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## Part 17 - Administration

### Rule 82 - Administration of Civil Proceedings

#### Educational Notes

##### *How this Rule Works*

This Rule addresses fax filing (R.82.11). It also allows for e-filing once the court has a system that can accommodate it.

Rule 82.20 gives the prothonotary broad powers to do things on consent, including amending a document, releasing an exhibit, extending or shortening a deadline in the Rules, or excusing strict compliance.

Rule 82.17 requires a party to notify the prothonotary when a proceeding settles or cannot be continued. Rule 82.18 allows a judge to dismiss a proceeding for want of prosecution. Rule 82.19 allows a designated judge to complete the work of a seized judge who cannot complete a trial or hearing.

Rule 82.22 limits a judge's power to re-open proceedings or vary a final order to situations involving correction of errors, extension of a deadline in the order, where legislation permits variation, or where the text of the order applies it in circumstances that were not intended. The power to provide for something that should have been adjudicated upon is found in R.78.08. Rule 82.22(2) allows a party to move to reopen a case to present further evidence prior to the final order and restricts reopening after a final order to only those situations recognized in law.

##### *Highlights of Changes*

*Proper format for style of cause and transcripts* - Rule 82.09 deals with the proper format of headings. Rule 82.09(6) directs that a party's title (e.g. plaintiff) not be changed for a counterclaim or crossclaim, or on a motion. Improper heading changes were of concern to the court. Rule 82 also deals with the proper format of discovery and commission transcripts (R.82.06(3)).

*Protection of personal information* - Rule 82.07 directs that documents filed with the court should not contain more personal information about another person than is necessary. In particular, it is sufficient to refer to a person's community rather than his or her address. This restriction is consistent with the current emphasis on privacy and helps to minimize the risk of court documents being used to facilitate identity theft.

*Filing of authorized documents* - Rule 82.05 states that the prothonotary must accept for filing an authorized document that complies with the Rules. Non-compliant documents may be accepted conditionally or otherwise, and will be accepted even if non-compliant, where a substantive right is at stake, such as imminent expiry of a limitation period. Non-payment of fees is not listed as a reason for rejecting a document, except in the case of a conditionally accepted fax-filing (R.82.11(5)).

*Documents not authorized to be filed* - Rule 82.05(4) sets out a number of documents that are not authorized to be filed under the Rules and should not be filed with the court:

- a. **Formal offers to settle** made under R.10;

- b. **Affidavit for disclosure of documents, or the documents disclosed** under R.15 or R.16;
- c. **Documents disclosed under an order for production;**
- d. **Interrogatories or responses** under R.19;
- e. **Requests for admissions or responses** under R.20;
- f. **Contingency fee agreements** made under R.77;
- g. **Notices of Intended Action** required by legislation to be delivered but not filed.

Rule 82.05(5) clarifies that unauthorized does not mean inadmissible.

*Practice Tips*

The direction in R.82.05(4) not to file certain documents is an alteration of previous practice with respect to lists of documents (but not the documents themselves) and contingency fee agreements. There is a practice of filing Notices of Intended Action with the court, but s.18 of the *Proceedings against the Crown Act*, R.S.N.S. 1989, c. 360 and s.512 of the *Municipal Government Act*, S.N.S. 1998, c. 18 do not require filing with the court.

### **82.01 - Scope of Rule 82**

This Rule provides generally for administration of civil proceedings in the Supreme Court of Nova Scotia, to the extent that provision is not made by another Rule.

### **82.02 - Responsibility of Chief Justice**

- (1) The Chief Justice has responsibility for the administration of civil proceedings in the Supreme Court of Nova Scotia, except as provided in these Rules or by general order of the court.
- (2) The Chief Justice may delegate responsibility to an Associate Chief Justice or another judge, including delegating to a resident judge the power to give directions to a prothonotary in the district for which the judge is appointed.

### **82.03 - Responsibilities of prothonotary**

- (1) The prothonotary has responsibility to do all of the following:
  - (a) first, to follow a direction of the Chief Justice and comply with an order imposing a responsibility on the prothonotary;
  - (b) second, and subject to the first responsibility, to act in accordance with, and enforce, these Rules;
  - (c) third, and subject to the first and second responsibilities, to manage the administration of civil proceedings in the place for which the prothonotary is appointed.
- (2) The prothonotary may fulfill a responsibility by making requests of, and working with, the court administrator and other public officials who fulfill government responsibilities to provide necessary services, resources, and other assistance to the court.

