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## Part 16 - Costs, Order, and Enforcement

### Rule 77 - Costs

#### Educational Notes

This Rule clarifies the awarding of costs but makes no major changes to the law. Costs remain at the discretion of the judge (R.77.02(2)). Costs generally follow the event (R.77.03(3)). Solicitor and client costs are awarded only in exceptional circumstances recognized by law (R.77.03(3)). The Tariffs still apply. Costs are still assessed by a judge or in the Small Claims Court.

Costs on motions, judicial review, and appeal are assessed in accordance with Tariff C. Costs in actions and applications are assessed in accordance with Tariff A, though it is likely only applications in court that will benefit from Tariff A. Costs of applications in chambers should arguably be dealt with under Tariff C, as is the current practice. Note that the wording of Tariff C still refers to an "Application heard in Chambers" rather than a motion.

Contingency fee agreements are addressed in R.77.14, which must be strictly complied with. Contingency fee agreements are now held in a sealed envelope by the lawyer and are not filed with the court.

The costs consequences of formal offers to settle are set out in R.10.

#### 77.01 - Scope of Rule 77

- (1) The court deals with each of the following kinds of costs:
  - (a) party and party costs, by which one party compensates another party for part of the compensated party's expenses of litigation;
  - (b) solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation;
  - (c) fees and disbursements counsel charges to a client for representing the client in a proceeding.
- (2) Costs may be ordered, the amount of costs may be assessed, and counsel's fees and disbursements may be charged, in accordance with this Rule.

#### 77.02 - General discretion (party and party costs)

- (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
- (2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.

#### Annotations

The infant plaintiff sustained serious injuries in a school bus accident. After a more than 26 day trial with 51 witnesses (23 experts), the jury found the defendants not liable.

Costs were in issue. The defendants sought to have the current and previous litigation guardians held jointly liable for costs. *Held*, costs are payable by the infant's estate only. Rule 77.02(1) sets out that costs can be awarded in any manner so as to do justice between the parties. Here, the litigation guardians should not be held personally liable: this wasn't a frivolous matter, there was no abuse of process and there were significant matters in issue.

*Marshall v. Annapolis County District School Board et al.*, [2010 NSSC 179](#)

### **77.03 - Liability for costs**

- (1) A judge may order that parties bear their own costs, one party pay costs to another, two or more parties jointly pay costs, a party pay costs out of a fund or an estate, or that liability for party and party costs is fixed in any other way.
- (2) A judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized by law.
- (3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.
- (4) A judge who awards party and party costs of a motion that does not result in the final determination of the proceeding may order payment in any of the following ways:
  - (a) in the cause, in which case the party who succeeds in the proceeding receives the costs of the motion at the end of the proceeding;
  - (b) to a party in the cause, in which case the party receives the costs of the motion at the end of the proceeding if the party succeeds;
  - (c) to a party in any event of the cause and to be paid immediately or at the end of the proceeding, in which case the party receives the costs of the motion regardless of success in the proceeding and the judge directs when the costs are payable;
  - (d) any other way the judge sees fit.
- (5) A judge may order that costs awarded to a party represented by counsel with Nova Scotia Legal Aid or Dalhousie Legal Aid be paid directly to the Nova Scotia Legal Aid Commission or Dalhousie Legal Aid Service.

### **77.04 - Relief from liability because of poverty**

- (1) A party who cannot afford to pay costs and for whom the risk of an award of costs is a serious impediment to making, defending, or contesting a claim may make a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.
- (2) A motion for an order against paying costs must be made as soon as possible after either of the following occurs:
  - (a) the party is notified of a proceeding the party wishes to defend or contest;
  - (b) a claim made by the party is defended or contested.
- (3) An order against paying costs may be varied when the circumstances of the party change.
- (4) An order against paying costs does not apply to costs under Rule 88 - Abuse of Process, Rule 89 - Contempt, or Rule 90 - Civil Appeal.

### **77.05 - Assessment of interlocutory costs**

- (1) The provisions of Tariff C apply to a motion, unless the judge hearing the motion orders otherwise.
- (2) A judge may assess costs, and provide for payment of costs, when a motion is withdrawn or abandoned.

### **77.06 - Assessment of costs under tariff at end of proceeding**

- (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.
- (2) Party and party costs of an application must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial.
- (3) Party and party costs of a proceeding for judicial review or an appeal to the Supreme Court of Nova Scotia must, unless the presiding judge orders otherwise, be assessed in accordance with Tariff C.

### **Annotations**

The plaintiff failed to prove liability. He had claimed almost \$20 million in damages. The court provisionally assessed damages at \$8.4 million (had the plaintiff been successful). Costs were in issue. An offer to settle for \$250,000 was made almost two months before trial. The defendant wanted costs based on the total amount claimed, the Tariffs and a 25 percent increase for the rejected settlement offer. The plaintiff argued costs calculated in this manner would be too high and the court should award a lump sum of \$60,000. *Held*, lump sum costs of \$300,000 plus disbursements awarded; a substantial contribution to the actual costs (\$700,000). A strict calculation based on the Tariffs and amount claimed would result in an award that significantly exceeds the actual costs; using the provisional award results in an amount that almost equals them.

*MacIntyre v. Cape Breton District Health Authority*, [2010 NSSC 170](#)

### **77.07 - Increasing or decreasing tariff amount**

- (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.
- (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
  - (a) the amount claimed in relation to the amount recovered;
  - (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
  - (c) an offer of contribution;
  - (d) a payment into court;
  - (e) conduct of a party affecting the speed or expense of the proceeding;
  - (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;

## Rule 77 - Costs

- (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;
  - (h) a failure to admit something that should have been admitted.
- (3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.

### Annotations

The infant plaintiff sustained serious injuries in a school bus accident. After a more than 26 day trial with 51 witnesses (23 experts), the jury found the defendants not liable. Costs were in issue. The parties agreed the 2008 *Rules* and 1989 Tariffs applied. They agreed any cost award should be increased by 25 percent to take into account the defendant's formal offer to settle that was rejected. The defendants sought costs under Scale 4, based on an amount involved of \$4.3 million (the amount claimed at trial). They sought to have the current and previous litigation guardians held jointly liable for costs. The plaintiff felt costs should be awarded under Scale 2, based on an amount involved of \$500,000 (the amount they estimated would have been awarded had the plaintiffs been successful). They argued costs should only be payable by the infant's estate and not the litigation guardians. *Held*, Rule 77 applies; the 1989 Tariffs apply because they were the ones in effect when the action was started. This was a complex matter with a complicated trial. The amount involved is the full amount claimed at trial - a reasonable estimate of the range that would have been awarded had the plaintiffs been successful on liability. The appropriate scale is 4, with a 25 percent increase and no HST. Costs are payable by the infant's estate only.

*Marshall v. Annapolis County District School Board et al.*, [2010 NSSC 179](#)

### 77.08 - Lump sum amount instead of tariff

A judge may award lump sum costs instead of tariff costs.

### Annotations

The plaintiff failed to prove liability. He had claimed almost \$20 million in damages. The court provisionally assessed damages at \$8.4 million (had the plaintiff been successful). Costs were in issue. An offer to settle for \$250,000 was made almost two months before trial. The defendant wanted costs based on the total amount claimed, the Tariffs and a 25 percent increase for the rejected settlement offer. The plaintiff argued costs calculated in this manner would be too high and the court should award a lump sum of \$60,000. *Held*, lump sum costs of \$300,000 plus disbursements awarded; a substantial contribution to the actual costs (\$700,000). A strict calculation based on the Tariffs and amount claimed would result in an award that significantly exceeds the actual costs; using the provisional award results in an amount that almost equals them.

*MacIntyre v. Cape Breton District Health Authority*, [2010 NSSC 170](#)

The applicant sought an order of mandamus requiring Halifax Regional Municipality to exercise its powers under the *Municipal Government Act* and enforce the building of an access road and bridge as per the terms of an allegedly breached development agreement. Their application was dismissed and Halifax Regional Municipality sought costs of over \$76,000 based on the amount it would have cost to build the access road, six days of trial and Tariff A. The applicant argued each party should bear their own costs, or that costs should be in the range of \$6,000 to \$7,000. *Held*, lump sum costs of \$7,500 (including disbursements) awarded, with an additional \$1,000 awarded in

relation to an earlier interlocutory application by Halifax Regional Municipality which helped narrow the issues. Rule 77.02 gives the court discretion to order costs in an amount that is fair and appropriate in the circumstances. Here the claim did not directly involve money, although (if successful) could have resulted in significant advantage to the applicants. The applicant's position was relatively straightforward from the outset. Halifax Regional Municipality responded by filing volumes of materials and a multitude of affidavits defending every assertion of fact the applicant needed to prove. Had Halifax Regional Municipality agreed to the admission of certain facts, the hearing time could have been cut in half.

