Subject to the rules of the official body, when a lawyer or any of his or her partners or associates is a member of an official body, the lawyer shall not appear professionally before that body.

Commentary

Subject to the rules of the official body, a partner or associate may appear professionally before a committee of the official body if the partner or associate is not a member of that committee, provided that in respect of matters in which the partner or associate appears, the lawyer does not sit on the committee, take part in the discussions of the committee's recommendations, or vote upon them.

Conduct after Leaving Public Office

(5) A lawyer who has left public office shall not act for a client in connection with any matter for which the lawyer had substantial responsibility before leaving public office.

Commentary

It would not be improper for the lawyer to act professionally in the matter on behalf of the public body in question.

A lawyer who has acquired confidential information by virtue of holding public office should keep the information confidential and not divulge or use it, notwithstanding that the lawyer has ceased to hold such office.

6.06 PUBLIC APPEARANCES AND PUBLIC STATEMENTS

Communication with the Public

6.06 (1) Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.

Commentary

Lawyers in their public appearances and public statements should conduct themselves in the same manner as with their clients, their fellow legal practitioners, and tribunals. Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal, or the lawyer's office does not excuse conduct that would otherwise be considered improper.

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A lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer.

Public communications about a client's affairs should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that the lawyer's real purpose is self-promotion or self-aggrandizement.

Given the variety of cases that can arise in the legal system, particularly in civil, criminal, and administrative proceedings, it is impossible to set down guidelines that would anticipate every possible circumstance. Circumstances will arise where the lawyer should have no contact with the media and other cases where the lawyer is under a specific duty to contact the media to properly serve the client - the latter situation will arise more often in the context of administrative boards and tribunals where a particular tribunal is an instrument of government policy and hence is susceptible to public opinion.

A lawyer is often involved in a non-legal setting where contact is made with the media about publicizing such things as fund-raising, expansion of hospitals or universities, programs of public institutions or political organizations, or in acting as a spokesperson for organizations that, in turn, represent particular racial, religious, or other special interest groups. This is a well-established and completely proper role for the lawyer to play in view of the obvious contribution it makes to the community.

A lawyer is often called upon to comment publicly on the effectiveness of existing statutory or legal remedies, on the effect of particular legislation or decided cases, or to offer an opinion about cases that have been instituted or are about to be instituted. This, too, is an important role the lawyer can play to assist the public in understanding legal issues.

[Amended – June 2009]

A lawyer is often involved as advocate for interest groups whose objective is to bring about changes in legislation, governmental policy, or even a heightened public awareness about certain issues. This is also an important role that the lawyer can be called upon to play.

Lawyers should be aware that when they make a public appearance or give a statement they will ordinarily have no control over any editing that may follow or the context in which the appearance or statement may be used, or under what headline it may appear.

Interference with Right to Fair Trial or Hearing

(2) A lawyer shall not communicate information to the media or make public statements about a matter before a tribunal if the lawyer knows or ought to know that the information or statement will have a substantial likelihood of materially prejudicing a party's right to a fair trial or hearing.

Commentary

Fair trials and hearings are fundamental to a free and democratic society. It is important that the public, including the media, be informed about cases before courts and tribunals. The administration of justice benefits from public scrutiny. It is also important that a person's, particularly an accused person's, right to a fair trial or hearing not be impaired by inappropriate public statements made before the case has concluded.

6.07 PREVENTING UNAUTHORIZED PRACTICE**Preventing Unauthorized Practice**

6.07 (1) A lawyer shall assist in preventing the unauthorized practice of law and the unauthorized provision of legal services.

[Amended – June 2007]

Commentary

Statutory provisions against the practice of law and provision of legal services by unauthorized persons are for the protection of the public. Unauthorized persons may have technical or personal ability, but they are immune from control, regulation, and, in the case of misconduct, from discipline by the Society. Moreover, the client of a lawyer who is authorized to practise has the protection and benefit of the lawyer-client privilege, the lawyer's duty of secrecy, the professional standard of care that the law requires of lawyers, and the authority that the courts exercise over them. Other safeguards include professional liability insurance, rights with respect to the assessment of bills, rules respecting the handling of trust monies, and requirements for the maintenance of compensation funds.

Working With or Employing Unauthorized Persons

(2) Without the express approval of a committee of Convocation appointed for the purpose, a lawyer shall not retain, occupy office space with, use the services of, partner or associate with, or employ in any capacity having to do with the practice of law or provision of legal services any person who, in Ontario or elsewhere, has been disbarred and struck off the Rolls, has had his or her license to practise law or to provide legal services revoked, has been suspended, has had his or her license to practise law or to provide legal services suspended, has undertaken not to practise law or to provide legal services, or who has been involved in disciplinary action and been permitted to resign or to surrender his or her license to practise law or to provide legal services, and has not had his or her license restored.

[Amended – January 2008]

Practice by Suspended Lawyers Prohibited

(3) A lawyer whose license to practise law is suspended shall comply with the requirements of the By-laws and shall not

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- (a) practice law
- (b) represent or hold himself or herself out as a person entitled to practise law, or
- (c) represent or hold himself or herself out as a person entitled to provide legal services.

[New – January 2008]

Commentary

Part II of By-Law 7.1 (Operational Obligations and Responsibilities) and Part II.1 of By-Law 9 (Financial Transactions and Records) set out the obligations of a lawyer whose license to practise law is suspended.

[Amended - May 2008]

Undertakings Not to Practise Law

- (4) A lawyer who gives an undertaking to the Law Society not to practise law shall not,
 - (a) practise law,
 - (b) represent or hold himself or herself out as a person entitled to practise law, or
 - (c) represent or hold himself or herself out as a person entitled to provide legal services.

[New – January 2008]

Undertakings to Practise Law Subject to Restrictions

- (5) A lawyer who gives an undertaking to the Law Society to restrict his or her practise shall comply with the undertaking.

[New – January 2008]

6.08 RETIRED JUDGES RETURNING TO PRACTICE

Definitions

- 6.08 (1) In this rule, “retired appellate judge” means a lawyer
 - (a) who was formerly a judge of the Supreme Court of Canada, the Court of Appeal for Ontario, or the Federal Court of Appeal,

[Amended - January 2009]

- (b) who has retired, resigned, or been removed from the Bench, and
- (c) who has returned to practice.

- (2) In this rule, “retired judge” means a lawyer
- (a) who was formerly a judge of the Federal Court, the Tax Court of Canada, the Supreme Court of Ontario, Trial Division, a County or District Court, the Ontario Court of Justice, or the Superior Court of Justice,
[Amended - January 2009]
 - (b) who has retired, resigned, or been removed from the Bench, and
 - (c) who has returned to practice.

Appearance as Counsel

(3) A retired appellate judge shall not appear as counsel or advocate in any court, or in chambers, or before any administrative board or tribunal without the express approval of a committee of Convocation appointed for the purpose. This approval may only be granted in exceptional circumstances and may be restricted as the committee of Convocation sees fit.

- (4) A retired judge shall not appear as counsel or advocate
- (a) before the court on which the judge served or any lower court, and
 - (b) before any administrative board or tribunal over which the court on which the judge served exercised an appellate or judicial review jurisdiction

for a period of two years from the date of his or her retirement, resignation, or removal, without the express approval of a committee of Convocation, appointed for the purpose, which approval may only be granted in exceptional circumstances and may be restricted as the committee of Convocation sees fit.

6.09 ERRORS AND OMISSIONS

Informing Client of Error or Omission

- 6.09 (1) When, in connection with a matter for which a lawyer is responsible, the lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer shall
- (a) promptly inform the client of the error or omission being careful not to prejudice any rights of indemnity that either of them may have under an insurance, client's protection or indemnity plan, or otherwise,
 - (b) recommend that the client obtain legal advice elsewhere concerning any rights the client may have arising from the error or omission, and
 - (c) advise the client that in the circumstances, the lawyer may no longer be able to act for the client.

Notice of Claim

(2) A lawyer shall give prompt notice of any circumstance that the lawyer may reasonably expect to give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.

Commentary

Compulsory insurance imposes obligations on a lawyer, but these obligations must not impair the relationship and duties of the lawyer to the client. The insurer's rights must be preserved. There may well be occasions when a lawyer believes that certain actions or the failure to take action have made the lawyer liable for damages to the client when, in reality, no liability exists. Further, in every case a careful assessment will have to be made of the client's damages arising from the lawyer's negligence. Many factors will have to be taken into account in assessing the client's claim and damages. As soon as a lawyer becomes aware that an error or omission may have occurred, that may reasonably be expected to involve liability to the client for professional negligence, the lawyer should take the following steps.

[Amended - January 2009]

1. Immediately arrange an interview with the client and advise the client that an error or omission may have occurred, that may form the basis of a claim by the client against the lawyer.
2. Advise the client to obtain an opinion from an independent lawyer and that, in the circumstances, the first lawyer might no longer be able to act for the client.
3. Subject to rule 2.03 (Confidentiality), inform the insurer of the facts of the situation.
4. Co-operate fully and as expeditiously as possible with the insurer in the investigation and eventual settlement of the claim.
5. Make arrangements to pay that portion of the client's claim that is not covered by the insurance immediately upon completion of the settlement of the client's claim. This would include payment of the deductible under a policy of insurance in accordance with By-Law 6 (Professional Liability Insurance).

[Amended - January 2009]

Co-operation

(3) When a claim of professional negligence is made against a lawyer, he or she shall assist and co-operate with the insurer or other indemnitor to the extent necessary to enable the claim to be dealt with promptly.

Responding to Client's Claim

(4) If a lawyer is not indemnified for a client's errors and omissions claim or to the extent that the indemnity may not fully cover the claim, the lawyer shall expeditiously deal with the claim and shall not take unfair advantage that would defeat or impair the client's claim.

(5) In cases where liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim, a lawyer has a duty to pay the balance.

6.10 RESPONSIBILITY IN MULTI-DISCIPLINE PRACTICES

Compliance with these Rules

6.10 A lawyer in a multi-discipline practice shall ensure that non-licensee partners and associates comply with these rules and all ethical principles that govern a lawyer in the discharge of his or her professional obligations.

[Amended - June 2009]

6.11 DISCIPLINE

Disciplinary Authority

6.11 (1) A lawyer is subject to the disciplinary authority of the Society regardless of where the lawyer's conduct occurs.

Professional Misconduct

(2) The Society may discipline a lawyer for professional misconduct.

Conduct Unbecoming a Lawyer

(3) The Society may discipline a lawyer for conduct unbecoming a lawyer.

Law Society of Upper Canada

By-Laws 6.1, 7.1, 8, and 9

BY-LAW 6.1

January 29, 2009

Amended: October 29, 2009

Revoked and Replaced: October 28, 2010

Amended: November 9, 2010 (editorial changes)

April 28, 2011

CONTINUING PROFESSIONAL DEVELOPMENT

Continuing professional development requirement

1. (1) Beginning January 1, 2011, the following licensees shall complete the number of hours of eligible activities each year required under subsection (2):
 1. A licensee who is required to pay the full amount of the annual fee under subsection 2 (2) of By-Law 5 [Annual Fee].
 2. A licensee who is exempt from payment of the full amount of the annual fee under section 3.1 of By-Law 5 [Annual Fee].
 3. A licensee who is exempt from payment of the annual fee under subsection 4 (1) of By-Law 5 [Annual Fee] and who practises law as described therein.
 4. A licensee who is exempt from payment of the annual fee under subsection 4 (6) of By-law 5 [Annual Fee] and who practises law in Ontario as a barrister and solicitor.