### **82.04 - Delegation by prothonotary**

- (1) The prothonotary may delegate a power or assign a duty to a deputy prothonotary, except for each of the following:
  - (a) making a motion to a judge for a dismissal under Rule 4 - Action, Rule 5 - Application, or Rule 7 - Judicial Review and Appeal, or for a change of place under Rule 32 - Place of Proceedings;
  - (b) the hearing and determination of a motion made on notice under Rule 30 - Motion to Prothonotary;
  - (c) making an order under Rule 43 - Temporary Recovery Order or Rule 44 - Attachment;
  - (d) issuing a letter of request under Rule 56 - Commission Evidence;
  - (e) granting an order confirming sale under Rule 72 - Mortgages;
  - (f) making a report to the Chief Justice or the court as a whole;
  - (g) accepting, or refusing to accept, a document for filing as provided in Rule 82.05;
  - (h) acting as official referee under Section 53 of the *Judicature Act* ;
  - (i) complying with an order that requires or permits the prothonotary to do something and does not permit delegation.
- (2) The prothonotary for Halifax may delegate to a scheduler designated by the Chief Justice a power to appoint a time, date, or place for conduct of a trial, hearing, or other business by a judge.
- (3) The prothonotary who has a duty to appoint a time, date, or place for conduct of business by a judge outside Halifax may assign the duty to a scheduler designated by the Chief Justice or by a judge resident in the judicial district that includes the place for which the prothonotary is appointed.
- (4) The prothonotary may delegate or assign to a court reporter a power or duty involving the conduct of the trial or hearing of a proceeding, hearing of a motion, or any other business of the court conducted on record.
- (5) The prothonotary who is, or expects to be, absent for vacation or for another reason may designate a prothonotary appointed for another place to act as the prothonotary.

### **82.05 - Filing documents**

- (1) The prothonotary must accept for filing a document that is authorized by a Rule to be filed, and that conforms with a Rule about its content.
- (2) The prothonotary may accept for filing a document that does not conform with a Rule about the content of the document and must do so when both of the following are brought to the attention of the prothonotary:
  - (a) the document is intended to start a proceeding or make a cross-claim, counterclaim, or third party claim in an action;
  - (b) the person seeking to file the document may lose a substantive right, such as a claim to which the Limitation of Actions Act may apply, unless the document is filed.
- (3) A prothonotary who accepts for filing a document that does not conform with a Rule about the content of the document may accept the document conditionally, provide the conditions in writing to the person who files the document, and return the document if a condition is not fulfilled.

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- (4) The prothonotary may only file a document that is authorized to be filed by these Rules, and each of the following is an example of a document that is not authorized by these Rules to be filed:
  - (a) a formal offer under Rule 10 - Settlement;
  - (b) an affidavit for disclosure, or documents disclosed, under Rule 15 - Disclosure of Documents or Rule 16 - Disclosure of Electronic Information;
  - (c) documents disclosed under an order for production;
  - (d) interrogatories or a response under Rule 19 - Interrogatories;
  - (e) a request or response under Rule 20 - Admission;
  - (f) a contingency fee agreement under Rule 77 - Costs;
  - (g) a notice of intended action required by legislation to be delivered, but not to be filed.
- (5) The absence of authority to file a document does not imply that it cannot be exhibited to an affidavit or admitted as evidence.