*Olympic International Realty Ltd. v. Halifax (Regional Municipality)* , [2010 NSSC 16](#)

### **77.09 - Amount under a Rule about indemnification**

- (1) This Rule 77.09 applies to an indemnification under any of the following Rules, or a similar Rule:
  - (a) Rules 4.18(4) and 4.21(d), (e), or (f), of Rule 4 - Action;
  - (b) Rules 5.11(3) and 5.15(c), of Rule 5 - Application;
  - (c) Rules 10.12(4) and (5), of Rule 10 - Settlement;
  - (d) Rule 18.19(3), of Rule 18 - Discovery;
  - (e) Rule 19.08(2), of Rule 19 - Interrogatories;
  - (f) Rule 20.06, of Rule 20 - Admission;
  - (g) Rules 23.09(8) and 23.12(3), of Rule 23 - Chambers Motion;
  - (h) Rule 39.04(5), of Rule 39 - Affidavit;
  - (i) Rule 50.14(4), of Rule 50 - Subpoena;
  - (j) Rules 51.02(3) and 51.03(2), of Rule 51 - Conduct of Trial;
  - (k) Rule 55.13(5), of Rule 55 - Expert Opinion;
  - (l) Rule 88.02(d), of Rule 88 - Abuse of Process.
- (2) A judge may order indemnification for all of the following amounts under a Rule to which this Rule 77.09 applies:
  - (a) a substantial contribution towards the cost of necessary services of counsel, or a fair payment for the work of a person who acts on their own;
  - (b) necessary and reasonable out of pocket expenses or disbursements;
  - (c) fair compensation for a harm or loss referred to in the applicable Rule.
- (3) The indemnification is payable when the order is made, unless the order provides otherwise.

### **77.10 - Disbursements included in award**

- (1) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.
- (2) A provision in an award for an apportionment of costs applies to disbursements, unless a judge orders otherwise.

### **77.11 - Set-off against party and party costs**

A judge who awards party and party costs may order a set-off against another award of costs or any other amount.

### **77.12 - Award of costs in other circumstances**

- (1) A judge may award, assess, and provide for payment of costs for any act or omission of a person in relation to a proceeding or an order.
- (2) A judge who determines that expenses are caused by the improper or negligent conduct of counsel may order any of the following:
  - (a) counsel not recover fees from the client;
  - (b) counsel reimburse the client for costs the client is ordered to pay to another party as a result of counsel's conduct;
  - (c) counsel personally pay costs.

### **77.13 - Counsel's fees and disbursements: entitlement and assessment**

- (1) Counsel is entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who is involved in a proceeding.
- (2) The reasonableness of counsel's compensation must be assessed in light of all the relevant circumstances, and the following are examples of subjects and circumstances that may be relevant on the assessment:
  - (a) counsel's efforts to secure speed and avoid expense for the client;
  - (b) the nature, importance, and urgency of the case;
  - (c) the circumstances of the person who is to pay counsel, or of the fund out of which counsel is to be paid;
  - (d) the general conduct and expense of the proceeding;
  - (e) the skill, labour, and responsibility involved;
  - (f) counsel's terms of retention, including an authorized contingency agreement, terms for payment by hourly rate, and terms for value billing.

### **Annotations**

A lawyer agreed to represent the applicant in her disability claim. She signed a contingency fee agreement that said the law firm would be paid 30 per cent of any lump sum damage award made at any time. The claim settled early in the proceeding, on very favorable terms for the applicant. The lawyer had said something about how an early settlement would not attract the entire 30 per cent fee, but no other numbers were discussed. The law firm never used sliding scale contingency agreements, preferring to "share the risk". *Held*, 25 per cent of the lump sum is a reasonable fee in the circumstances, having regard to the factors in Rule 77.13(2). The law firm's decision to abandon sliding scale contingency agreements failed to take into account the need for the fee to be reasonable in light of the amount of work done, as required by Rule 77.13. *Lennox v. Cantini Law Group*, [2009 NSSM 8](#)

This decision arose under the old rules. The appellant retained the respondent lawyer to represent him in his disability claim. They signed a contingency fee agreement, and the matter settled shortly thereafter. There was disagreement over the interpretation of the agreement - the client arguing the 40 per cent applied only to the retroactive lump sum settlement, the lawyer arguing the 40 per cent also applied to future payments. *Held*, the agreement was limited to the lump sum payment. Any ambiguity should be resolved in the client's favor according to the doctrine of *contra proferentem*. After reviewing the lawyer's bill, the court found the agreement was reasonable in light of the risk involved. *Lacelles v. Rizzetto*, [1996 CanLII 5188](#)

#### **77.14 - Counsel's fees and disbursements: contingency fee agreement**

- (1) A client may make an agreement with a lawyer under which payment for all or part of the lawyer's services or disbursements in a proceeding is conditional on success.
- (2) A contingency fee agreement may provide for payment of a reasonable amount to compensate for services and the risk taken by the lawyer, and the amount may be based on a gross sum, a percentage of the amount recovered, or any other reasonable means of calculation.
- (3) A litigation guardian, a guardian under the Guardianship Act or the Incompetent Persons Act, the representative of an estate, or a power of attorney may enter into a contingency fee agreement on behalf of a represented party or estate and a payment due under the agreement may, with approval of a judge, be made out of proceeds of a claim advanced for the represented party or estate.
- (4) A contingency fee agreement must be in writing, be dated and signed by each person who makes the agreement, and contain all of the following:
  - (a) the names and addresses of the lawyer and each client bound by the agreement;
  - (b) a concise description of the client's claim;
  - (c) a condition prescribing the contingency upon which services or disbursements are to be paid;
  - (d) a term providing for any part of the services or disbursements the client is required to pay regardless of the contingency, or providing that there are no such services or disbursements;
  - (e) a term providing the amount to be paid on the contingency expressed either as a gross sum or by a stated formula;
  - (f) the responsibilities of the parties if the solicitor and client relationship terminates before the claim is settled or determined;
  - (g) a statement that the client has the right to have the agreement and any payment due under it reviewed for the reasonableness and necessity of the charges by an adjudicator under the *Small Claims Court Act* or a judge.
- (5) A lawyer must do all of the following after a contingency agreement is signed and dated by the parties:
  - (a) immediately deliver a copy to each client;
  - (b) place the original in a sealed envelope;
  - (c) after the envelope is sealed, keep it so that it can be produced on order of an adjudicator under the *Small Claims Court Act* or a judge.

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- (6) A lawyer may seek payment under a contingency agreement only if the agreement conforms with Rule 77.14(4) and the lawyer complies with Rule 77.14(5).

### 77.15 - Charging order

- (1) Counsel who represents a party in a proceeding in which the party claims an order for the payment or recovery of money or a remedy involving real or personal property may make a motion for an order securing counsel's reasonable and necessary fees and disbursements against the party's right to the money or the party's interest in property.
- (2) An order securing counsel's fees and disbursements may attach an obligation to pay the money or provide for a lien on the property.

### 77.16 - Taxation of costs

- (1) A judge who awards costs may fix the amount or order that the amount, or a part of the amount, be fixed by taxation before an adjudicator under the *Small Claims Court Act*.
- (2) A judge may order that the amount of fees and disbursements owing by a party to the party's counsel be fixed by taxation before an adjudicator.
- (3) An adjudicator who fixes the amount of fees and disbursements owing to counsel may disallow fees for a service, or disallow a disbursement, that is unnecessary or otherwise unreasonable.
- (4) The adjudicator may allow fees for a service, or allow a disbursement, that is rendered, or incurred, on the client's specific instruction even if the service, or disbursement, is otherwise unreasonable.
- (5) A certificate of taxation is final and conclusive of the amounts certified on it against a person who was notified of the taxation, except for each of the following:
  - (a) the certificate may contain terms upon which the amount is to be calculated;
  - (b) the order may contain terms limiting the taxation or providing conditions for payment of some or all of the taxed amount;
  - (c) the certificate may be varied on appeal.