Number of required hours per year

(2) Each year, a licensee to whom subsection (1) applies shall complete one hour of eligible activities for each calendar month in the year during which for any amount of time the licensee practises law in Ontario as a barrister and solicitor or provides legal services in Ontario, of the total of which hours at least twenty-five percent shall consist of eligible activities that are accredited by the Society covering ethics, professionalism or practice management topics.

Exemption from or reduction in required number of hours

(3) On application by a licensee, in any year, the Society may, for that year, exempt the licensee from the requirement under subsection (1) or reduce the number of hours of eligible activities that the licensee is required to complete under subsection (2).

No carry-over

(4) A licensee may not carry over from one year to any other year any hours of eligible activities that the licensee completes in the one year.

Application

(5) Section 1 does not apply to a licensee for the period of time during which section 2 applies to the licensee.

New licensees: twenty-four hour requirement

2. (1) A licensee who after May 31, 2010 is licensed to practise law in Ontario as a barrister and solicitor or licensed to provide legal services in Ontario shall complete twenty-four hours of eligible activities that are accredited by the Society, of which at least twenty-five percent shall consist of eligible activities that are accredited by the Society covering ethics, professionalism or practice management topics, within a period of twenty-four months.

Twenty-four month period

- (2) The twenty-four month period mentioned in subsection (1),
 - (a) begins on the day on which the licensee is paying the full amount of the annual fee under subsection 2 (2) of By-Law 5 [Annual Fee] and that is on or after the first day of January of the year immediately following the day on which the licensee is licensed; and
 - (b) includes only those whole or part calendar months during which the licensee pays the full amount of the annual fee under subsection 2 (2) of By-Law 5 [Annual Fee].

Exemption from or reduction in required number of hours

(3) On application by a licensee, the Society may exempt the licensee from the requirement under subsection (1) or reduce the number of hours of eligible activities that the licensee is required to complete under subsection (1).

Eligible activities completed prior to January 1

(4) Where the start of the twenty-four month period described in subsection (2) is January 1 of the year immediately following the day on which a licensee is licensed and where, for the period of time commencing on the day immediately following the day on which the licensee is licensed and ending on December 31 of the year in which the licensee is licensed, the licensee pays the full amount of the annual fee, the licensee may include, in the required number of hours of eligible activities accredited by the Society to be completed by the licensee under subsection (1), any hours of eligible activities that are accredited by the Society that the licensee completes after he or she is licensed but before the start of the twenty-four month period.

No carry-over

(5) Except as permitted under subsection (4), a licensee may not carry over from one year to any other year any hours of eligible activities that are accredited by the Society that the licensee completes in the one year.

Number of hours completed in year: determining compliance with subs. (1)

(6) Subject to subsection (7), in any year, if a licensee completes more hours of eligible activities that are accredited by the Society than the number of whole or part calendar months in that year during which the licensee pays the full amount of the annual fee under subsection 2 (2) of By-Law 5 [Annual Fee], for the purposes of determining compliance with subsection (1), the licensee shall be deemed to have completed a number of hours of eligible activities that are accredited by the Society that is equal to the number of whole or part calendar months in that year during which the licensee pays the full amount of the annual fee under subsection 2 (2) of By-Law 5 [Annual Fee].

Same

(7) In the first year immediately following the day on which a licensee is licensed, if subsection (4) applies to the licensee and the licensee has completed more hours of eligible activities that are accredited by the Society than the number of whole or part calendar months in the first year during which the licensee pays the full amount of the annual fee under subsection 2 (2) of By-Law 5 [Annual Fee], for the purposes of determining compliance with subsection (1), the licensee shall be deemed to have completed a number of hours of eligible activities that are accredited by the Society that is equal to the lesser of,

- (a) the total of the number of whole or part calendar months in that year during which the licensee pays the full amount of the annual fee under subsection 2 (2) of By-Law 5 [Annual Fee] and the number of hours of eligible activities that are accredited by the Society that are completed by the licensee in the circumstances mentioned in subsection (4); and
- (b) the total of the number of hours of eligible activities that are accredited by the Society that are completed by the licensee in the first year and the number of hours or eligible activities that are accredited by the Society that are completed by the licensee in the circumstances mentioned in subsection (4).

Application

(8) This section does not apply to a licensee who, on the day on which he or she is licensed to practise law in Ontario as a barrister and solicitor, has practised law in Canada outside Ontario for a period of time exceeding twenty-four months.

Interpretation: “eligible activity”

3. For the purposes of sections 1 and 2, an “eligible activity” is an activity that serves to maintain or enhance a licensee’s professional knowledge, skills, attitudes or ethics as determined by the Society.

Reporting: licensees to whom s. 1 applies

4. (1) Every licensee to whom section 1 applies shall file a report with the Society, by December 31 of each year, in respect of the eligible activities completed by the licensee in each year.

Reporting: licensees to whom s. 2 applies

(2) Every licensee to whom section 2 applies shall file a report with the Society, by December 31 of each year, commencing with the year immediately following the day on which the licensee is licensed, in respect of the eligible activities completed by the licensee in each year.

Eligible activities included under subs. 2 (4)

(3) A licensee to whom subsection 2 (4) applies shall report the eligible activities mentioned in that subsection in the first year in which the licensee is required under subsection (2) to file a report with the Society in respect of eligible activities completed by the licensee in that year.

Form, format and manner of filing

(4) The report required under subsection (1) or subsection (2) shall be in a form provided, and in an electronic format specified, by the Society and shall be filed electronically as permitted by the Society.

Documents required to be kept

5. (1) A licensee shall keep all documents substantiating the licensee’s completion of the eligible activities reported by him or her in a year until December 31 of the year following the year in which the activities were reported.

Providing documents to Society

(2) If requested by the Society to do so, a licensee shall provide to the Society all documents kept by the licensee under subsection (1).

Requirement to provide information

6. (1) The Society may require a licensee to whom section 1 or section 2 applies to provide to it specific information about the licensee’s completion of the required number of hours of eligible activities.

Notice of requirement

(2) The Society shall notify a licensee in writing of the requirement to provide information under subsection (1) and shall send to the licensee a detailed list of the information to be provided by him or her.

Time for providing information

(3) Subject to subsection (4), the licensee shall provide to the Society the specific information required of him or her not later than ten days after the date specified on the notice of the requirement to provide information.

Extension of time for providing information

(4) On the request of the licensee, the Society may extend the time within which the licensee is required to provide to the Society the specific information required of him or her.

Request for extension of time

(5) A request to the Society to extend time under subsection (4) shall be made by the licensee in writing and by not later than the day by which the licensee is required under subsection (3) to provide information to the Society.

Additional authority to require information

(6) The Society's authority to require a licensee to provide information contained in this section is in addition to, and does not limit, the Society's authority to require a licensee to provide information contained elsewhere in this By-Law, in any other by-law or in the Act.

BY-LAW 7.1

Made: October 25, 2007
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OPERATIONAL OBLIGATIONS AND RESPONSIBILITIES

PART I

SUPERVISION OF ASSIGNED TASKS AND FUNCTIONS

Interpretation

1. (1) In this Part,

“non-licensee” means an individual who,

- (a) in the case of the assignment of tasks and functions by a person licensed to practise law in Ontario as a barrister and solicitor, is not a person licensed to practise law in Ontario as a barrister and solicitor and, in the case of the assignment of tasks and functions by a person licensed to provide legal services in Ontario, is not a licensee,
- (b) is engaged by a licensee to provide her or his services to the licensee, and
- (c) expressly agrees with the licensee that the licensee shall have effective control over the individual’s provision of services to the licensee;

“catastrophic impairment” means a catastrophic impairment within the meaning of the *Statutory Accident Benefits Schedule*;

“claim” means a claim for statutory accident benefits within the meaning of the *Insurance Act*;

“impairment” means an impairment within the meaning of the *Statutory Accident Benefits Schedule*;

“law firm” means a law firm within the meaning of section 29 of By-Law 4 [Licensing], except the reference to clause 61.0.1 (a) in that definition shall be read as a reference to clauses 61.0.1 (a) and (c);

“*Statutory Accident Benefits Schedule*” means the *Statutory Accident Benefits Schedule* within the meaning of the *Insurance Act*.

Interpretation: “effective control”

(2) For the purposes of subsection (1), a licensee has effective control over an individual’s provision of services to the licensee when the licensee may, without the agreement of the individual, take any action necessary to ensure that the licensee complies with the *Law Society Act*, the by-laws, the Society’s rules of professional conduct and the Society’s policies and guidelines.

Application: provision of legal services by student

2. (1) This Part does not apply to the provision of legal services by a student under the supervision of a licensee pursuant to subsection 34 (1) of By-Law 4.

Application: provision of legal services by law student

(2) This Part, subject to necessary modifications, does apply to the provision of legal services by a law student under the supervision of a licensee pursuant to subsection 34 (2) or (3) of By-Law 4.

Assignment of tasks, functions: general

3. (1) Subject to subsection (2), a licensee may, in accordance with this Part, assign to a non-licensee tasks and functions in connection with the licensee’s practice of law or provision of legal services in relation to the affairs of the licensee’s client.

Assignment of tasks, functions: affiliation

(2) A licensee who is affiliated with an entity under By-Law 7 may, in accordance with this Part, assign to the entity or its staff, tasks and functions in connection with the licensee’s practice of law or provision of legal services in relation to the affairs of the licensee’s client only if the client consents to the licensee doing so.

Assignment of tasks, function: direct supervision required

4. (1) A licensee shall assume complete professional responsibility for her or his practice of law or provision of legal services in relation to the affairs of the licensee’s clients and shall directly supervise any non-licensee to whom are assigned particular tasks and functions in

connection with the licensee's practice of law or provision of legal services in relation to the affairs of each client.

- (2) Without limiting the generality of subsection (1),
 - (a) the licensee shall not permit a non-licensee to accept a client on the licensee's behalf;
 - (b) the licensee shall maintain a direct relationship with each client throughout the licensee's retainer;
 - (c) the licensee shall assign to a non-licensee only tasks and functions that the non-licensee is competent to perform;
 - (d) the licensee shall ensure that a non-licensee does not act without the licensee's instruction;
 - (e) the licensee shall review a non-licensee's performance of the tasks and functions assigned to her or him at frequent intervals;
 - (f) the licensee shall ensure that the tasks and functions assigned to a non-licensee are performed properly and in a timely manner;
 - (g) the licensee shall assume responsibility for all tasks and functions performed by a non-licensee, including all documents prepared by the non-licensee; and
 - (h) the licensee shall ensure that a non-licensee does not, at any time, act finally in respect of the affairs of the licensee's client.