### **82.06 - Format of document**

- (1) A document authorized to be filed, or required to be delivered to a party, under these Rules must, in addition to conforming with a Rule about the content of the document, conform with each of the following:
  - (a) the document must be printed, or if it is permitted to be filed electronically it must be capable of being reproduced, on eight and a half by eleven inch paper;
  - (b) the document must have margins, spaces, upper and lower case, size and style of print or font, numbered pages, and a general organization that makes it readily readable;
  - (c) no backer is to be attached.
- (2) The prothonotary may refuse to file a document that does not conform with the format requirements.
- (3) A discovery transcript must contain the standard heading, be entitled "Transcript of the Discovery Examination of" including the witness' name, and conform with the requirements for a document to be filed and each of the following further requirements:
  - (a) a page of transcribed testimony must be titled with the name of the witness and indicate as part of the title whether the witness is being examined directly, by cross-examination, or by redirect examination;
  - (b) each question must be preceded by the letter "Q", and each answer by "A";
  - (c) a transcript of something other than testimony must be titled submission, ruling, direction, instruction, discussion, or other business;
  - (d) the title must appear at the top of each page of a printed transcript, or at similar convenient places in a transcript that is produced and permitted to be filed electronically;
  - (e) each page or question must be numbered;
  - (f) a printed transcript must be conveniently bound, and have a cover and a blank back.
- (4) A transcript of evidence to be introduced at trial, such as a transcript of evidence given on commission, must conform with the requirements for a discovery transcript except for the title.

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- (5) A copy of a document to be delivered to a party must be as readable as the filed version of the document.

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### **82.07 - Restrict personal information**

- (1) A person must not file a document that contains more personal information about another person than is necessary to accomplish the purpose of the document.
- (2) A document that identifies an individual may refer to the person's name and the name of the community in which the person resides or does business rather than an address.

### **82.08 - Provide personal information for contact**

- (1) A person who files a document for the first time in a proceeding must provide information to the prothonotary by which the prothonotary or a party may contact either the person or counsel who represents the person.
- (2) The contact information must include a mailing address, which may be the designated address, and any other means by which the person or counsel is regularly contacted by others, such as a telephone number, an e-mail address, and a fax number.
- (3) The party or counsel must advise the prothonotary of a change in the contact information.
- (4) Contact information is accessible only as provided in Rule 85.09, of Rule 85 - Access to Court Records.

### **82.09 - Headings**

- (1) A party who establishes the heading for a proceeding must put the year the proceeding is commenced in the upper left corner and, in the upper right corner, the registry code under Rule 32 – Place of Proceeding, followed by the abbreviation "No.", followed by a blank for the prothonotary to assign a proceeding number.
- (2) The headings for each of the following originating documents must conform with the following forms:

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<b>Originating Document</b>	<b>Rule</b>	<b>Form</b>
Notice of Action	4.02	82.09A
Notice of Action for Debt	4.03	82.09A
<i>Ex Parte</i> Application	5.02	82.09B
Notice of Application in Chambers	5.03	82.09C
Notice of Application in Court	5.07	82.09C
Notice for Judicial Review	7.05	82.09C
Notice for <i>Habeas Corpus</i>	7.12	82.09C
Notice of Appeal	7.19	82.09D
Notice of Summary Conviction Appeal	63.05	63.04
Application for Reduction of Parole Ineligibility	65.04	65.03
Election Petition	69.02	82.09E
Notice of Child Protection Application	60A.03	82.09G
Application for Removal from Child Abuse Register	60A.32	82.09H
Notice of Adult Protection Application	60A.39	82.09I
Notice of Adult Protection Application (After Removal)	60A.40	82.09I
Application for Adoption with Consents	61.02	82.09J
Notice of Application	59.07	82.09K
Petition for Divorce	59.09	82.09L
Notice of Variation Application	59.12	82.09K
Application for Divorce by Agreement	59.45	82.09M
Joint Application for Divorce	59.46	82.09N
Petition for Divorce	62.09	82.09O
Application for Divorce by Agreement	62.14	82.09P
Joint Application for Divorce	62.15	82.09Q.

- (3) A party who files one of the following documents must vary the heading established by the party who files the originating document in the following ways:
- (a) a notice of claim against third party, by composing the heading to conform with Form 82.09F;
  - (b) a notice of claim against a further party, by naming and giving the title of fourth or further parties and otherwise conforming with Form 82.09F;
  - (c) the statement of a litigation guardian who is not named when the proceeding is started, by including the name and title of the litigation guardian after the words "by her" or "by his";
  - (d) an amended notice that adds or deletes a party, by adding or deleting the name of the party.