*N.S. Gaz. Pt. 1, 12/16/2009*

### Annotations

The infant plaintiff sustained serious injuries in a school bus accident. After a more than 26 day trial with 51 witnesses (23 experts), the jury found the defendants not liable. Costs were in issue. The defendants also disputed disbursements and sought to have them taxed. *Held*, disbursements will be taxed. Given the multiple issues raised by the plaintiffs and to allow the defendants time to adequately explain them, the disbursements should be referred to an adjudicator for taxation.

*Marshall v. Annapolis County District School Board et al.* , [2010 NSSC 179](#)

### 77.17 - Appeal of taxation

An appeal of a certificate of taxation may be brought and determined in accordance with Rule 7 - Judicial Review and Appeal.

### **77.18 - Reference to adjudicator**

A question about costs may be referred to an adjudicator under the *Small Claims Court Act*, in accordance with Rule 11 - Reference.

#### **TARIFFS OF COSTS AND FEES DETERMINED BY THE COSTS AND FEES COMMITTEE TO BE USED IN DETERMINING PARTY AND PARTY COSTS**

In these Tariffs unless otherwise prescribed, the “amount involved” shall be

- (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
  - (i) the amount allowed,
  - (ii) the complexity of the proceeding, and
  - (iii) the importance of the issues;
- (b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to
  - (i) the amount of damages provisionally assessed by the court, if any,
  - (ii) the amount claimed, if any,
  - (iii) the complexity of the proceeding, and
  - (iv) the importance of the issues;
- (c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to
  - (i) the complexity of the proceeding, and
  - (ii) the importance of the issues;
- (d) an amount agreed upon by the parties.

#### **TARIFF A**

##### **Tariff of Fees for Solicitor's Services Allowable to a Party Entitled to Costs on a Decision or Order in a Proceeding**

In applying this Schedule the “length of trial” is to be fixed by a Trial Judge.

The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars (\$2000) shall be added to the amount calculated under this tariff for each day of trial as determined by the trial judge

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<b>Amount Involved</b>	<b>Scale 1(-25%)</b>	<b>Scale 2 (Basic)</b>	<b>Scale 3 (+25%)</b>
Less than \$25,000	\$ 3,000	\$ 4,000	\$ 5,000
\$25,000-\$40,000	4,688	6,250	7,813
\$40,001-\$65,000	5,138	7,250	9,063
\$65,001-\$90,000	7,313	9,750	12,188
\$90,001-\$125,000	9,188	12,250	15,313
\$125,001-\$200,000	12,563	16,750	20,938
\$200,001-\$300,000	17,063	22,750	28,438
\$300,001-\$500,000	26,063	34,750	43,438
\$500,001-\$750,000	37,313	49,750	63,188
\$750,001-\$1,000,000	48,563	64,750	80,938
more than \$1,000,000	The Basic Scale is derived by multiplying the "amount involved by 6.5%.		

**TARIFF B**

**Tariff of Party and Party costs allowed on an Appeal to the Nova Scotia Court of Appeal**

On an appeal, the costs allowed shall be 40% of the costs awarded at trial excluding the "length of trial" component unless a different amount is set by the Nova Scotia Court of Appeal.

**TARIFF C**

**Tariff of Costs payable following an Application heard in Chambers by the Supreme Court of Nova Scotia**

For applications heard in Chambers the following guidelines shall apply:

- (1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.
- (2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.
- (3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.
- (4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:
  - (a) the complexity of the matter,
  - (b) the importance of the matter to the parties,
  - (c) the amount of effort involved in preparing for and conducting the application.

(such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

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<b>Length of Hearing of Application</b>	<b>Range of Costs</b>
Less than 1 hour	\$250 - \$500
More than 1 hour but less than 1/2 day	\$750 - \$1,000
More than 1/2 day but less than 1 day	\$1000-\$2000
1 day or more	\$2000 per full day

**TARIFF D**

**Tariff of Fees for Solicitor's Services Allowable to a Party Entitled to Costs on the Signing of Default Judgment**

<b>Amount Involved</b>	<b>Costs</b>
Where the "amount involved"	
Is less than \$15,000	\$200.00
exceeds \$15,000 but not \$25 000	\$300.00
exceeds \$25,000 but not \$50 000	\$375.00
exceeds \$50,000 but not \$75 000	\$450.00
exceeds \$75,000 but not \$100 000	\$600.00
exceeds \$100,000	\$600.00 plus \$1.00 for each increase of \$1000.00 in amount involved

When an execution order is issued, an additional \$25.00 may be allowed for the order.

**TARIFF E**

**Tariff of Fees for Solicitor's Services Allowable to a Party Entitled to Costs in an Uncontested Proceeding for Foreclosure, or Foreclosure and Sale**

1..For all steps in the proceeding up to and including the application for an order for foreclosure or foreclosure and sale the allowable fees shall be determined in accordance with one of the following scales:

<b>Scale 1</b>	<b>Scale 2 (Basic)</b>	<b>Scale 3</b>
\$300	\$900	\$1500

2. For all steps in the proceeding subsequent to the application for an order for foreclosure or foreclosure and sale, the allowable fees shall be determined in accordance with one of the following scales:

<b>Scale 1</b>	<b>Scale 2 (Basic)</b>	<b>Scale 3</b>
\$650	\$850	\$1500

3. Notwithstanding anything contained in this Tariff E there shall be, in addition to the allowable fees otherwise provided by this Tariff E, an allowable fee for all steps taken in obtaining a deficiency judgment in a proceeding for foreclosure or foreclosure and sale and that allowable fee shall be determined in accordance with one of the following scales:

Rule 77 - Costs

**Scale 1**  
\$300

**Scale 2 (Basic)**  
\$500

**Scale 3**  
\$700

**TARIFF F**

**Tariff of fees allowed for Solicitor's Services Allowable to a Party Entitled to Costs in a proceeding which is Discontinued or Settled**

Costs on settlement are always a matter of negotiation between the parties.

This Tariff F is to be applied if the costs cannot be settled and must be assessed by a taxing officer.

The "amount involved" for purposes of this Tariff F is the amount of a settlement without including disbursements.

When determining costs in a proceeding, which is settled or discontinued, a taxing officer may assess the amount involved and the costs based on the following

<b>Amount Involved</b>	<b>Amount of Costs</b>
Up to \$25,000	Not more than \$3000
\$25,001 - \$50,000	Not more than \$4000
\$50,001 - \$100,000	Not more than \$5000

Where the proceeding is discontinued or settled and the amount involved exceeds \$100,000.00, costs shall not be more than the total of \$5000.00 plus 2% of the amount in excess of \$100,000.00.

## **Rule 78 - Order**

### **Educational Notes**

This Rule provides that all directions and rulings are orders of the court and that orders may be granted and enforced in accordance with R.78. Rule 78 replaces the previous R.51.

Directions certified by a court reporter or judge may now be enforced in the same manner as written orders (R.78.03(4)).

Rule 78.05 and Form 78.05 provide guidance on the form of orders. Rule 78.07 allows for orders to become effective when made, on a future date, conditionally, or even retroactively, in certain situations.

Rule 78.08 permits a judge to correct errors in orders, adjudicate matters which should have been adjudicated, extend a deadline in the order, or add a deadline to an order that did not originally include one. It replaces the previous R.15.07.

Rule 78.04 sets out a useful mechanism for settling orders. The successful party must circulate a draft order with a place for each party to consent to form no more than 10 days after receiving a decision. The other parties then have 5 days to either sign the draft order consenting to form, or deliver an alternate draft order with a concise statement of their objection. Failure to respond is taken as consent. The successful party then forwards the order to the judge along with any statements of objection within 20 days after receiving the decision. The judge may then settle the order or direct that the matter be resolved by motion, which may be by appointment, conference, or correspondence.

The previous R.51.05 allowed the prothonotary to issue a consent order. Consent orders are now dealt with in a motion by correspondence to a judge under R.27.01(1)(e). They do not require a notice of motion or supporting affidavit.

### **78.01 - Scope of Rule 78**

- (1) The court acts on motion, by order made in writing or orally.
- (2) Directions and rulings are orders.
- (3) An order may be granted and enforced, in accordance with this Rule.

### **78.02 - Order by judge**

A judge may grant any order in the jurisdiction of the court, including an order that, by these Rules or legislation, the prothonotary may grant.

### **78.03 - Orders made in writing or orally**

- (1) An order must be in writing, except directions and a ruling may be given orally and other kinds of orders may be given orally if the order is to be enforced before a written order can be made.

- (2) A court reporter must make a record of an order made orally in open court.
- (3) A judge who makes an order orally other than in open court must make a record of the order.
- (4) A direction in a record certified by a court reporter or a judge may be enforced in the same manner as a written order issued by the court.
- (5) A judge who makes an order orally may provide that the order is to be replaced by a written order and give directions for the drafting of the replacement order.