Assignment of tasks, functions: prior express instruction and authorization required

5. (1) A licensee shall give a non-licensee express instruction and authorization prior to permitting the non-licensee,
 - (a) to give or accept an undertaking on behalf of the licensee;
 - (b) to act on behalf of the licensee in respect of a scheduling or other related routine administrative matter before an adjudicative body; or
 - (c) to take instructions from the licensee's client.

Assignment of tasks, functions: prior consent and approval

- (2) A licensee shall obtain a client's consent to permit a non-licensee to conduct routine negotiations with third parties in relation to the affairs of the licensee's client and shall approve the results of the negotiations before any action is taken following from the negotiations.

Assignment of tasks, functions: mediation of ancillary issues relating to catastrophic impairment claims

5.1 (1) Despite clause 6 (1) (c), a licensee who holds a Class L1 licence may permit a non-licensee who holds a Class P1 licence to participate in mediation of ancillary issues relating to a claim of an individual who has or appears to have a catastrophic impairment, but only if the non-licensee is employed by the licensee or by the law firm of which the licensee is a member.

(2) For the purposes of subsection (1), ancillary issues do not include issues relating to the determination of whether an impairment is a catastrophic impairment.

Tasks and functions that may not be assigned: general

6. (1) A licensee shall not permit a non-licensee,
- (a) to give the licensee's client legal advice;
 - (b) to act on behalf of a person in a proceeding before an adjudicative body, other than on behalf of the licensee in accordance with subsection 5 (1), unless the non-licensee is authorized under the *Law Society Act* to do so;
 - (c) to conduct negotiations with third parties, other than in accordance with subsection 5 (2);
 - (d) to sign correspondence, other than correspondence of a routine administrative nature; or
 - (e) to forward to the licensee's client any document, other than a routine document, that has not been previously reviewed by the licensee.

Tasks and functions that may not be assigned by Class L1 licensee

(2) A licensee who holds a Class L1 licence shall not permit a non-licensee to use the licensee's personalized specially encrypted diskette in order to access the system for the electronic registration of title documents.

Collection letters

7. A licensee shall not permit a collection letter to be sent to any person unless,
- (a) the letter is in relation to the affairs of the licensee's client;
 - (b) the letter is prepared by the licensee or by a non-licensee under the direct supervision of the licensee;
 - (c) if the letter is prepared by a non-licensee under the direct supervision of the licensee, the letter is reviewed and approved by the licensee prior to it being sent;

- (d) the letter is on the licensee's business letterhead; and
- (e) the letter is signed by the licensee.

PART II

OBLIGATIONS RESULTING FROM SUSPENSION

Interpretation

8. In this Part,

“existing client” means,

- (a) a person who is a client of a suspended licensee when a suspension order is made against the licensee, or
- (b) a person who becomes a client of the suspended licensee after the suspension order is made but before the suspension begins;

“former client” means a person who was a client of a suspended licensee before a suspension order was made against the licensee but who was not a client when the order was made;

“prospective client” means a person who seeks to retain a suspended licensee after the suspension order is made the licensee but before the suspension begins;

“suspended licensee” means a licensee who is the subject of a suspension order;

“suspension order” means an order made under the Act suspending a licensee's licence to practise law in Ontario as a barrister and solicitor or to provide legal services in Ontario, regardless of whether the suspension begins when the order is made or thereafter.

Notice requirements before suspension begins

9. (1) A suspended licensee shall before the suspension begins, but not later than the date on which the suspension begins,

- (a) notify every existing client, on whose matters the work will not be completed by the suspended licensee before the suspension begins, of the suspension order and that,
 - (i) the suspended licensee will be unable to complete the work,
 - (ii) the client will need to retain another licensee to complete the work, and

- (iii) the suspended licensee, subject to any rights that the suspended licensee may have over the client's file, will transfer the file to the licensee, if any, retained by the client to complete the work or will return the file to the client; and
- (b) notify every existing client and former client for whom the suspended licensee performs or has performed the work described in subsection 14 (1) of the name and contact information of the licensee to whom the suspended licensee has given possession of the client's documents and files.

Compliance with subclauses (1) (a) (i) to (iii) not required

(2) A suspended licensee is not required to comply with the notice requirements mentioned in subclauses (1) (a) (i) to (iii) if the only work remaining to be completed on the client's matter is work mentioned in section 12 or 13, but, in such a case, the suspended licensee shall, before the suspension begins, notify the client of the name and contact information of the licensee retained by the suspended licensee to complete the work.

Notice requirements: during suspension

10. A suspended licensee shall, during the suspension,
- (a) notify all persons who contact the suspended licensee's place of business of the suspension order; and
 - (b) notify any existing client or former client who contacts the suspended licensee's place of business of the name and contact information of another licensee who has been given possession of the clients' documents and files.

Notice requirements: prospective clients

11. A suspended licensee, at the time a prospective client seeks to retain the suspended licensee, shall notify the prospective client of the suspension order.

Work remaining on file: final report to client

12. If, on the date the suspension begins, the only work remaining for a suspended licensee to complete on a client's matter is a final report to the client, the suspended licensee shall, before the suspension begins, retain another licensee, who is authorized to do so, to review the client's file and to complete and send the final report to the client.

Work remaining on file: fulfillment of undertakings

13. If, on the date the suspension begins, the only work remaining for a suspended licensee to complete on a client's matter is the fulfillment of one or more undertakings given by the

suspended licensee, the suspended licensee shall retain another licensee or person, who is authorized to do so, to take all steps necessary to fulfill the undertakings.

Additional requirements: preparation of will, power of attorney, corporate records

14. (1) This section applies to a suspended licensee who performs or has performed any of the following work for a client:

1. Preparation of a will.
2. Preparation of a power of attorney.
3. Preparation of, or preparation and continued maintenance of, corporate records.

Requirement re original documents

- (2) A suspended licensee shall, before the suspension begins,
 - (a) return to the client all original documents; or
 - (b) transfer the client's file, including all original documents, to another licensee who is authorized to perform any requisite work.

Real estate law: direction re Teranet access disk

15. A suspended licensee who has access to the Teranet system shall, on or before the date the suspension begins, complete and file with the Society, in a form provided by the Society, a direction authorizing the Society to take all steps necessary to cancel the suspended licensee's Teranet access disk for the period of the suspension.

Return of photo identification card

16. A suspended licensee shall, on or before the date the suspension begins, return to the Society any photo identification card issued to her or him by the Society.

Students

17. A suspended licensee, who has accepted a person into service under articles of clerkship where the period of service includes any or all of the period of the suspension, shall, before the suspension begins,

- (a) notify the person of the suspension order and that the suspended licensee will not be able to retain the person in service under articles of clerkship after the suspension begins;

- (b) arrange for another licensee, who is authorized and approved by the Society to do so, to accept the person into service under articles of clerkship after the suspension begins; and
- (c) arrange with the Society for the person's service under articles of clerkship to be transferred from the suspended licensee to the other licensee effective the date on which the suspension begins.

Report to Society on compliance

18. A suspended licensee shall, not later than thirty days after the suspension begins, complete and file with the Society, in a form provided by the Society, a report confirming and providing details of the suspended licensee's compliance with this Part.

Permission to be exempt from requirement

19. A suspended licensee may apply in writing to the Society for an exemption from or a modification of a requirement mentioned in this Part, and the Society may exempt the suspended licensee from or modify the requirement, subject to such terms and conditions as the Society may impose.

PART III

CLIENT IDENTIFICATION AND VERIFICATION

Definitions

20. In this Part,

“electronic funds transfer” means the transfer of funds from one financial institution or financial entity to another initiated by the transmission, through any electronic, magnetic or optical device, telephone instrument or computer, of instructions for the transfer of funds, where the record of the transfer includes a reference number, the name of the financial institution or financial entity sending the funds, the name of the financial institution or financial entity receiving the funds, the date of the transfer of the funds, the amount of funds transferred, the currency of the funds transferred, the name of the holder of the account from which the funds transferred are drawn and the name of the holder of the account to which the funds transferred are deposited;

“financial entity” means a financial entity headquartered and operating in a country that is a member of the Financial Action Task Force on Money Laundering;

“financial institution” means,

- (a) a bank to which the *Bank Act* (Canada) applies,

- (b) an authorized foreign bank within the meaning of section 2 of the *Bank Act* (Canada) in respect of its business in Canada,
- (c) a cooperative credit society, savings and credit union, credit union or caisse populaire that is regulated by an Act of a province or territory of Canada,
- (d) an association that is regulated by the *Cooperative Credit Associations Act* (Canada),
- (e) a company to which the *Trust and Loan Companies Act* (Canada) applies,
- (f) a loan or trust corporation regulated by an Act of a province or territory of Canada,
- (g) a ministry, department or agent of the government of Canada or of a province or territory of Canada if the ministry, department or agent accepts deposit liabilities in the course of providing financial services to the public, or
- (h) a subsidiary of an entity mentioned in clauses (a) to (g) where the financial statements of the subsidiary are consolidated with the financial statements of the entity;

“funds” means cash, currency, securities, negotiable instruments and other financial instruments that indicate a person’s title or interest in them;

“lawyer” means an individual who is authorized to practise law in a province or territory of Canada outside Ontario;

“organization” means a body corporate, partnership, fund, trust, co-operative or an unincorporated association;

“proceeding” means a proceeding before an adjudicative body;

“public body” means,

- (a) a ministry, department or agent of the government of Canada or of a province or territory of Canada,
- (b) a municipality incorporated by or under an Act of a province or territory of Canada, including a city, town, village, metropolitan or regional municipality, township, district, county, rural municipality, any other incorporated municipal body and an agent of any of them,
- (c) a local board of a municipality incorporated by or under an Act of a province or territory of Canada, including any local board as defined in the *Municipal Act* and any similar body incorporated under the law of another province or territory,

- (d) an organization that operates a public hospital and that is designated by the Minister of National Revenue as a hospital authority under the *Excise Tax Act* (Canada) or an agent of the organization,
- (e) a body incorporated by or under an Act of Canada or of a province or territory of Canada for a public purpose, or
- (f) a subsidiary of an entity mentioned in clauses (a) to (e) where the financial statements of the subsidiary are consolidated with the financial statements of the entity;

“reporting issuer” means,

- (a) a reporting issuer within the meaning of an Act of a province or territory of Canada in respect of the securities law of the province or territory,
- (b) a corporation whose shares are traded on a stock exchange designated under section 262 of the *Income Tax Act* (Canada) and that operates in a country that is a member of the Financial Action Task Force on Money Laundering, or
- (c) a subsidiary of an entity mentioned in clause (a) or (b) where the financial statements of the subsidiary are consolidated with the financial statements of the entity;

“securities dealer” means a person authorized under an Act of a province or territory of Canada to engage in the business of dealing in securities or any other financial instruments or to provide portfolio management or investment advising services.

Application of Part

21. This Part applies only to matters in respect of which a licensee is retained to provide her or his professional services after this Part comes into force regardless of whether the client is a new or existing client.

Application of client identification and verification requirements

22. (1) Subject to subsections (2), (3) and (4), a licensee shall,
- (a) when the licensee is retained to provide her or his professional services to a client, comply with the client identification requirements set out in subsection 23 (1); and
 - (b) when the licensee engages in or gives instructions in respect of the receiving, paying or transferring of funds,
 - (i) comply with the client identification requirements set out in subsection 23 (2), and

- (ii) comply with the client verification requirements set out in subsection 23 (4).