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- (4) All further documents for filing must contain the standard heading established under Rule 82.09(2), varied under Rule 82.09(3), or permitted under Rule 83 - Amendment.
- (5) The year at the upper left of the standard heading is the commencement year, and it is not to be changed in subsequent years.
- (6) The title of a party, such as "Plaintiff" or "Defendant", is not to be changed for a counterclaim or crossclaim, or to denote who is making a motion.
- (7) A judge may prescribe or vary the heading to be used in a proceeding.

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### Forms

Headings (82.09C), Headings(82.09L), Headings(82.09I), Headings(82.09P), Headings (82.09D), Headings(82.09H), Headings(82.09K), Headings(82.09Q), Headings (82.09F), Headings (82.09E), Headings(82.09G), Headings(82.09A), Headings(82.09O), Headings(82.09M), Headings(82.09J), Headings (82.09B), Headings(82.09N).

### 82.10 - Order returning document

A judge may order a document that does not conform with a Rule be returned to the party who prepared the document, unless the document is part of a record on which the prothonotary or a judge made a decision.

### 82.11 - Fax filing

- (1) A document may be delivered by fax to the office of the prothonotary for filing.
- (2) The faxed document must be accompanied by a cover page that includes all of the following information:
  - (a) the name, address, and telephone number of the person sending the document;
  - (b) the date it is sent;
  - (c) the names of the parties and the registry number;
  - (d) the total number of the pages being faxed, including the cover;
  - (e) the name and telephone number of a person to contact about a transmission problem;
  - (f) an undertaking to immediately pay a fee that must be paid for filing a document.
- (3) The prothonotary may accept a faxed document for filing that is complete and readable.
- (4) The prothonotary may accept the faxed document when it is received during the court's business hours or on the next business day after the document is received outside business hours.
- (5) The prothonotary may make the filing of a faxed document conditional on the payment of a required fee, and return the document if the fee remains unpaid for ten days after the day of the conditional filing.
- (6) A faxed document that is returned, because the fee is unpaid, is taken to have never been filed.

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- (7) A prothonotary who rejects a faxed document on the ground that it does not conform with a Rule about content or format may return the document by mail, but the prothonotary must notify the sender by fax that the document is being returned.
- (8) A person who files an affidavit by fax must replace the affidavit with the original, and the prothonotary or a judge may direct that another kind of document be replaced by the original.

### **82.12 - Electronic filing**

- (1) The prothonotary may not accept an electronic filing unless the court issues a general order approving a system for electronic filing that is securely in the control of the court.
- (2) A judge may authorize delivery in electronic form of a document that is to be delivered to the judge.

### **82.13 - Filing written decision and publication**

- (1) A judge who signs a reserved decision must deliver it to the prothonotary after staff in the judge's office have had an opportunity to notify the parties of the decision.
- (2) A judge who signs a written version of a decision given orally must immediately deliver it to the prothonotary.
- (3) The judge who signs a decision may provide a summary for the assistance of publishers and the media.

### **82.14 - Document starting proceeding**

- (1) The prothonotary at Halifax must organize, and keep control of, a system for assigning a proceeding number that uniquely identifies each proceeding started in Nova Scotia.
- (2) When a proceeding is started, the prothonotary to whose office the originating document is delivered must register the proceeding by assigning a proceeding number to it, putting the number after the registry code, impressing the seal of the court on the document, certifying the date of filing on the original, filing the original, and making the entries in the civil proceedings list required by Rule 84 - Court Records.
- (3) Numbers assigned for registration of divorces must be included in the registry number after the letters that make up the registry code and before the proceeding number, and the assigned numbers are as follows:

1201	Halifax
1202	Amherst
1203	Bridgewater
1204	Kentville
1205	Pictou
1206	Sydney
1207	Truro
1208	Yarmouth
1209	Annapolis Royal

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1210	Antigonish
1213	Digby
1217	Port Hawkesbury.

- (4) The party who starts a proceeding must provide, and the prothonotary must certify, one copy of the originating document for each person entitled to notice of the proceeding.

### **82.15 - Filing miscellaneous document**

A document permitted to be filed by a Rule or legislation, but which is not interlocutory and does not start a proceeding, must contain a heading or have a heading attached as a cover, and the heading must include all of the following:

- (a) the year of the filing;
- (b) a registry number, as if the document starts a proceeding;
- (c) a reference to the Rule or legislation that permits it to be filed without a proceeding having been started;
- (d) a title indicating the purpose of the document;
- (e) the name of the person who files the document and of persons whose rights may be affected as a result of the filing.