#### **78.04 - Finalizing operative terms of order**

- (1) A judge who decides to grant a draft order filed by a party may approve the draft and cause the order to be issued.
- (2) A judge who makes a decision without having a draft order at hand, or a decision that is inconsistent with a draft order, may settle the order or give directions for settlement of it.
- (3) In the absence of directions, the following procedures apply to drafting and settling an order:
  - (a) the successful party must prepare a draft order with a place for each party to consent to the form of the order and submit the draft to each other party no more than ten days after the day the judge's decision is communicated to the successful party;
  - (b) the party to whom a draft order is submitted must, no more than five days after the day the draft is delivered, either object to the draft by delivering to the successful party a concise statement of the objection and an alternate draft order, or sign in the place provided for consent to form;
  - (c) a party who fails to object to, or sign, the draft order in the required time is taken to consent to the form;
  - (d) the successful party must deliver a draft order consented to form, or a draft order with a copy of the statement of an unresolved objection, to the judge no more than twenty days after the day the judge's decision is communicated to the party;
  - (e) the judge may settle the terms of the order or direct that a dispute be resolved by motion under Rule 25 - Motion by Appointment, Rule 26 - Conference, or Rule 27 - Motion by Correspondence;
  - (f) the judge who resolves a dispute about the form of order may direct that a final draft be delivered to the judge without a consent.
- (4) A judge who presides at a settlement conference at which the parties reach agreement may direct a party to prepare an order that conforms with the agreement and, if the judge does not settle the terms of the order at the conference, Rule 78.04(3) applies as if the directed party were the successful party and the agreement were the decision.
- (5) A judge, other than the judge who makes the decision, may settle the form of an order and approve a draft order, if the judge who makes the decision is unable to approve the order or gives permission for another judge to do so.

### **78.05 - Form of written order**

- (1) A draft order must, unless a judge or the prothonotary who grants the order allows otherwise, contain the standard heading of the proceeding, be entitled as provided in Rule 78.05(2), and include all of the following:
  - (a) the title of the prothonotary, the title and name of the judge who approves the order, or the title and a blank for the judge's name;
  - (b) the operative part of the order divided into numbered paragraphs;
  - (c) a place for the prothonotary to date and sign the order when it is issued.
- (2) An order may be entitled "Order" or it may be entitled more specifically to distinguish it from other orders in the proceeding, such as "Order for Production", "Order for Interlocutory Injunction", "Order or Summary Judgment", "Order After Trial Without a Jury", "Order After Trial With a Jury", "Order After Hearing of Application".
- (3) An order may include, in a paragraph after the title and before the operative part, a concise narrative explaining the proceedings that led to the order.
- (4) Each paragraph in the operative part of the order may be written as a separate order or introductory words, such as "the following is ordered", may be used.
- (5) The order may be in Form 78.05.
- (6) In an emergency, a judge may approve a written order in any form.

#### **Forms**

Order(78.05).

### **78.06 - Approving and Issuing written order**

- (1) A judge may approve a draft order by initialling it, or by any other means the judge finds to be convenient.
- (2) A prothonotary may issue a draft order approved by a judge or an order made by the prothonotary by dating, signing, and sealing the order.
- (3) In an emergency, a judge may issue an order by dating and signing it and printing the judge's name under the signature, and the judge may certify a copy.
- (4) A judge who issues an order must immediately deliver it to the prothonotary.

### **78.07 - When and how order becomes effective**

- (1) A written order is in effect when it is issued and an order made orally is in effect from the time it is spoken, unless the order provides otherwise.
- (2) An order may provide that it is otherwise effective at one of the following times:
  - (a) on a date, or starting on a date, in the past as if the order had been granted on that day, if retroactivity does not deprive a person of a substantive right and does justice between the parties;
  - (b) on a specific date in the future;
  - (c) on the happening of an event or the fulfillment of a condition described in the order.
- (3) An order that is varied on appeal is in effect as varied from the time the order of the Court of Appeal is issued, or such other time as that order provides.

**78.08 - Errors and extensions of time**

A judge may do any of the following, although a final order has been issued:

- (a) correct a clerical mistake, or an error resulting from an accidental mistake or omission, in an order;
- (b) amend an order to provide for something that should have been, but was not, adjudicated on;
- (c) extend the time for doing something required to be done by an order that provides a deadline;
- (d) set a deadline for complying with an order that does not set a deadline.

**78.09 - Proof order is satisfied or performed**

A prothonotary or a judge may grant an order declaring that an order providing for payment or recovery of money has been satisfied or that another kind of order has been performed.

*N.S. Gaz. Pt. 1, [12/10/08](#)*

## Rule 79 - Enforcement by Execution Order

### Educational Notes

#### *How this Rule Works*

This Rule addresses three subjects: (a) execution orders (R.79.05–79.17 and R.79.20-79.22), (b) periodic execution orders (a new means of enforcement similar to revolving execution orders under the common law) (R.79.18-79.22), and (c) discovery in aid of execution (R.79.23-79.26).

The operation of execution orders has not changed substantially, but the form of order is now more detailed, and the Rule includes some significant new elements, including periodic execution orders, a process for execution on joint accounts, significant increases in the amount of wages that can be seized, more powers to sheriffs, and a simplified process to obtain discovery in aid of execution.

#### *Highlights of Changes*

##### *Execution Orders*

*Deadline to obtain* – Rule 79.05(1) allows a judgment creditor to obtain an execution order for five years after the date of judgment (under the previous R.52.04, it was available for six years.) A judge may permit a motion for an execution order after the five year period has expired.

*Duration of order* – Under R.79.22(4) an execution order or superceding execution order now expire five years from the date the order was issued (under the previous R.52.05 the period was six years). A judge may extend the period.

*Exempt wages and assets* – Rule 79.08(3) now allows for seizure of 100% of after tax wages above a scaled low income threshold of \$285 per week for a person with no dependents, to \$750 per week for a person with six or more dependents (the most generous low income cutoff in Canada.) The previous R.53.05 limited judgment creditors to 15% of gross wages above a low income threshold of \$275 for an individual or \$415 for a person supporting a family.

The language of the previous R.53.05(a) referred to “deduction of all amounts required by law to be deducted from such wages,” which could include things like statutory deductions and support payments. Rule 79.08(3) speaks only of “after-tax wages from all sources,” which is narrower, but mirrors the way that Statistics Canada defines the low income cutoff.

Judgment debtors who draw on an asset for regular support can make a motion for a partial stay of enforcement under R.79.22(2) and the court can consider limiting the stay in the same manner as the wage exemption under R.79.22(3).

*Execution on Joint Accounts* – Rule 79.09 creates a rebuttable presumption that a judgment debtor is entitled to an equal share of the funds in any joint account, along with a mechanism for seizing the debtor’s share. Rule 79.08(3) creates a temporary freeze on the account until the debtor’s share is determined. There is a new obligation on a deposit-taking corporation under R.79.09(5) to notify the debtor and all other joint

account holders, who then have 10 days to move to rebut the presumption of equal sharing.

Note that the Rules do not impose a deadline for issuing the notice on the deposit-taking corporation; they merely specify that the notice is deemed received after 5 days and the joint account holders have a further 10 days to object before the debtor's equal share of the funds are paid out in execution. As such, the minimum freeze is likely to be 15 days, but it could be longer.

*Payments made under execution orders* – Third party payors in receipt of execution orders must take care to comply with them, as payments made directly to a debtor contrary to the order, or terms agreed to by the sheriff, do not discharge the payor's liability. As such, a third party payor who does not comply may end up paying twice – once (incorrectly) to the debtor, and a second time to the sheriff (R.79.08(7)).

*Sheriff's powers* – Sheriffs have powers to demand information (R.79.15(h)), liquidate a share, bond, debenture, or other security (R.79.15(d)), and seize funds from joint accounts (R.79.08-79.10). It is not yet clear what security or indemnity the sheriff will require before exercising these powers. The limitation in R.79.16(1)(f) on seizing property in excess of what the sheriff estimates will be sufficient to satisfy the order also raises the issues of how the estimate will be determined and whether the judgment creditor will need to provide the sheriff with an estimate or appraisal.