Exemption re certain licensees

(2) A licensee is not required to comply with the client identification and verification requirements set out in section 23 if,

- (a) the licensee is engaged in the activities described in subsection (1) on behalf of her or his employer;
- (b) the licensee is engaged in the activities described in subsection (1) as agent for another licensee or a lawyer who has already complied with the client identification and verification requirements set out in section 23;
- (c) the licensee is engaged in the activities described in subsection (1) for a client referred to the licensee by another licensee or a lawyer who has already complied with the client identification and verification requirements set out in section 23; or
- (d) the licensee is engaged in the activities described in subsection (1), other than the activities described in clause (1) (b), as a duty counsel under the *Legal Aid Services Act, 1998*, as a duty counsel providing professional services through a duty counsel program operated by a not-for-profit organization or as a provider of legal aid services through the provision of summary advice under the *Legal Aid Services Act, 1998*.

Exemptions re certain funds

(3) A licensee is not required to comply with the client identification requirements set out in subsection 23 (2) or the client verification requirements set out in subsection 23(4) in respect of funds,

- (a) paid to or received from a financial institution, public body or reporting issuer;
- (b) received from the trust account of another licensee or a lawyer;
- (c) received from a peace officer, law enforcement agency or other public official acting in an official capacity;
- (d) paid or received pursuant to a court order;
- (e) paid to pay a fine or penalty;
- (f) paid or received as a settlement in a proceeding;

- (g) paid or received for professional fees, disbursements, expenses or bail; or
- (h) paid, received or transferred by electronic funds transfer.

Exemptions re certain clients

(4) A licensee is not required to comply with the client identification requirements set out in subsection 23 (2) or the client verification requirements set out in subsection 23 (4) in respect of any of the following clients:

- 1. A financial institution.
- 2. A public body.
- 3. A reporting issuer.

Client identification

23. (1) When a licensee is retained to provide her or his professional services to a client, the licensee shall obtain the following information about the client:

- 1. The client's full name.
- 2. The client's business address and business telephone number, if applicable.
- 3. If the client is an individual, the client's home address and home telephone number.
- 4. If the client is an organization, other than a financial institution, public body or reporting issuer, the organization's incorporation or business identification number and the place of issue of its incorporation or business identification number, if applicable.
- 5. If the client is an individual, the client's occupation or occupations.
- 6. If the client is an organization, other than a financial institution, public body or reporting issuer, the general nature of the type of business or businesses or activity or activities engaged in by the client.
- 7. If the client is an organization, the name, position and contact information for each individual who gives instructions with respect to the matter for which the licensee is retained.
- 8. If the client is acting for or representing a third party, information about the third party as set out in paragraphs 1 to 7, as applicable.

Same

(2) When a licensee is engaged in the activities described in clause 22 (1) (b) and the client or any third party that the client is acting for or representing is an organization, in addition to complying with the client identification requirements set out in subsection (1), the licensee shall make reasonable efforts to obtain the following information about the client and the third party:

1. The name and occupation or occupations of each director of the organization, other than an organization that is a securities dealer.
2. The name, address and occupation or occupations of each person who owns twenty-five percent or more of the organization or of the shares of the organization.

Client identification, identification by others in licensee's firm

(2.1) A licensee complies with the identification requirements set out in subsections (1) and (2) if an employee of the licensee's firm or another licensee who practises law or provides legal services through the licensee's firm, acting on behalf of the licensee, complies with the requirements.

Client identification, previous identification

(3) A licensee complies with the identification requirements set out in subsection (2) if the licensee or another individual acting on behalf of the licensee under subsection (2.1) has previously complied with the identification requirements and has also previously complied with the verification requirements set out in subsection (4) in respect of the organization.

Client verification requirements

(4) When a licensee is engaged in the activities described in clause 22 (1) (b), the licensee shall take reasonable steps to verify the identity of the client and any third party that the client is acting for or representing using what the licensee reasonably considers to be reliable, independent source documents, data or information.

Timing of verification, individuals

(5) A licensee shall verify the identity of an individual mentioned in subsection (1), including an individual mentioned in paragraph 7, immediately after first engaging in the activities described in clause 22 (1) (b).

Timing of verification, organizations

(6) A licensee shall verify the identity of an organization mentioned in subsection (1) by not later than 60 days after first engaging in the activities described in clause 22 (1) (b).

Examples of independent source documents

(7) The following are examples of independent source documents for the purposes of subsection (4):

1. If the client or third party is an individual, an original government issued identification that is valid and has not expired, including a driver's licence, birth certificate, provincial or territorial health card (if such use of the card is not prohibited by the applicable provincial or territorial law), passport or similar record.
2. If the client or third party is an organization such as a corporation or society that is created or registered pursuant to legislative authority, a written confirmation from a government registry as to the existence, name and address of the organization, which includes the names of the organization's directors, if applicable, such as,
 - i. a certificate of corporate status issued by a public body,
 - ii. a copy obtained from a public body of a record that the organization is required to file annually under applicable legislation, or
 - iii. a copy of a similar record obtained from a public body that confirms the organization's existence.
3. If the client or third party is an organization other than a corporation or society, such as a trust or partnership which is not registered in any government registry, a copy of the organization's constating documents, such as a trust or partnership agreement, articles of association or any other similar record that confirms its existence as an organization.

Client verification, non-face-to-face

(8) When a licensee is engaged in the activities described in clause 22 (1) (b) and the licensee is not receiving instructions from an individual face-to-face, the licensee complies with the verification requirements set out in subsection (4) if the licensee obtains an attestation from a person described in subsection (9) that the person has seen the appropriate independent source documents.

Persons from whom attestations may be accepted

(9) For the purposes of section (8), a licensee may obtain an attestation from the following persons:

1. If the client whose identity is being verified is present in Canada,
 - i. a person entitled to administer oaths and affirmations in Canada, or
 - ii. any of the following persons:
 - A. a dentist,
 - B. a physician,
 - C. a chiropractor,
 - D. a judge,
 - E. a magistrate or a justice of the peace,
 - F. a lawyer,
 - G. a licensee (in Ontario)
 - H. a notary (in Quebec),
 - I. a notary public,
 - J. an optometrist,
 - K. a pharmacist,
 - L. an accountant,
 - M. a professional engineer,
 - N. a veterinarian,
 - O. a police officer,
 - P. a nurse,
 - Q. a school principal.
2. If the client whose identity is being verified is not present in Canada, a person acting on behalf of the licensee under clause (11) (b).

Attestation, form

(10) For the purposes of subsection (8), an attestation shall be endorsed on a legible photocopy of the document and shall include,

- (a) the name, occupation and address of the person providing the attestation;
- (b) the signature of the person providing the attestation; and
- (c) the type and number of the document seen by the person providing the attestation.

Client verification, use of agent, etc.

(11) A licensee complies with the verification requirements set out in subsection (4) if,

- (a) an employee of the licensee's firm or another licensee who practises law or provides legal services through the licensee's firm, acting on behalf of the licensee, complies with the requirements; or
- (b) an individual who is not an individual mentioned in clause (a), acting on behalf of the licensee, complies with the requirements, provided that the licensee and the individual, prior to the individual acting on behalf of the licensee, enter into a written agreement specifying the steps that the individual will be taking on behalf of the licensee to comply with the verification requirements.

Client verification, previous verification

(12) A licensee complies with the verification requirements set out in subsection (4),

- (a) in the case of an individual mentioned in subsection (1), if the licensee has previously complied with the verification requirements set out in subsection (4) in respect of the individual and recognizes the individual; and
- (b) in the case of an organization mentioned in subsection (1), the licensee or an individual acting on behalf of the licensee under subsection (11) has previously complied with the identification requirements set out in subsection (2) and the verification requirements set out in subsection (4) in respect of the organization.

Copies to be obtained

(13) The licensee shall obtain a copy of every document used to verify the identity of any individual or organization for the purposes of subsection (4), including a copy of every document used by an individual acting on behalf of the licensee under subsection (11).

Record retention

(14) The licensee shall retain a record of the information obtained for the purposes of subsections (1) and (2) and copies of all documents received for the purposes of subsection (4) for the longer of,

- (a) the duration of the licensee and client relationship and for as long as is necessary for the purpose of providing service to the client; and
- (b) a period of at least six years following completion of the work for which the licensee was retained.

Criminal activity, duty to withdraw at time of taking information

24. If a licensee, in the course of complying with the client identification or verification requirements set out in section 23, knows or ought to know that he or she is or would be assisting a client in fraud or other illegal conduct, the licensee shall,

- (a) immediately cease to and not further engage in any activities that would assist the client in fraud or other illegal conduct; and
- (b) if the licensee is unable to comply with clause (a), withdraw from the provision of the licensee's professional services to the client.

Commencement

25. This Part comes into force on December 31, 2008.

PART IV

WITHDRAWAL OF SERVICES

Application of Part

26. This Part applies to all matters in respect of which a licensee is retained to provide her or his professional services to a client, including matters in respect of which the licensee was retained before this Part came into force and matters in respect of which the licensee is retained after that time regardless of whether the client is a new or existing client.

Criminal activity, duty to withdraw after being retained

27. If a licensee while retained by a client knows or ought to know that he or she is or would be assisting the client in fraud or other illegal conduct, the licensee shall,

- (a) immediately cease to and not further engage in any activities that would assist the client in fraud or other illegal conduct; and

- (b) if the licensee is unable to comply with clause (a), withdraw from the provision of the licensee's professional services to the client.
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BY-LAW 8

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REPORTING AND FILING REQUIREMENTS

PART I

REPORTING REQUIREMENTS

BANKRUPTCY OR INSOLVENCY OF LICENSEE

Notice of bankruptcy or insolvency

1. A licensee shall immediately notify the Society whenever any of the following events occurs:
 1. The licensee receives notice of or is served with a petition for a receiving order against him or her filed in court under subsection 43 (1) of the *Bankruptcy and Insolvency Act* (Canada).
 2. The licensee makes an assignment of all his or her property for the general benefit of his or her creditors under section 49 of the *Bankruptcy and Insolvency Act* (Canada).

OFFENCES

Requirement to report offences: licensees

2. (1) Every licensee shall inform the Society in writing of,
 - (a) a charge that the licensee committed,

- (i) an indictable offence under the *Criminal Code* (Canada),
 - (ii) an offence under the *Controlled Drugs and Substances Act* (Canada),
 - (iii) an offence under the *Income Tax Act* (Canada) or under an Act of the legislature of a province or territory of Canada in respect of the income tax law of the province or territory, where the charge alleges, explicitly or implicitly, dishonesty on the part of the licensee or relates in any way to the professional business of the licensee,
 - (iv) an offence under an Act of the legislature of a province or territory of Canada in respect of the securities law of the province or territory, where the charge alleges, explicitly or implicitly, dishonesty on the part of the licensee or relates in any way to the professional business of the licensee, or
 - (v) an offence under another Act of Parliament, or under another Act of the legislature of a province or territory of Canada, where the charge alleges, explicitly or implicitly, dishonesty on the part of the licensee or relates in any way to the professional business of the licensee; and
- (b) the disposition of a charge mentioned in clause (a).

Requirement to report: private prosecution

(2) Despite subsection (1), a licensee is only required to inform the Society of a charge contained in an information laid under section 504 of the *Criminal Code* (Canada), other than an information referred to in subsection 507 (1) of the *Criminal Code* (Canada), and of the disposition of the charge, if the charge results in a finding of guilt or a conviction.

Time of report

(3) A licensee shall report a charge as soon as reasonably practicable after he or she receives notice of the charge and shall report the disposition of a charge as soon as reasonably practicable after he or she receives notice of the disposition.

Same

(4) In the circumstances mentioned in subsection (2), a licensee shall report a charge and the disposition of the charge as soon as reasonably practicable after he or she receives notice of the disposition.

Interpretation: “indictable offence”

(5) In this section, “indictable offence” excludes an offence for which an offender is punishable only by summary conviction but includes,

- (a) an offence for which an offender may be prosecuted only by indictment; and
- (b) an offence for which an offender may be prosecuted by indictment or is punishable by summary conviction, at the instance of the prosecution.

INFORMATION: GENERAL

Requirement to provide various information

3. (1) The Society may require a licensee to provide to the Society the following information:
- 1. Personal identification information, including the licensee’s legal and assumed names.
 - 2. Personal contact information.
 - 3. Business contact information.
 - 4. Information with respect to the licensee’s professional business, including,
 - i. information about whether the licensee is practising law in Ontario as a barrister and solicitor or providing legal services in Ontario,
 - ii. information with respect to where and in what capacity the licensee is practising law or providing legal services,
 - iii. information with respect to the licensee’s handling of money and other property,
 - iv. information with respect to the licensee’s storage of client files,
 - v. information with respect to the licensee’s storage of wills and powers of attorney, and
 - vi. information with respect to the licensee’s storage of corporate records, including minute books and seals.

Interpretation: personal and business contact information

- (2) For the purposes of subsection (1),
 - (a) personal contact information includes,
 - (i) home address,
 - (ii) home telephone number,
 - (iii) home facsimile number, and
 - (iv) home e-mail address; and
 - (b) business contact information includes,
 - (i) business address,
 - (ii) business telephone number,
 - (iii) business facsimile number, and
 - (iv) business e-mail address.

Notice of requirement

(3) The Society shall notify a licensee in writing of the requirement to provide information under subsection (1) and shall send to the licensee a detailed list of the information to be provided by him or her.

Time for providing information

(4) Subject to subsection (5), the licensee shall provide to the Society the specific information required of him or her not later than ten days after the date specified on the notice of the requirement to provide information.

Extension of time for providing information

(5) On the request of the licensee, the Society may extend the time within which the licensee is required to provide to the Society the specific information required of him or her.

Request for extension of time

(6) A request to the Society to extend time under subsection (5) shall be made by the licensee in writing and by not later than the day by which the licensee is required under subsection (4) to provide information to the Society.

Additional authority to provide information

(7) The Society's authority to require a licensee to provide information contained in this section is in addition to, and does not limit, the Society's authority to require a licensee to provide information contained elsewhere in this By-Law, in any other by-law or in the Act.

REPORTING CHANGES

Requirement to report changes

4. (1) A licensee shall notify the Society in writing immediately after any change in the following information, previously provided by the licensee to the Society either before or after the coming into force of this section:

1. The licensee's legal and assumed names.
2. The licensee's personal contact information.
3. The licensee's business contact information.
4. Information with respect to whether the licensee is practising law in Ontario as a barrister and solicitor or providing legal services in Ontario.
5. Information with respect to the location and account number of any account at a chartered bank, provincial savings office, credit union or a league to which the *Credit Unions and Caisses Populaires Act, 1994* applies into which the licensee pays or paid money received in trust for a client.

Interpretation: personal and business contact information

- (2) For the purposes of subsection (1),
 - (a) personal contact information includes,
 - (i) home address,
 - (ii) home telephone number,
 - (iii) home facsimile number, and
 - (iv) home e-mail address; and
 - (b) business contact information includes,

- (i) business address,
- (ii) business telephone number,
- (iii) business facsimile number, and
- (iv) business e-mail address.

Information required

(3) The notice required under subsection (1) shall include details of the change and the effective date of the change.

Documents, explanations

(4) The licensee shall provide to the Society such documents and explanations with respect to any change in the information mentioned in subsection (1) as the Society may require.

PART II

FILING REQUIREMENTS

ANNUAL REPORT

Requirement to file annual report

5. (1) Every licensee shall file a report with the Society, by March 31 of each year, in respect of,
- (a) the licensee's professional business during the preceding year; and
 - (b) the licensee's other activities during the preceding year related to the licensee's practice of law or provision of legal services.

Form, format and manner of filing

(2) The report required under subsection (1) shall be in a form provided, and in an electronic format specified, by the Society and shall be filed electronically as permitted by the Society.

Same

(2.1) Despite subsection (2), on application by a licensee, in any year, the Society may, for that year, permit the licensee to file the report required under subsection (1) in a format other than the specified electronic format and in a manner other than electronically as permitted and a licensee who files the report required under subsection (1) in the format and manner as permitted by the Society under this subsection shall be deemed to have complied with the format and manner of filing requirements set out in subsection (2).

Exemption from requirement to file annual report

(3) The following licensees may apply to the Society for an exemption from the requirement to file a report under subsection (1):

1. A licensee who holds a Class L1 licence who is over sixty-five years of age and who,
 - i. does not practise law in Ontario,
 - ii. is not an estate trustee,
 - iii. is not a trustee of an *inter vivos* trust, and
 - iv. does not act as an attorney under a power of attorney for property given by a client or former client.
2. A licensee who holds a Class P1 licence who is over sixty-five years of age and who does not provide legal services in Ontario.
3. A licensee who is incapacitated within the meaning of the Act.

Application by licensee's representative

(4) The Society may permit any person on behalf of a licensee to make an application under subsection (3).

Application form

- (5) An application under subsection (3) shall be in a form provided by the Society.

Documents and explanations

(6) For the purposes of assisting the Society to consider an application under subsection (3), the licensee or the person applying on behalf of the licensee shall provide to the Society such documents and explanations as may be required.

Consideration of application

(7) The Society shall consider every application made under subsection (3) and if satisfied that the licensee is eligible for an exemption under paragraph 1 or 2 of subsection (3), the Society shall approve the application.

Duration of exemption

(8) A licensee whose application is approved is exempt from the requirement to file a report under subsection (1) in respect of the year in which the application is approved and in respect of every year thereafter if the licensee remains eligible for the exemption throughout the entire year.

Period of default

6. For the purpose of clause 47 (1) (a) of the Act, the period of default for failure to complete or file a report required under section 5 is 120 days after the day the report is required to be filed.

Requirement to file public accountant's report

7. (1) The Society may require any licensee who is required to file a report under subsection 5 (1) to file, in addition to the report required under that subsection, a report of a public accountant relating to the matters in respect of which the licensee is required to file a report with the Society under subsection 5 (1).

Contents of report and time for filing

(2) The Society shall specify the matters to be included in the report and the time within which it must be filed with the Society.

Licensee's obligation to provide access to files, etc.

(3) For the purpose of permitting the public accountant to complete the report, the licensee shall,

- (a) grant to the public accountant full access, without restriction, to all files maintained by the licensee;
- (b) produce to the public accountant all financial records and other evidence and documents which the public accountant may require; and

- (c) provide to the public accountant such explanations as the public accountant may require.

Authority to confirm independently particulars of transactions

(4) For the purpose of permitting the public accountant to complete the report, the public accountant may confirm independently the particulars of any transaction recorded in the files.

Cost

(5) The cost of preparing the report required under subsection (1), including the cost of retaining a public accountant, shall be paid for by the licensee.

Public accountant's duty of confidentiality

(6) When retaining a public accountant to complete a report required under this section, a licensee shall ensure that the public accountant is bound not to disclose any information that comes to his or her knowledge as a result of activities undertaken to complete the report, but the public accountant shall not be prohibited from disclosing information to the Society as required under this Part.

Period of default

8. (1) For the purpose of clause 47 (1) (a) of the Act, the period of default for failure to file a report of a public accountant in accordance with section 7 is 60 days after the day the report is required to be filed.

Reinstatement of licensee

(2) If a licensee's licence has been suspended under clause 47 (1) (a) of the Act for failure to file a report of a public accountant in accordance with section 7, for the purpose of subsection 47 (2) of the Act, the licensee shall file the report.

Failure to file public accountant's report: investigation

9. (1) If a licensee fails to file the report of a public accountant in accordance with section 7, the Society may require an investigation of the licensee's financial records to be made by a person designated by it, who need not be a public accountant, for the purpose of obtaining the information that would have been provided in the report.

Investigation: application of subs. 7 (3) and (4)

(2) Subsections 7 (3) and (4) apply with necessary modifications to the investigation under this section.

Confidentiality

(3) A person designated to investigate a licensee's financial records under this section shall not disclose any information that comes to his or her knowledge as a result of the investigation except as required in connection with the administration of the Act or the by-laws.

Cost

(4) The cost of the investigation under this section shall be paid for by the licensee.

PART III

REGISTER

Contents of register

10. (1) In addition to the information mentioned in subsection 27.1 (2) of the Act, the register that the Society is required to establish and maintain under section 27.1 of the Act shall contain the following information:

1. The assumed names, if any, of each licensee.
2. An indication of every time period that the licensee practises law in Ontario as a barrister and solicitor or provides legal services in Ontario.
3. For each time period that a licensee practises law in Ontario as a barrister and solicitor or provides legal services in Ontario,
 - i. where and in what capacity the licensee practises law or provides legal services, and
 - ii. the licensee's business contact information, including address, telephone number, facsimile number and e-mail address.
4. For each time period that a licensee does not practise law in Ontario as a barrister and solicitor or provide legal services in Ontario,
 - i. if the licensee is otherwise working, the licensee's business contact information, including address, telephone number, facsimile number and e-mail address, or
 - ii. if the licensee is not otherwise working, information as to how a licensee

may be contacted by former clients.

5. For a licensee who is deceased, the name and contact information, if any, of the licensee's estate trustee.

Availability to public

(2) The Society shall make the register available for public inspection in one or more of the following ways:

1. By establishing and maintaining a directory of licensees containing some or all of the information contained in the register on the Society's website.
2. By publishing a print directory of licensees containing some or all of the information contained in the register.
3. By establishing and maintaining a telephone line, open during the Society's normal business hours, for answering inquiries about contents of the register with respect to any licensee.