*Release* – Rule 79.03 deals with binding land and release of a judgment binding land under the *Land Registration Act*, while R.79.04 deals with binding a moveable under the *Creditors' Relief Act* and *Personal Property Security Act*. Money paid to satisfy a claim in a notice of action for debt results in a receipt in Form 9.04. There is no corresponding Rule or Form to the previous R.51.11 and Form 51.11A for satisfaction pieces. The new Rules make no reference to satisfaction pieces. The closest reference is in R.82.20(1), which permits the prothonotary to make an order releasing a judgment or the binding effect of a judgment that has been satisfied. No form of order is provided. The Court intends to provide a form of satisfaction piece when the Rules are amended, though it will likely have another name.

#### *Periodic Execution Orders*

Rules 79.18-79.19 create a new form of order called a periodic execution order, available to enforce an order for the periodic payment of money. Note that garnishees of wages and other periodic payments are still conducted under a regular execution order – the periodic execution order is designed to address situations where an order contemplates that one party will pay another on a periodic basis, as with disability insurance payments. The two types of execution orders are not mutually exclusive (R.79.18(2)).

*Duration* – Unlike execution orders, which expire after five years, periodic execution orders remain valid until the periodic obligation ends under R.79.22(5).

*Exemptions* – the usual wage exemptions apply, unless the order is for family maintenance or support.

*Family maintenance or support orders* – Two special Rules exist to aid in enforcement of family support orders. Rule 79.18(5) eliminates the low income threshold and permits 100% of wages to be seized if the order is certified to be for family maintenance or support. (Presumably this is because the payor's financial circumstances were taken

into account when the order was made and the payor has the right to apply for a variation if circumstances change.) The second Rule aiding enforcement relates to arrears. Under R.79.18(6) where family maintenance or support is in arrears, a periodic execution order may include an additional 25% of the initial amount to go towards the arrears (e.g. if periodic support is set at \$1,000 per month, and arrears exist, a periodic execution order can issue for \$1,250 per month.)

Can family counsel have recourse to periodic execution orders prior to the coming into force of the new family Rules? The previous R.70.03(4) contains a general provision applying the rest of the Civil Procedure Rules to family proceedings, to the extent that any matter is not governed by R.70 or statute, but R.92.02(2) suggests that it is the *previous* Rules that will apply, not the new ones. Principles of interpretation suggest that the specific should prevail over the general. That said, counsel have long had access to “revolving execution orders” – see *Kennedy v. Kennedy* (1988) 84 N.S.R. (2d) 265 (S.C.T.D.)

*Payments made under periodic execution orders* – As with regular execution orders, third party payors must take care to comply with periodic execution orders, as payment to the judgment debtor will not discharge the payor’s liability.

#### *Discovery in Aid of Execution*

The new Rules include a simplified process permitting discovery of judgment debtors as of right, on filing representations that the person is someone who may be discovered in aid of execution under the Rules, and that the discovery is necessary. The Rule extends to current (and sometimes past) directors, officers and managers of corporate judgment debtors. A motion is now only necessary to obtain discovery of someone other than the judgment debtor. To discover someone other than the judgment debtor, a party must show that the person likely has information that will aid enforcement, and will not provide the information via interview.

The general procedure under R.79.25 is to effect personal service of a discovery subpoena on 10 days notice, and pay fees and travel expenses under the *Costs and Fees Act*. Some (but not all) of the Rules relating to discovery apply on discovery in aid of execution. Rule 79.26 allows a judge to give directions, and order costs.

#### *Practice Tips*

Counsel acting for deposit-taking corporations will want to ensure their clients are aware of their new obligations where execution on a joint account is sought. Deposit-taking corporations will need to consider the matter of fees for addressing this obligation and the potential for liability in the event that a joint account holder is not notified as required by the Rule.

Counsel conducting discovery in aid of execution should take a careful look at R.79.26 which sets out which parts of R. 18 apply, and which by implication, do not. For example, the ability to compel subsequent production of documents under R.18.13 and adjourn the discovery for such production under R.18.18 do not apply to discovery in aid of execution.

### **79.01 - Definition**

In this Rule,

## Rule 79 - Enforcement by Execution Order

“judgment” means an order, or a part of an order, providing for payment or recovery of money including costs;

“sheriff” includes a person who is not a sheriff but is designated in an execution order granted by a judge to carry out the order.

### 79.02 - Scope of Rule 79

This Rule provides for each of the following:

- (a) an execution order to enforce an order for the payment or recovery of money;
- (b) a periodic execution order to enforce an order for regular payments of money in the future;
- (c) discovery of the judgment debtor and others in aid of recovery under an execution order or periodic execution order.

### 79.03 - Judgment binding land

- (1) A person who obtains a judgment and wishes to bind land under the *Land Registration Act* may deliver to the prothonotary a draft document that is entitled “Judgment Certified for Recording Under the *Land Registration Act*” and that conforms with Section 67 of the Act.
- (2) A prothonotary or judge who is satisfied that a judgment debt is paid in full or otherwise extinguished may provide a release of judgment under Section 66 of the Act.

### 79.04 - Judgment binding moveable

A person who obtains a judgment and wishes to bind a moveable under the *Creditors’ Relief Act* and the *Personal Property Security Act* may deliver to the prothonotary a draft document that is entitled “Notice of Judgment” and that conforms with Section 2A of the *Creditors’ Relief Act*.

### 79.05 - Execution order

- (1) A judgment creditor may obtain an execution order by delivering to the office of the prothonotary a draft execution order that conforms with this Rule, or a variation permitted by a judge, no more than five years after the date of the judgment.
- (2) A judge may permit a person to make a motion to the prothonotary for an execution order more than five years after the date of the judgment.
- (3) A prothonotary may require a person who obtains permission, and then delays making the motion for the execution order, to seek fresh permission.
- (4) A motion for permission may be made *ex parte*.

### Annotations

The creditor was awarded significant costs, and took out a judgment in 2001. The execution order was renewed in 2007 and 2008 and was set to expire in 2009. He

made an *ex parte* motion under Rule 79.22 (4), for an order "directing the prothonotary to issue an execution order effective [for] five years". *Held*, fresh execution order granted, which will be effective for five years. Although the new *Rules* have changed the scheme for expiry and extension of execution orders, the changes are not substantial and the threshold in *MacKay v. MacMillan* (decided under the old *Rules*) continues to apply. A proceeding under Rule 79.22(4) (relied on here) in circumstances such as this would not normally fall under Rule 22.03 (*ex parte* motions) and requires notice be given to the debtor; however, Rule 79.05(4) allows the creditor to proceed on an *ex parte* basis. *Smith's Field Manor Development Ltd. et al. v. Campbell*, [2010 NSSC 63](#)

### **79.06 - Exceptions**

- (1) A prothonotary may not issue an execution order in any of the following circumstances, unless a judge permits:
  - (a) the judgment debtor is deceased;
  - (b) enforcement of the judgment is stayed by an order, or by operation of law;
  - (c) the judgment debtor makes an assignment in bankruptcy, a receiving order is made against the judgment debtor, or the judgment debtor otherwise becomes bankrupt, and there is no order declaring that the judgment debt is not stayed or discharged;
  - (d) the order for payment, or recovery, of money is subject to the fulfilment of a condition that the judgment debtor says has not been fulfilled;
  - (e) a change in parties, or the status of a party, causes the judgment creditor to cease to be entitled to enforcement or the judgment debtor to cease to be liable.
- (2) A judgment debtor may request the prothonotary rescind an execution order that was issued in one of the circumstances referred to in Rule 79.06(1) without the permission of a judge.
- (3) A prothonotary may refer a motion for an execution order to a judge.

### **79.07 - Parties**

An execution order may be issued against any judgment debtor, whether or not an execution order is sought against another judgment debtor liable for the same amount or judgment is sought against another party claimed to be liable for the same amount.

### **79.08 - Attachment of debt or other obligation**

- (1) A person to whom an execution order is delivered and who is, or will become, obligated to pay a debt or other liquidable liability to the judgment debtor must make the payment to the sheriff up to the amount of the execution order.
- (2) An execution order does not attach to a debt or other liability owed to the judgment debtor as a trustee for another person.
- (3) Unless a judge orders otherwise, fifteen percent of a judgment debtor's gross wages are payable to the sheriff under an execution order, the rest of the judgment debtor's wages are exempt from execution, and nothing is payable that reduces the judgment debtor's net wages, after deduction of amounts required by law to be deducted, below the applicable of the following minimums:

## Rule 79 - Enforcement by Execution Order

- (a) \$450 a week for a judgment debtor who supports a dependant, as defined in the *Income Tax Act* (Canada);
- (b) \$330 a week for any other judgment debtor.
- (4) An employer may not pay exempt wages to the sheriff under an execution order.
- (5) A deposit-taking corporation must not pay to the sheriff any part of a balance owing to a judgment debtor that, to the knowledge of a person in charge of the account, came from either of the following sources at any time, and the deposit-taking corporation remains liable to the judgment debtor for an amount paid in violation of this Rule:
  - (a) a portion of wages that are exempt under Rule 79.08(3);
  - (b) income, such as income assistance or a Canada Pension Plan payment, that is exempt from execution under legislation.
- (6) The sheriff may make a calculation of the amount to be paid under Rule 79.08(3), and the deposit-taking corporation may rely on the calculation.
- (7) A payment made in compliance with an execution order discharges the payor's liability to the judgment debtor to the extent of the payment, and a payment made to a judgment debtor contrary to an execution order, terms agreed to by the sheriff, or terms ordered by a judge does not discharge the liability.