BY-LAW 9

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FINANCIAL TRANSACTIONS AND RECORDS

PART I

INTERPRETATION

Interpretation

1. (1) In this By-Law,

“arm’s length” has the same meaning given it in the *Income Tax Act* (Canada);

“cash” means current coin within the meaning of the *Currency Act* (Canada), notes intended for circulation in Canada issued by the Bank of Canada pursuant to the *Bank of Canada Act* and current coin or banks notes of countries other than Canada;

“charge” has the same meaning given it in the *Land Registration Reform Act*;

“client” means a person or group of persons from whom or on whose behalf a licensee receives money or other property;

“firm of licensees” means,

- (a) a partnership of licensees and all licensees employed by the partnership,
- (b) a professional corporation established for the purpose of practising law in Ontario and all licensees employed by the professional corporation,
- (c) a professional corporation established for the purpose of providing legal services in Ontario and all licensees employed by the professional corporation, or

- (d) a professional corporation established for the purpose of practising law and providing legal services in Ontario and all licensees employed by the professional corporation;

“holiday” means,

- (a) any Saturday or Sunday;
- (b) New Year’s Day, and where New Year’s Day falls on a Saturday or Sunday, the following Monday;
- (c) Family Day
- (d) Good Friday;
- (e) Easter Monday;
- (f) Victoria Day;
- (g) Canada Day, and where Canada Day falls on a Saturday or Sunday, the following Monday;
- (h) Civic Holiday;
- (i) Labour Day;
- (j) Thanksgiving Day;
- (k) Remembrance Day, and where Remembrance Day falls on a Saturday or Sunday, the following Monday;
- (l) Christmas Day, and where Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday, and where Christmas Day falls on a Friday, the following Monday;
- (m) Boxing Day; and
- (n) any special holiday proclaimed by the Governor General or the Lieutenant Governor;

“lender” means a person who is making a loan that is secured or to be secured by a charge, including a charge to be held in trust directly or indirectly through a related person or

corporation;

“licensee” includes a firm of licensees;

“money” includes cash, cheques, drafts, credit card sales slips, post office orders and express and bank money orders;

“related” has the same meaning given it in the *Income Tax Act* (Canada);

“Teranet” means Teranet Inc., a corporation incorporated under the *Business Corporations Act*, acting as agent for the Ministry of Consumer and Business Services.

Time for doing an act expires on a holiday

(2) Except where a contrary intention appears, if the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday.

When deemed in trust

(3) For the purposes of subsections 9 (1), (2) and (3) and section 14, cash, cheques negotiable by the licensee, cheques drawn by the licensee on the licensee’s trust account and credit card sales slips in the possession and control of the licensee shall be deemed from the time the licensee receives such possession and control to be money held in a trust account if the cash, cheques or credit card sales slips, as the case may be, are deposited in the trust account not later than the following banking day.

PART II

HANDLING OF MONEY BY BANKRUPT LICENSEE

Handling of money by bankrupt licensee

2. (1) Subject to subsections (2) and (3), a licensee who is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada) shall not receive from or on behalf of a person or group of persons any money or other property and shall not otherwise handle money or other property that is held in trust for a person or group of persons.

Exception

(2) A licensee who is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada) may receive from or on behalf of a person or group of persons money,

- (a) in payment of fees for services performed by the licensee for the person or group;
or
- (b) in reimbursement for money properly expended, or for expenses properly incurred, on behalf of the person or group.

Same

(3) A licensee who is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada) may apply in writing to the Society for permission to receive from or on behalf of a person or group of persons any money or other property, other than as permitted under subsection (2), or for permission to handle money or other property that is held in trust for a person or group of persons, and the Society may permit the licensee to do so, subject to such terms and conditions as the Society may impose.

PART II.1

HANDLING OF MONEY BY LICENSEE WHOSE LICENCE IS SUSPENDED

Interpretation

2.1 In this Part,

“suspended licensee” means a licensee who is the subject of a suspension order;

“suspension order” means an order made under the Act suspending a licensee’s licence to practise law in Ontario as a barrister and solicitor or to provide legal services in Ontario, regardless of whether the suspension begins when the order is made or thereafter.

Handling of money by suspended licensee

2.2 (1) Subject to subsection (2) and section 2.3, a suspended licensee shall not, during the suspension receive from or on behalf of a person or group of persons any money or other property and shall not otherwise handle money or other property that is held in trust for a person or group of persons.

Exception

(2) A suspended licensee may receive from or on behalf of a person or group of persons money,

- (a) in payment of fees for services performed by the suspended licensee for the person or group; or
- (b) in reimbursement for money properly expended, or for expenses properly incurred, on behalf of the person or group.

Trust account

- 2.3 (1) A suspended licensee shall, within 30 days of the beginning of the suspension,
- (a) withdraw from every trust account kept in the name of the suspended licensee, or in the name of the firm of licensees of which the suspended licensee is a partner or by which the suspended licensee is employed, and, as required, pay to the appropriate person,
 - (i) money properly required for payment to a person on behalf of a client,
 - (ii) money required to reimburse the suspended licensee for money properly expended, or for expenses properly incurred, on behalf of a client,
 - (iii) money required for or toward payment of fees for services performed by the suspended licensee, and
 - (iv) all other money that belongs to the suspended licensee or to a person other than a client;
 - (b) after complying with clause (a), withdraw from every trust account kept in the name of the suspended licensee, or in the name of the firm of licensees of which the suspended licensee is a partner or by which the suspended licensee is employed, all money belonging to a client and pay the money to,
 - (i) the client,
 - (ii) another licensee to whom the client has directed the suspended licensee to make payment, or
 - (iii) another licensee who has agreed with the suspended licensee to accept payment in the event that the suspended licensee is unable to comply with subclause (i) or (ii); and
 - (c) after complying with clauses (a) and (b),
 - (i) close every trust account that was kept in the name of the suspended

licensee, and

- (ii) cancel or cause to be cancelled the suspended licensee's signing authority on every trust account that was kept in the name of the firm of licensees of which the suspended licensee is a partner or by which the suspended licensee is employed.

Compliance with clause (1) (b) not required

(2) A suspended licensee is not required to comply with clause (1) (b) if the client's file is transferred, in accordance with Part IV of By-Law 7.1, to another licensee in the firm of licensees of which the suspended licensee is a partner or by which the suspended licensee is employed.

Application of sections of Part IV

(3) Subsection 9 (3) and sections 10, 11 and 12 apply to the withdrawal of money from a trust account under this section.

Report to Society on compliance

(4) A suspended licensee shall, not later than thirty days after the suspension begins, complete and file with the Society, in a form provided by the Society, a report confirming and providing details of the suspended licensee's compliance with this section.

Permission to be exempt from requirement

2.4 A suspended licensee may apply in writing to the Society for an exemption from or a modification of a requirement mentioned in this Part, and the Society may exempt the suspended licensee from or modify the requirement, subject to such terms and conditions as the Society may impose.

PART III

CASH TRANSACTIONS

Definition

3. In this Part,

“funds” means cash, currency, securities and negotiable instruments or other financial instruments that indicate the person’s title or interest in them;

“public body” means,

- (a) a department or agent of Her Majesty in right of Canada or of a province;
- (b) an incorporated city, metropolitan authority, town, township, village, county, district, rural municipality or other incorporated municipal body or an agent of any of them; and
- (c) an organization that operates a public hospital and that is designated by the Minister of National Revenue as a hospital under the *Excise Tax Act* (Canada) or agent of the organization.

Cash received

4. (1) A licensee shall not receive or accept from a person, in respect of any one client file, cash in an aggregate amount of 7,500 or more Canadian dollars.

Foreign currency

(2) For the purposes of this section, when a licensee receives or accepts from a person cash in a foreign currency the licensee shall be deemed to have received or accepted the cash converted into Canadian dollars at,

- (a) the official conversion rate of the Bank of Canada for the foreign currency as published in the Bank of Canada’s Daily Noon Rates that is in effect at the time the licensee receives or accepts the cash; or
- (b) if the day on which the licensee receives or accepts cash is a holiday, the official conversion rate of the Bank of Canada in effect on the most recent business day preceding the day on which the licensee receives or accepts the cash.

Application

5. Section 4 applies when, in respect of a client file, a licensee engages in or gives instructions in respect of the following activities:

- 1. The licensee receives or pays funds.
- 2. The licensee purchases or sells securities, real properties or business assets or entities.

3. The licensee transfers funds by any means.

Exceptions

6. Despite section 5, section 4 does not apply when the licensee,
 - (a) receives cash from a public body, an authorized foreign bank within the meaning of section 2 of the *Bank Act* (Canada) in respect of its business in Canada or a bank to which the *Bank Act* (Canada) applies, a cooperative credit society, savings and credit union or caisse populaire that is regulated by a provincial Act, an association that is regulated by the *Cooperative Credit Associations Act* (Canada), a company to which the *Trust and Loan Companies Act* (Canada) applies, a trust company or loan company regulated by a provincial Act or a department or agent of Her Majesty in right of Canada or of a province where the department or agent accepts deposit liabilities in the course of providing financial services to the public;
 - (b) receives cash from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity;
 - (c) receives cash pursuant to an order of a tribunal;
 - (d) receives cash to pay a fine or penalty; or
 - (e) receives cash for fees, disbursements, expenses or bail provided that any refund out of such receipts is also made in cash.

PART IV

TRUST ACCOUNT

TRUST ACCOUNT TRANSACTIONS

Money received in trust for client

7. (1) Subject to section 8, every licensee who receives money in trust for a client shall immediately pay the money into an account at a chartered bank, provincial savings office, credit union or a league to which the *Credit Unions and Caisses Populaires Act, 1994* applies or registered trust corporation, to be kept in the name of the licensee, or in the name of the firm of licensees of which the licensee is a partner, through which the licensee practises law or provides

legal services or by which the licensee is employed, and designated as a trust account.

Interpretation

(2) For the purposes of subsection (1), a licensee receives money in trust for a client if the licensee receives from a person,

- (a) money that belongs in whole or in part to a client;
- (b) money that is to be held on behalf of a client;
- (c) money that is to be held on a client=s direction or order;
- (d) money that is advanced to the licensee on account of fees for services not yet rendered; or
- (e) money that is advanced to the licensee on account of disbursements not yet made.

Money to be paid into trust account

(3) In addition to the money required under subsection (1) to be paid into a trust account, a licensee shall pay the following money into a trust account:

- 1. Money that may by inadvertence have been drawn from a trust account in contravention of section 9.
- 2. Money paid to a licensee that belongs in part to a client and in part to the licensee where it is not practical to split the payment of the money.

Money to be paid into trust account: money received before licence issued

(3.1) If a licensee who holds a Class P1 licence receives from a person, prior to being issued the licence, money for services yet to be rendered to a client and the licensee does not perform the services for the client by May 2, 2010, the licensee shall on May 3, 2010 pay the money into a trust account.

Withdrawal of money from trust account

(4) A licensee who pays into a trust account money described in paragraph 2 of subsection (3) shall as soon as practical withdraw from the trust account the amount of the money that belongs to him or her.

One or more trust accounts

- (5) A licensee may keep one or more trust accounts.

Money not to be paid into trust account

8. (1) A licensee is not required to pay into a trust account money which he or she receives in trust for a client if,
- (a) the client requests the licensee in writing not to pay the money into a trust account;
 - (b) the licensee pays the money into an account to be kept in the name of the client, a person named by the client or an agent of the client; or
 - (c) the licensee pays the money immediately upon receiving it to the client or to a person on behalf of the client in accordance with ordinary business practices.

Same

- (2) A licensee shall not pay into a trust account the following money:
- 1. Money that belongs entirely to the licensee or to another licensee of the firm of licensees of which the licensee is a partner, through which the licensee practises law or provides legal services or by which the licensee is employed, including an amount received as a general retainer for which the licensee is not required either to account or to provide services.
 - 2. Money that is received by the licensee as payment of fees for services for which a billing has been delivered, as payment of fees for services already performed for which a billing will be delivered immediately after the money is received or as reimbursement for disbursements made or expenses incurred by the licensee on behalf of a client.

Record keeping requirements

- (3) A licensee who, in accordance with subsection (1), does not pay into a trust account money which he or she receives in trust for a client shall include all handling of such money in the records required to be maintained under Part V.

Withdrawal of money from trust account

9. (1) A licensee may withdraw from a trust account only the following money:

1. Money properly required for payment to a client or to a person on behalf of a client.
2. Money required to reimburse the licensee for money properly expended on behalf of a client or for expenses properly incurred on behalf of a client.
3. Money properly required for or toward payment of fees for services performed by the licensee for which a billing has been delivered.
4. Money that is directly transferred into another trust account and held on behalf of a client.
5. Money that under this Part should not have been paid into a trust account but was through inadvertence paid into a trust account.

Permission to withdraw other money

(2) A licensee may withdraw from a trust account money other than the money mentioned in subsection (1) if he or she has been authorized to do so by the Society.

Limit on amount withdrawn from trust account

(3) A licensee shall not at any time with respect to a client withdraw from a trust account under this section more money than is held on behalf of that client in that trust account at that time.

Manner in which certain money may be withdrawn from trust account

10. A licensee shall withdraw money from a trust account under paragraph 2 or 3 of subsection 9 (1) only,

- (a) by a cheque drawn in favour of the licensee;
- (b) by a transfer to a bank account that is kept in the name of the licensee and is not a trust account; or
- (c) by electronic transfer.

Withdrawal by cheque

11. A cheque drawn on a trust account shall not be,
- (a) made payable either to cash or to bearer; or

- (b) signed by a person who is not a licensee except in exceptional circumstances and except when the person has signing authority on the trust account on which a cheque will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the licensee in all the trust accounts on which signing authority has been delegated to the person.

Withdrawal by electronic transfer

12. (1) Money withdrawn from a trust account by electronic transfer shall be withdrawn only in accordance with this section.

When money may be withdrawn

(2) Money shall not be withdrawn from a trust account by electronic transfer unless the following conditions are met:

1. The electronic transfer system used by the licensee must be one that does not permit an electronic transfer of funds unless,
 - i. one person, using a password or access code, enters into the system the data describing the details of the transfer, and
 - ii. another person, using another password or access code, enters into the system the data authorizing the financial institution to carry out the transfer.
2. The electronic transfer system used by the licensee must be one that will produce, not later than the close of the banking day immediately after the day on which the electronic transfer of funds is authorized, a confirmation from the financial institution confirming that the data describing the details of the transfer and authorizing the financial institution to carry out the transfer were received.
3. The confirmation required by paragraph 2 must contain,
 - i. the number of the trust account from which money is drawn,
 - ii. the name, branch name and address of the financial institution where the account to which money is transferred is kept,
 - iii. the name of the person or entity in whose name the account to which money is transferred is kept,

- iv. the number of the account to which money is transferred,
 - v. the time and date that the data describing the details of the transfer and authorizing the financial institution to carry out the transfer are received by the financial institution, and
 - vi. the time and date that the confirmation from the financial institution is sent to the licensee.
4. Before any data describing the details of the transfer or authorizing the financial institution to carry out the transfer is entered into the electronic trust transfer system, an electronic trust transfer requisition must be signed by,
- i. a licensee, or
 - ii. in exceptional circumstances, a person who is not a licensee if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the licensee in all trust accounts on which signing authority has been delegated to the person.
5. The data entered into the electronic trust transfer system describing the details of the transfer and authorizing the financial institution to carry out the transfer must be as specified in the electronic trust transfer requisition.

Application of para. 1 of subs. (2) to sole practitioner

(3) Paragraph 1 of subsection (2) does not apply to a licensee who practises law or provides legal services without another licensee as a partner, if the licensee practises law or provides legal services through a professional corporation, without another licensee practising law or providing legal services through the professional corporation and without another licensee or person as an employee, if the licensee himself or herself enters into the electronic trust transfer system both the data describing the details of the transfer and the data authorizing the financial institution to carry out the transfer.

Same

(4) In exceptional circumstances, the data referred to in subsection (3) may be entered by a person other than the licensee, if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the licensee in all trust accounts on which signing authority has been delegated to the person.

Additional requirements relating to confirmation

- (5) Not later than the close of the banking day immediately after the day on which the confirmation required by paragraph 2 of subsection (2) is sent to a licensee, the licensee shall,
- (a) produce a printed copy of the confirmation;
 - (b) compare the printed copy of the confirmation and the signed electronic trust transfer requisition relating to the transfer to verify whether the money was drawn from the trust account as specified in the signed requisition;
 - (c) indicate on the printed copy of the confirmation the name of the client, the subject matter of the file and any file number in respect of which money was drawn from the trust account; and
 - (d) after complying with clauses (a) to (c), sign and date the printed copy of the confirmation.

Same

- (6) In exceptional circumstances, the tasks required by subsection (5) may be performed by a person other than the licensee, if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the licensee in all trust accounts on which signing authority has been delegated to the person.

Electronic trust transfer requisition

- (7) The electronic trust transfer requisition required under paragraph 4 of subsection (2) shall be in Form 9A.

Definitions

13. (1) In this section,

“closing funds” means the money necessary to complete or close a transaction in real estate;

“transaction in real estate” means,

- (a) a charge on land given for the purpose of securing the payment of a debt or the performance of an obligation, including a charge under the *Land Titles Act* and a mortgage, but excluding a rent charge, or

- (b) a conveyance of freehold or leasehold land, including a deed and a transfer under the *Land Titles Act*, but excluding a lease.

Withdrawal by electronic transfer: closing funds

(2) Despite section 12, closing funds may be withdrawn from a trust account by electronic transfer in accordance with this section.

When closing funds may be withdrawn

(3) Closing funds shall not be withdrawn from a trust account by electronic transfer unless the following conditions are met:

1. The electronic transfer system used by the licensee must be one to which access is restricted by the use of at least one password or access code.
2. The electronic transfer system used by the licensee must be one that will produce immediately after the electronic transfer of funds a confirmation of the transfer.
3. The confirmation required by paragraph 2 must contain,
 - i. the name of the person or entity in whose name the account from which money is drawn is kept,
 - ii. the number of the trust account from which money is drawn,
 - iii. the name of the person or entity in whose name the account to which money is transferred is kept,
 - iv. the number of the account to which money is transferred, and
 - v. the date the transfer is carried out.
4. Before the electronic transfer system used by the licensee is accessed to carry out an electronic transfer of funds, an electronic trust transfer requisition must be signed by,
 - i. the licensee, or
 - ii. in exceptional circumstances, a person who is not the licensee if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance

on deposit during the immediately preceding fiscal year of the licensee in all trust accounts on which signing authority has been delegated to the person.

5. The data entered into the electronic transfer system describing the details of the electronic transfer of funds must be as specified in the electronic trust transfer requisition.

Additional requirements relating to confirmation

- (4) Not later than 5 p.m. on the day immediately after the day on which the electronic transfer of funds is carried out, the licensee shall,
 - (a) produce a printed copy of the confirmation required by paragraph 2 of subsection (3);
 - (b) compare the printed copy of the confirmation and the signed electronic trust transfer requisition relating to the transfer to verify whether the money was drawn from the trust account as specified in the signed requisition;
 - (c) indicate on the printed copy of the confirmation the name of the client, the subject matter of the file and any file number in respect of which money was drawn from the trust account; and
 - (d) after complying with clauses (a) to (c), sign and date the printed copy of the confirmation.

Same

- (5) In exceptional circumstances, the tasks required by subsection (4) may be performed by a person other than the licensee, if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the licensee in all trust accounts on which signing authority has been delegated to the person.

Electronic trust transfer requisition: closing funds

- (6) The electronic trust transfer requisition required under paragraph 4 of subsection (3) shall be in Form 9C.

Requirement to maintain sufficient balance in trust account

14. Despite any other provision in this Part, a licensee shall at all times maintain sufficient balances on deposit in his or her trust accounts to meet all his or her obligations with respect to money held in trust for clients.

AUTOMATIC WITHDRAWALS FROM TRUST ACCOUNTS

Authorizing Teranet to withdraw money from trust account

15. (1) Subject to subsection (2), a licensee may authorize Teranet to withdraw from a trust account described in subsection 16 (1) money required to pay the document registration fees and the land transfer tax, if any, related to a client=s real estate transaction.

Conditions

(2) A licensee shall not authorize Teranet to withdraw from a trust account described in subsection 16 (1) money required to pay the document registration fees and the land transfer tax, if any, related to a client=s real estate transaction unless Teranet agrees to provide to the licensee in accordance with subsection (3) a confirmation of the withdrawal that contains the information mentioned in subsection (4).

Time of receipt of confirmation

(3) The confirmation required under subsection (2) must be received by the licensee not later than 5 p.m. on the day immediately after the day on which the withdrawal is authorized by the licensee.

Contents of confirmation

- (4) The confirmation required under subsection (2) must contain,
- (a) the amount of money withdrawn from the trust account;
 - (b) the time and date that the authorization to withdraw money is received by Teranet;
and
 - (c) the time and date that the confirmation from Teranet is sent to the licensee.

Written record of authorization

(5) A licensee who authorizes Teranet to withdraw from a trust account described in subsection 16 (1) money required to pay the document registration fees and the land transfer tax, if any, related to a client=s real estate transaction shall record the authorization in writing.

Same

(6) The written record of the authorization required under subsection (5) shall be in Form 9B and shall be completed by the licensee before he or she authorizes Teranet to withdraw from a trust account described in subsection 16 (1) money required to pay the document registration fees and the land transfer tax, if any, related to a client=s real estate transaction.

Additional requirements relating to confirmation

- (7) Not later than 5 p.m. on the day immediately after the day on which the confirmation required under subsection (2) is sent to a licensee, the licensee shall,
- (a) produce a paper copy of the confirmation, if the confirmation is sent to the licensee by electronic means;
 - (b) compare the paper copy of the confirmation and the written record of the authorization relating to the withdrawal to verify whether money was withdrawn from the trust account by Teranet as authorized by the licensee;
 - (c) indicate on the paper copy of the confirmation the name of the client and any file number in respect of which money was withdrawn from the trust account, if the confirmation does not already contain such information; and
 - (d) after complying with clauses (a) to (c), sign and date the paper copy of the confirmation.

Special trust account

- 16 (1) The trust account from which Teranet may be authorized by a licensee to withdraw money shall be,
- (a) an account at a chartered bank, provincial savings office, credit union or league to which the *Credit Unions and Caisses Populaires Act, 1994* applies or a registered trust corporation kept in the name of the licensee or in the name of the firm of licensees of which the licensee is a partner, through which the licensee practises law or by which the licensee is employed, and designated as a trust account; and
 - (b) an account into which a licensee shall pay only,
 - (i) money received in trust for a client for the purposes of paying the document registration fees and the land transfer tax, if any, related to the client=s real estate transaction; and

- (ii) money properly withdrawn from another trust account for the purposes of paying the document registration fees and the land transfer tax, if any, related to the client=s real estate transaction.