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### **79.09 - Judgment debtor's joint account**

- (1) A judgment debtor who is a joint account holder, or to whom money is otherwise owed jointly with another person, is presumed to be entitled to an equal share of the joint account, or other joint obligation, unless an interested person proves otherwise.
- (2) The equal share must be calculated by dividing the amount of the joint account, or other joint obligation, by the number of joint account holders or joint obligees.
- (3) A deposit-taking corporation to whom an execution order is delivered must not honour a demand, other than the execution order itself, on a joint account of which the judgment debtor is one of the joint account holders until the interest of the judgment debtor is established in accordance with this Rule 79.09.
- (4) A person may make a motion for an order estimating the maximum interest of a judgment debtor in a joint account and permitting some or all demands to be honoured against the balance.
- (5) The deposit-taking corporation must prepare a written notice of an execution against a joint account, cause the notice to be delivered to the address of the joint account holder showing on the corporation's records, provide a copy to the sheriff and the judgment creditor, and advise the sheriff and the judgment creditor when the notice is delivered to all account holders.
- (6) The notice of execution against a joint account may be delivered in the way statements or notices about the account are delivered and, if the notice is mailed, it is taken to be delivered five days after the day it is delivered to Canada Post.
- (7) The deposit-taking corporation must pay the equal share to the sheriff, unless an interested person files a notice of motion for an order determining the judgment debtor's interest no more than ten days after the day the notice of execution against the joint account is delivered to all account holders.

### **79.10 - Content of notice to joint account holder**

- (1) A notice given by a deposit-taking corporation to a joint account holder must contain the standard heading, be entitled "Notice of Execution Against Joint Account", be dated and signed on behalf of the corporation, be addressed to the judgment creditor and each joint account holder, have a copy of the execution order attached, and include all of the following:
  - (a) a reference to the name and address of each joint account holder, the account number, and the balance;
  - (b) a notice that a copy of the attached execution order was delivered to the corporation;
  - (c) a statement that the judgment debtor is presumed to be entitled to an equal share of the account, unless an interested person proves otherwise;
  - (d) a statement that the presumed share will be paid from the account to the sheriff unless, no more than ten days after the day the notice is delivered, the person to whom it is delivered files and delivers to the corporation, the judgment creditor, the sheriff, and the other joint account holders, a notice of motion and supporting affidavit for an order determining the judgment debtor's interest, or lack of interest, in the account;
  - (e) a statement that the corporation will refuse a withdrawal from, and will not honour a demand on, the account until the equal share is made, a judge permits withdrawals and deposits, or, the judgment debtor's interest is determined by order;
  - (f) a designation of an address for delivery of documents to the deposit-taking corporation;
  - (g) an acknowledgement of the effect of delivery to the designated address and a statement that further contact information is available from the prothonotary.
- (2) The notice of execution against joint account may be in Form 79.10.

#### **Forms**

Notice of Execution against Joint Account(79.10).

### **79.11 - Enforcement against partner or partnership**

- (1) A judgment against a partner named individually under Rule 35.14 of Rule 35 - Parties may not be enforced against the partnership assets, unless a judge determines the extent of the judgment debtor's interest in the assets of the partnership and permits enforcement to that extent.
- (2) A judgment against a partnership named by firm name may not be enforced against non-partnership assets of a member of the partnership, unless a judge who is satisfied on all of the following grants an order for enforcement against the assets of the member:
  - (a) the person against whose assets judgment is sought to be enforced is, or was, a member of the partnership;
  - (b) the member, or former member, is personally liable on the claim made against the partnership for which judgment is recovered;
  - (c) the judgment creditor delivered a written notice to the member, or former member, describing the claim and stating that a judgment on the claim may be enforced against members of the partnership individually;

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- (d) the judgment creditor delivered the notice of possible claim against members to the member, or former member, within a reasonable time.
- (3) An order for enforcement granted by a judge against a partnership or a member may be substantially in the form of an execution order under this Rule 79, or a receivership order under Rule 73 - Receiver.

### 79.12 - Content of execution order (amount)

- (1) An execution order must provide that the order is for recovery of the judgment amount and other charges showing on an attached statement of amount for execution.
- (2) A statement of amount for execution must be divided into the following three parts:
  - (a) Part 1 - Judgment Amount;
  - (b) Part 2 - Total Due to Creditor;
  - (c) Part 3 - Further Charges and Credits.
- (3) Part 1 - Judgment Amount must contain each of the following subtitles and show the following amounts:
  - (a) judgment debt - the total amount allowed by the order for payment or recovery of money including costs and pre-judgment interest;
  - (b) credits - all credits due to the judgment debtor including a payment made, recovery from money paid into court, or an amount realized on security;
  - (c) judgment amount - the total of the judgment debt less credits.
- (4) Part 2 - Total Due to Creditor must contain each of the following subtitles and show the following amounts:
  - (a) registration expenses - the amount paid for recording and registering judgments under the *Land Registration Act*, the *Creditors' Relief Act*, and the *Personal Property Security Act* plus disbursements expended for these purposes;
  - (b) judgment interest - the amount of interest allowed by the *Interest on Judgments Act* from the date of the order for payment or recovery of money to the date of the execution order, or "nil" if the dates are the same;
  - (c) judgment amount - taken from Part 1;
  - (d) total due to creditor - totalling the expenses, interest, and judgment amount.
- (5) Part 3 - Further Charges and Credits must contain each of the following subtitles, with the amount left blank for insertion of the following amounts by the sheriff:
  - (a) sheriff's fees and expenses - fees due to the sheriff calculated by reference to Schedule "B" of the *Costs and Fees Act* and regulations under that Act and all expenses incurred by the sheriff, or on behalf of the sheriff, to carry out the order;
  - (b) further judgment interest - calculated from the date of the execution order to the date of return or satisfaction;
  - (c) further credits - the total of all credits due to the judgment debtor after the date of the execution order;
  - (d) balance - to be calculated to the date of the return or, if the order is satisfied, stated as "nil".
- (6) The execution order may not be enforced for an amount greater than the amounts stated in the statement or superceding statement.

### **79.13 - Content of execution order (sale of land)**

An execution order may authorize the sheriff to take possession of land to be sold in accordance with the Sale of Land Under Execution Act.

### **79.14 - Content of execution order (liquidation of other property)**

- (1) An execution order may authorize the sheriff to seize, otherwise take control of, and accept as a receiver property in which the judgment debtor has an interest including all of the following, but not including property that is exempt from execution:
  - (a) a moveable;
  - (b) currency;
  - (c) a share, bond, debenture, or other security;
  - (d) a legacy;
  - (e) a debt, rent, wages, or other demand due or accruing due at any time.
- (2) The order may authorize the sheriff to seize the property, or otherwise take control of it, from the judgment debtor or any other person, and to come on land, open a building, take control of a moveable, and break a lock or other barrier to effect the seizure.
- (3) The order may authorize the sheriff to cause a copy of the execution order to be delivered to a person who has control of a moveable the sheriff cannot conveniently seize, or to a person who is or may become liable to make a payment to the judgment debtor, and provide that the moveable is taken to be seized and the debt to be attached when the copy is delivered.
- (4) The order may provide that the person who receives a copy of the order is released from liability to make a payment to, or hold a moveable on behalf of, the judgment debtor when any of the following occurs:
  - (a) the person makes the payment to the sheriff;
  - (b) the sheriff seizes the moveable, or sells the moveable without a seizure;
  - (c) the person complies with terms for payment, seizure, or sale agreed to by the sheriff or set by further order.
- (5) The order must specifically exclude exempted wages from the amount to be paid from the judgment debtor's wages.
- (6) The order may authorize the sheriff to pay all reasonable expenses incurred to carry out the order.
- (7) The order may provide that the sheriff need not seize property before the sheriff receives an advance from, or agrees to terms with, the judgment creditor for the expenses of seizure, storage, protection, and sale.