One or more special trust accounts

(2) A licensee may keep one or more trust accounts of the kind described in subsection (1).

Payment of money into special trust account

(3) A licensee shall not pay into a trust account described in subsection (1) more money than is required to pay the document registration fees and the land transfer tax, if any, related to a client=s real estate transaction, and if more money is, through inadvertence, paid into the trust account, the licensee shall transfer from the trust account described in subsection (1) into another trust account that is not a trust account described in subsection (1) the excess money.

Time limit on holding money in special trust account

(4) A licensee who pays money into a trust account described in subsection (1) shall not keep the money in that account for more than five days, and if the money is not properly withdrawn from that account by Teranet within five days after the day on which it is paid into that account, the licensee shall transfer the money from that account into another trust account that is not a trust account described in subsection (1).

Interpretation: counting days

(5) In subsection 16 (4), holidays shall not be counted in determining if money has been kept in a trust account described in subsection 16 (1) for more than five days.

Application of ss. 9, 11, 12 and 14

17. Sections 9, 11, 12 and 14 apply, with necessary modifications, to a trust account described in subsection 16 (1).

PART V

RECORD KEEPING REQUIREMENTS

REQUIREMENTS

Requirement to maintain financial records

18. Every licensee shall maintain financial records to record all money and other property received and disbursed in connection with the licensee's professional business, and, as a minimum requirement, every licensee shall maintain, in accordance with sections 21, 22 and 23, the following records:

1. A book of original entry identifying each date on which money is received in trust for a client, the method by which money is received, the person from whom money is received, the amount of money received, the purpose for which money is received and the client for whom money is received in trust.
2. A book of original entry showing all disbursements out of money held in trust for a client and identifying each date on which money is disbursed, the method by which money is disbursed, including the number or a similar identifier of any document used to disburse money, the person to whom money is disbursed, the amount of money which is disbursed, the purpose for which money is disbursed and the client on whose behalf money is disbursed.
3. A clients' trust ledger showing separately for each client for whom money is received in trust all money received and disbursed and any unexpended balance.
4. A record showing all transfers of money between clients' trust ledger accounts and explaining the purpose for which each transfer is made.
5. A book of original entry showing all money received, other than money received in trust for a client, and identifying each date on which money is received, the method by which money is received, the amount of money which is received and the person from whom money is received.
6. A book of original entry showing all disbursements of money, other than money held in trust for a client, and identifying each date on which money is disbursed, the method by which money is disbursed, including the number or a similar identifier of any document used to disburse money, the amount of money which is disbursed and the person to whom money is disbursed.
7. A fees book or a chronological file of copies of billings, showing all fees charged and other billings made to clients and the dates on which fees are charged and other billings are made to clients and identifying the clients charged and billed.

8. A record showing a comparison made monthly of the total of balances held in the trust account or accounts and the total of all unexpended balances of funds held in trust for clients as they appear from the financial records together with the reasons for any differences between the totals, and the following records to support the monthly comparisons:
 - i. A detailed listing made monthly showing the amount of money held in trust for each client and identifying each client for whom money is held in trust.
 - ii. A detailed reconciliation made monthly of each trust bank account.
9. A record showing all property, other than money, held in trust for clients, and describing each property and identifying the date on which the licensee took possession of each property, the person who had possession of each property immediately before the licensee took possession of the property, the value of each property, the client for whom each property is held in trust, the date on which possession of each property is given away and the person to whom possession of each property is given.
10. Bank statements or pass books, cashed cheques and detailed duplicate deposit slips for all trust and general accounts.
11. Signed electronic trust transfer requisitions and signed printed confirmations of electronic transfers of trust funds.
12. Signed authorizations of withdrawals by Teranet and signed paper copies of confirmations of withdrawals by Teranet.

Record keeping requirements if cash received

19 (1) Every licensee who receives cash shall maintain financial records in addition to those required under section 18 and, as a minimum additional requirement, shall maintain, in accordance with sections 21, 22 and 23, a book of duplicate receipts, with each receipt identifying the date on which cash is received, the person from whom cash is received, the amount of cash received, the client for whom cash is received and any file number in respect of which cash is received and containing the signature of the licensee or the person authorized by the licensee to receive cash and of the person from whom cash is received.

No breach

(2) A licensee does not breach subsection (1) if a receipt does not contain the signature of the person from whom cash is received provided that the licensee has made reasonable efforts to obtain the signature of the person from whom cash is received.

Record keeping requirements if mortgages and other charges held in trust for clients

20. Every licensee who holds in trust mortgages or other charges on real property, either directly or indirectly through a related person or corporation, shall maintain financial records in addition to those required under section 18 and, as a minimum additional requirement, shall maintain, in accordance with sections 21, 22 and 23, the following records:

1. A mortgage asset ledger showing separately for each mortgage or charge,
 - i. all funds received and disbursed on account of the mortgage or charge,
 - ii. the balance of the principal amount outstanding for each mortgage or charge,
 - iii. an abbreviated legal description or the municipal address of the real property, and
 - iv. the particulars of registration of the mortgage or charge.
2. A mortgage liability ledger showing separately for each person on whose behalf a mortgage or charge is held in trust,
 - i. all funds received and disbursed on account of each mortgage or charge held in trust for the person,
 - ii. the balance of the principal amount invested in each mortgage or charge,
 - iii. an abbreviated legal description or the municipal address for each mortgaged or charged real property, and
 - iv. the particulars of registration of each mortgage or charge.
3. A record showing a comparison made monthly of the total of the principal balances outstanding on the mortgages or charges held in trust and the total of all principal balances held on behalf of the investors as they appear from the financial records together with the reasons for any differences between the totals, and the following records to support the monthly comparison:

- i. A detailed listing made monthly identifying each mortgage or charge and showing for each the balance of the principal amount outstanding.
- ii. A detailed listing made monthly identifying each investor and showing the balance of the principal invested in each mortgage or charge.

Financial records to be permanent

21. (1) The financial records required to be maintained under sections 18, 19 and 20 may be entered and posted by hand or by mechanical or electronic means, but if the records are entered and posted by hand, they shall be entered and posted in ink.

Paper copies of financial records

(2) If a financial record is entered and posted by mechanical or electronic means, a licensee shall ensure that a paper copy of the record may be produced promptly on the Society's request.

Financial records to be current

22. (1) Subject to subsection (2), the financial records required to be maintained under sections 18, 19 and 20 shall be entered and posted so as to be current at all times.

Exceptions

(2) The record required under paragraph 8 of section 18 and the record required under paragraph 3 of section 20 shall be created within twenty-five days after the last day of the month in respect of which the record is being created.

Preservation of financial records required under ss. 18 and 19

23. (1) Subject to subsection (2), a licensee shall keep the financial records required to be maintained under sections 18 and 19 for at least the six year period immediately preceding the licensee's most recent fiscal year end.

Same

(2) A licensee shall keep the financial records required to be maintained under paragraphs 1, 2, 3, 8, 9, 10 and 11 of section 18 for at least the ten year period immediately preceding the licensee's most recent fiscal year end.

Preservation of financial records required under s. 20

(3) A licensee shall keep the financial records required to be maintained under section 20 for at least the ten year period immediately preceding the licensee's most recent fiscal year end.

Record keeping requirements when acting for lender

24. (1) Every licensee who acts for or receives money from a lender shall, in addition to maintaining the financial records required under sections 18 and 20, maintain a file for each charge, containing,

- (a) a completed investment authority, signed by each lender before the first advance of money to or on behalf of the borrower;
- (b) a copy of a completed report on the investment;
- (c) if the charge is not held in the name of all the lenders, an original declaration of trust;
- (d) a copy of the registered charge; and
- (e) any supporting documents supplied by the lender.

Exceptions

- (2) Clauses (1) (a) and (b) do not apply with respect to a lender if,
 - (a) the lender,
 - (i) is a bank listed in Schedule I or II to the *Bank Act* (Canada), a licensed insurer, a registered loan or trust corporation, a subsidiary of any of them, a pension fund, or any other entity that lends money in the ordinary course of its business,
 - (ii) has entered a loan agreement with the borrower and has signed a written commitment setting out the terms of the prospective charge, and
 - (iii) has given the licensee a copy of the written commitment before the advance of money to or on behalf of the borrower;
 - (b) the lender and borrower are not at arm's length;
 - (c) the borrower is an employee of the lender or of a corporate entity related to the lender;

- (d) the lender has executed the Investor/Lender Disclosure Statement for Brokered Transactions, approved by the Superintendent under subsection 54 (1) of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, and has given the licensee written instructions, relating to the particular transaction, to accept the executed disclosure statement as proof of the loan agreement;
- (e) the total amount advanced by the lender does not exceed \$6,000; or
- (f) the lender is selling real property to the borrower and the charge represents part of the purchase price.

Requirement to provide documents to lender

(3) Forthwith after the first advance of money to or on behalf of the borrower, the licensee shall deliver to each lender,

- (a) if clause (1) (b) applies, an original of the report referred to therein; and
- (b) if clause (1) (c) applies, a copy of the declaration of trust.

Requirement to add to file maintained under subs. (1)

(4) Each time the licensee or any licensee of the same firm of licensees does an act described in subsection (5), the licensee shall add to the file maintained for the charge the investment authority referred to in clause (1) (a), completed anew and signed by each lender before the act is done, and a copy of the report on the investment referred to in clause (1) (b), also completed anew.

Application of subs. (4)

- (5) Subsection (4) applies in respect of the following acts:
 - 1. Making a change in the priority of the charge that results in a reduction of the amount of security available to it.
 - 2. Making a change to another charge of higher priority that results in a reduction of the amount of security available to the lender's charge.
 - 3. Releasing collateral or other security held for the loan.
 - 4. Releasing a person who is liable under a covenant with respect to an obligation in connection with the loan.

New requirement to provide documents to lender

(6) Forthwith after completing anew the report on the investment under subsection (4), the licensee shall deliver an original of it to each lender.

Requirement to add to file maintained under subs. (1): substitution

(7) Each time the licensee or any other licensee of the same firm of licensees substitutes for the charge another security or a financial instrument that is an acknowledgment of indebtedness, the licensee shall add to the file maintained for the charge the lender's written consent to the substitution, obtained before the substitution is made.

Exceptions

(8) The licensee need not comply with subsection (4) or (7) with respect to a lender if clause (2) (a), (b), (c), (e) or (f) applied to the lender in the original loan transaction.

Investment authority: Form 9D

(9) The investment authority required under clause (1) (a) shall be in Form 9D.

Report on investment: Form 9E

(10) Subject to subsection (11), the report on the investment required under clause (1) (b) shall be in Form 9E.

Report on investment: alternative to Form 9E

(11) The report on the investment required under clause (1) (b) may be contained in a reporting letter addressed to the lender or lenders which answers every question on Form 9E.

Table of Authorities

Appendix

Table of Authorities

A

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