### **79.15 - Content of execution order (injunctions)**

An execution order may require a judgment debtor and any person who has control of property in which the judgment debtor has an interest or who is or becomes obligated to pay a debt or other liquidable demand to the judgment debtor to do any of the following:

- (a) refrain from giving up control of the property or pay the debt or other demand except as permitted by the sheriff, the execution order, or another order;

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- (b) provide the sheriff with access to property and not to obstruct seizure;
- (c) pay a debt or other demand to the sheriff, unless the sheriff directs or the order provides otherwise;
- (d) comply with a direction by the sheriff to liquidate a liquidable share, bond, debenture, or other security;
- (e) pay wages, or wages on deposit, to the sheriff in accordance with Rule 79.08;
- (f) pay funds in a joint account in accordance with Rule 79.09.
- (g) refrain from terminating the employment of, demoting, reducing the wages of, or otherwise penalizing the judgment debtor by reason of the execution order;
- (h) fully answer any question asked by the sheriff about the property, debt, or other demand.

### **79.16 - Content of execution order (duties of sheriff and directions)**

- (1) In addition to the duties under the Creditor's Relief Act, an execution order may require the sheriff to do any of the following:
  - (a) cause a copy of the execution order to be delivered to a person from whom property is seized, personally if the person is present when the seizure is made or, otherwise, by registered mail to the person's last known address;
  - (b) cause a copy of the execution order to be delivered personally to a person who may be, or become, liable to pay a debt or other liquidable obligation to the judgment debtor;
  - (c) immediately following a seizure, prepare an inventory of the property seized and include an estimate of the value of each item;
  - (d) sell the property by public auction, or by another method authorized by a further order;
  - (e) cause the sale of the seized property to be advertised;
  - (f) seize no more property than the sheriff estimates is sufficient to fully satisfy the amount of the execution order and any other execution order against the same judgment debtor;
  - (g) pay money, or deliver property, not required to satisfy an execution to the judgment debtor, unless it is appropriate to make a motion under Rule 46 - Payment into Court or Rule 76 - Interpleader.
- (2) An execution order may authorize the sheriff to make a motion to a judge for directions.
- (3) A sheriff who seeks directions may be represented by counsel or act on the sheriff's own behalf.

### **79.17 - Form of execution order**

- (1) An execution order must conform with this Rule 79, contain one of the following headings, state the name and last known address of the judgment debtor, be issued by the prothonotary, and have a statement of amount for execution attached:
  - (a) the standard heading in the proceeding in which the judgment was issued;

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- (b) the heading in the notice of application, or *ex parte* application, for registration under the *Reciprocal Enforcement of Judgments Act*, for an execution order to enforce a judgment registered in that manner;
  - (c) the heading in the *ex parte* application or notice of application for any other execution order to enforce the order of another court or tribunal, followed by the style used by the other court or tribunal.
- (2) The execution order may be in Form 79.17A, and the statement of amount for execution may be in Form 79.17B.

### Forms

Statement of Amount for Execution(79.17B), Execution Order(79.17A).

### 79.18 - Periodic execution order

- (1) A party who obtains an order for periodic payment of money may make a motion to the prothonotary for a periodic execution order enforceable against money to be paid at regular intervals to the judgment debtor.
- (2) A periodic execution order may be issued in addition to an execution order.
- (3) A person to whom a periodic execution order is delivered and who is, or becomes, obligated to pay money at regular intervals to the judgment debtor must pay the money to the sheriff except for exempt amounts.
- (4) A periodic execution order does not apply to a payment made to the judgment debtor as a trustee for another person.
- (5) Wages in the amounts referred to in Rule 79.08 are exempted from execution under a periodic execution order, unless the order is certified to be for family maintenance or support.
- (6) A periodic execution order for payment of family maintenance or support that is in arrears may include an additional twenty-five percent to be applied against the arrears.
- (7) A sheriff who receives more than enough to cover the amount of a periodic execution order, sheriff's fees and expenses, and any balance owing on an execution order, may pay the excess to the judgment debtor.

### 79.19 - Content of periodic execution order

- (1) A periodic execution order must contain one of the standard headings required for an execution order, be entitled "Periodic Execution Order", be issued by the prothonotary, and include all of the following:
  - (a) a statement showing the name and address of the judgment debtor;
  - (b) statements showing the amount ordered to be paid periodically, when the amount comes due, and the termination event or date if there is one;
  - (c) a certificate of whether the order is for family maintenance or support;
  - (d) if the order is also for the payment of arrears of family maintenance or support, a statement of the amount in arrears;
  - (e) an injunction requiring a person to whom a copy of the order is delivered and who is or becomes periodically obligated to the judgment debtor to pay, out of the periodic obligation, the amount required by the order;

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- (f) a requirement to pay the certified amount of the periodic payment or, if the order is certified to include arrears of family maintenance or support, the periodic payment plus, until the arrears are paid, another twenty-five percent;
  - (g) a statement of the amount of wages exempt from execution;
  - (h) a notice that failure to comply may be punished under Rule 89 - Contempt and that payment to the judgment debtor in contravention of the periodic execution order does not discharge the liability;
  - (i) a statement of when the order expires.
- (2) The periodic execution order may be in Form 79.19.

### Forms

Periodic Execution Order (79.19).

### 79.20 - Return of execution order

- (1) A sheriff who has no information on a source for recovery, or further recovery, under an execution order may return the order to the judgment creditor with a report of any recovery realized under the order.
- (2) The judgment creditor may deliver the returned order to the prothonotary, with any report by the sheriff, and request a superceding execution order.

### 79.21 - Duplicate and superceding execution orders

- (1) A prothonotary may issue duplicate execution orders for delivery to more than one sheriff.
- (2) A prothonotary may issue a superceding execution order with a new statement of amount for execution to correct an error, or to bring the amount up-to-date when an execution order is returned by the sheriff.
- (3) A superceding execution order may be in the same form as an execution order, except it must be entitled "Execution Order Superceding Order Dated [date]".

### 79.22 - Stay and expiry of execution order

- (1) A judge may stay enforcement of an execution order or a periodic execution order, conditionally or unconditionally, and on any terms the judge sees fit.
- (2) A judgment debtor who relies on an asset, such as invested funds, for regular support of the judgment debtor or the debtor's dependants may make a motion to stay enforcement against such part of the asset, or such part of income paid periodically from the asset, as is needed for the regular support of the judgment debtor or the debtor's dependants.
- (3) A judge who stays enforcement against an asset relied on for regular support may consider limiting the stay to the amount by which wages are exempt from execution.
- (4) An execution order and a superceding execution order expire five years after the date the order is issued, unless a judge extends the period.
- (5) A periodic execution order expires when the periodic obligation ends.

- (6) A property interest obtained by operation of an execution order or a superceding execution order is not affected by the expiry of the order.

*N.S. Gaz. Pt. 1*, [12/16/2009](#)

### Annotations

This decision arose under the *Civil Procedure Rules (1972)*. The judgment creditor made an assignment in bankruptcy. The trustee made no effort to collect. The debt was assigned to the plaintiff several years after the creditor's discharge from bankruptcy. He was granted an *ex parte* order renewing the execution order. The evidence showed little had been done to enforce the judgment. The defendant applied to stay the execution order and sheriff's sale, or to set aside the default judgment so that he could defend the claim on the merits. The defendant's wife, a joint owner, wanted to intervene on the basis of prejudice to her interest. *Held*, stay granted; application to set aside the default judgment denied. Although a chambers judge may use a low threshold when granting an *ex parte* order for leave to renew an execution order, a more rigorous standard applies when there is an application to revisit that order. In this circumstance, the creditor will be required to account for the delay in collection and the court must balance this against the prejudice to the debtor. Prejudice involving a third party can be considered. There was no adequate explanation for the delay here. Considering the facts, and the prejudice to the defendant's wife given her joint interest, it is appropriate to set aside the *ex parte* order granting leave to renew the execution order. The appropriate route would be to reappoint the trustee under the *Bankruptcy and Insolvency Act*.

*MacKay et al. v. MacMillan*, [2009 NSSC 330](#)

The creditor was awarded significant costs, and took out a judgment in 2001. The execution order was renewed in 2007 and 2008 and was set to expire in 2009. He made an *ex parte* motion under Rule 79.22 (4), for an order "directing the prothonotary to issue an execution order effective [for] five years". *Held*, fresh execution order granted, which will be effective for five years. Although the new *Rules* have changed the scheme for expiry and extension of execution orders, the changes are not substantial and the threshold in *MacKay v. MacMillan* (decided under the old *Rules*) continues to apply. A proceeding under Rule 79.22(4) (relied on here) in circumstances such as this would not normally fall under Rule 22.03 (*ex parte* motions) and requires notice be given to the debtor; however, Rule 79.05(4) allows the creditor to proceed on an *ex parte* basis. *Smith's Field Manor Development Ltd. et al. v. Campbell*, [2010 NSSC 63](#)

### 79.23 - Discovery of debtor in aid of execution

- (1) A judgment creditor who provides the representations required by Rule 79.23(2) may request that the prothonotary issue a discovery subpoena in aid of execution addressed to any of the following persons:
- (a) a judgment debtor who is an individual;
  - (b) a person who holds office in, manages all or part of the business of, or is a director of a corporate judgment debtor;
  - (c) if a corporate judgment debtor ceases to have any officer, manager, or director, each person who last held office in, managed, or was a director of the corporation.
- (2) A judgment creditor who makes a motion for a discovery subpoena in aid of execution must attach to the draft subpoena both of the following representations:

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- (a) that the person to whom the subpoena is addressed is the judgment debtor, that the person is an officer, manager, or director of the judgment debtor, or that there is no officer, manager, or director and the person is a former officer, manager, or director.
- (b) that the discovery is necessary for determining whether there are assets available for execution, to locate assets for execution, or to identify a debt or other liquidable obligation for attachment and execution.
- (3) The subpoena must contain the standard heading, be entitled "Discovery Subpoena in Aid of Execution", be issued by the prothonotary, and include all of the following:
  - (a) the name of the witness and of the community in which the witness resides;
  - (b) a description of the judgment including the names of the judgment creditor and debtor, the date of the judgment, and the amount;
  - (c) requirements that the judgment debtor answer questions properly asked and bring, or provide access to, described documents, electronic information, or other things;
  - (d) the time, date, and place of the discovery;
  - (e) a warning that failure to obey the subpoena may be punished as contempt of court.
- (4) The subpoena may be in Form 79.23A, and the representation for a subpoena to a judgment debtor may be in Form 79.23B.
- (5) A judge may set aside a discovery subpoena in aid of execution.

### Forms

Discovery Subpoena in Aid of Execution (79.23A), Representations (79.23B).

### 79.24 - Discovery of others

A judge who is satisfied on both of the following may order discovery in aid of execution of a person who is not a judgment debtor:

- (a) the person likely has information that will aid enforcement of an execution order;
- (b) the person will not provide the information, or will not fully or reliably provide the information, in an interview.

### 79.25 - Delivery of subpoena and witness fees

- (1) A discovery subpoena in aid of execution, or an order for discovery in aid of execution, must be delivered to the witness personally.
- (2) Fees and travel expenses in the same amount required by the *Costs and Fees Act* to be paid to a witness for attending a civil trial or hearing must be delivered to a witness who is not a judgment debtor, or a present or former officer, manager, or director of a corporate judgment debtor.
- (3) The subpoena, or the order and payment, must be delivered no less than ten days before the day of the discovery or the witness is not obliged to attend the discovery.

**79.26 - Conduct of discovery in aid of execution**

- (1) Rules 18.13(1) and (2), 18.14, 18.15, 18.16(3) to (5), 18.17, 18.22, and 18.23, of Rule 18 - Discovery, apply to a discovery in aid of execution, unless a judge orders otherwise.
- (2) A judge may give directions for the conduct of a discovery in aid of execution, and may award costs of the discovery.

## **Rule 80 - Other Enforcement Orders**

### **Educational Notes**

This Rule specifies that both interlocutory and final orders may be enforced by further orders. The previous enforcement methods of Recovery Orders, Receivership Orders, Injunctions, and Contempt Orders remain (see R.73-75 and R.89 and R.41-46 addressing temporary remedies.) There are two new provisions for putting a party in possession of property or removing a person from land (R.80.02(1)(b)) and authorizing a third person to do an act required to be done by a party (such as executing a conveyance) (R.80.02(1)(c)). Rule 80 also provides for discovery in aid of enforcement.

### **80.01 - Scope of Rule 80**

This Rule provides for enforcement of orders other than by execution order or periodic execution order.

### **80.02 - Enforcement**

- (1) An interlocutory or final order may be enforced by further order, including an order for any of the following:
  - (a) seizure and protection of property;
  - (b) putting a party in possession of property such as an order that provides for delivery of property to a party or that requires a sheriff, receiver, or other person to remove a person from land;
  - (c) authorizing a person to do an act required to be done by a party under the order, such as executing a conveyance, making a direction for transfer of a licence, or authorizing access to premises, documents, or electronic information;
  - (d) receivership or an injunction;
  - (e) an order under Rule 88 - Contempt.
- (2) An enforcement order that authorizes a person to do an act required to be done by a party may provide that the party is bound by the action of the authorized person.

### **80.03 - Discovery and production to aid enforcement**

- (1) A judge who is satisfied that a person is likely to have knowledge that will assist enforcement of an order may order discovery of the person in aid of enforcement.
- (2) A judge who is satisfied a person is likely to be in control of a document, electronic information, or other thing that is a subject of an order or is a likely source of information that will assist enforcement may order discovery of the person in aid of enforcement or production of the document, electronic information, or other thing.

## **Rule 81 - Reciprocal Enforcement**

### **Educational Notes**

This Rule provides procedures for registration and enforcement of a judgment from a reciprocating state that complement those in the *Reciprocal Enforcement of Judgments Act*. There are no significant changes to the previous practice, except that there is now a prescribed form of notice (Form 81.03) to the judgment debtor.

### **81.01 - Scope of Rule 81**

- (1) This Rule is made under, and provides procedures complementary to those in, the *Reciprocal Enforcement of Judgments Act*.
- (2) This Rule does not affect enforcement, outside of the Act, of an order made by a court in another province or one of the territories, or of a non-penal order made by a foreign judicial authority.
- (3) These Rules apply to an application for registration, and for enforcement of a registered judgment, unless a Rule is inconsistent with a provision in the Act or this Rule.

### **81.02 - Application for registration**

A person who obtains a judgment in a reciprocating state and wishes to apply for registration of the judgment under the *Reciprocal Enforcement of Judgments Act* may start the application in one of the following ways:

- (a) for an *ex parte* registration under subsection 3(2) of the Act, by filing an *ex parte* application as provided for in Rule 5 - Application;
- (b) for registration on notice under the Act, by filing a notice of application as provided for in Rule 5 - Application.

### **81.03 - Notice after *ex parte* registration**

- (1) The notice of registration required by the *Reciprocal Enforcement of Judgments Act* to be served after *ex parte* registration may be served in the same manner as notice of a proceeding is given under Rule 31 - Notice.
- (2) The notice of registration must contain the standard heading, be entitled "Notice of *Ex Parte* Registration", be addressed to the judgment debtor, be dated and signed, and include all of the following:
  - (a) a statement that a judgment obtained against the judgment debtor in the reciprocating state is registered in Nova Scotia and may be enforced as a judgment of the court;
  - (b) details of the judgment;
  - (c) details of the order for registration;
  - (d) a statement of the judgment debtor's right to make a motion to set aside the registration, the grounds in subsection 3(5) of the *Reciprocal Enforcement of*

## Rule 81 - Reciprocal Enforcement

*Judgments Act*, and the time provided in the Act within which the motion must be made;

- (e) the address designated by the judgment creditor in the *ex parte* application;
  - (f) a statement that a document delivered to the designated address is considered received by the judgment creditor on delivery.
  - (g) an acknowledgement of the effect of delivery to the designated address and a statement that further contact information is available from the prothonotary.
- (3) The notice of registration may be in Form 81.03.

*N.S. Gaz. Pt. 1, 06/16/2010*

### Forms

Notice of Ex Parte Registration (81.03).

### 81.04 - Motion to set aside

A judgment debtor who wishes to set aside an *ex parte* registration may make a motion in the proceeding started by the judgment creditor.

### 81.05 - Enforcement

- (1) A judgment creditor who registers a judgment may make a motion for an order to enforce the judgment under Rule 78 - Order, or Rule 79 - Enforcement by Execution Order.
- (2) An execution order to enforce a judgment registered by *ex parte* order must allow for the notice period required by clause 6(a) of the *Reciprocal Enforcement of Judgments Act*.