### **82.16 - Money in court**

- (1) Money that is to be paid into court must be paid to the prothonotary.
- (2) The prothonotary must deposit the money in an interest bearing account, unless a judge orders otherwise.
- (3) A judge may order that the prothonotary deposit the money for a term.
- (4) The prothonotary must report to the court and notify the parties when the money is paid to the Minister of Finance under Section 5 of the *Payment into Court Act*.

### **82.17 - Duty of party when proceeding no longer required**

A party who settles all issues in a proceeding or becomes aware that a proceeding cannot continue, such as a proceeding that is stayed by operation of the *Bankruptcy and Insolvency Act*, must notify the prothonotary and state whether the party intends to seek an order disposing of the proceeding, file a notice of discontinuance, take some other step, or take no further step in the proceeding.

### **82.18 - Dismissal for want of prosecution**

A judge may dismiss a proceeding that is not brought to trial or hearing in a reasonable time.

**82.19 - Judge designated to complete work of another**

- (1) The Chief Justice may designate a judge to complete the work of a judge who presides at a trial or hearing and ceases to be able to complete the trial or hearing or to render a decision following a completed trial or hearing.
- (2) The designated judge may do any of the following:
  - (a) rely on the record and complete the trial or hearing;
  - (b) rely on the record of a completed trial or hearing, give a decision, and grant an order;
  - (c) require additional evidence or submissions before completing the trial or hearing, giving a decision, or granting an order;
  - (d) give directions necessary for completion of the trial or hearing.

**82.20 - Orders by prothonotary without judge's approval**

- (1) In addition to an order authorized to be made by a prothonotary under a Rule outside this Rule 82.20 or legislation, the prothonotary may make any of the following kinds of orders without the approval of a judge:
  - (a) a subpoena;
  - (b) an *ex parte* order confirming a sale under an order for foreclosure, sale, and possession;
  - (c) an order releasing a judgment, or the binding effect of a judgment, that has been satisfied.
- (2) The prothonotary may, with the written consent of each party entitled to notice, make an order that does any of the following:
  - (a) permits a court document to be amended;
  - (b) appoints a commissioner to take evidence or authorizes a letter requesting assistance with compelling a witness to attend before the commissioner;
  - (c) releases an exhibit;
  - (d) confirms an order made orally that has been recorded and logged in court records;
  - (e) dismisses a proceeding, unless a party is represented by a guardian;
  - (f) extends or shortens the time for doing something under a Rule or, otherwise, excuses strict compliance with a Rule.

**82.21 - Issuing order approved by judge or made by prothonotary**

- (1) The prothonotary may issue an order by signing the order, sealing it with the seal of the court, and filing it.
- (2) The prothonotary may provide a duplicate that is also signed and sealed, or provide a certified copy, to a person who delivers a copy for duplication or certification.

**82.22 - Varying order or re-opening proceeding**

- (1) A party to a proceeding concluded by final order may make a motion to vary the order only in one of the following circumstances:
  - (a) an error is to be corrected, or time extended, under Rule 78 - Order;
  - (b) legislation permits the order to be varied;
  - (c) the text of the order would have it apply in circumstances in which it is not intended to apply.
- (2) A party may make a motion for permission to present further evidence before a final order and after one of the following events:
  - (a) the party closes the party's case at trial;
  - (b) the party chooses to present no evidence at trial;
  - (c) a jury begins deliberation or a judge reserves decision.
- (3) A party may make a motion to re-open the trial or hearing of a proceeding concluded by final order only in the limited circumstances in which the re-opening is permitted by law.

## Rule 83 - Amendments

### Educational Notes

This Rule replaces the previous R.15. Rule 83 deals with amending court documents, including pleadings, but not amendment of orders (which is addressed in R.78 and R.82). While R.83.02 refers to amending the “notice” rather than the “pleading”, R.38.12 specifically contemplates that pleadings will be amended in accordance with R.83 and R.4.02(2) specifies that a statement of claim is “part of the notice.”

Amendment after the close of pleadings in an action remains available as of right, but the deadline has been shortened to 10 days from 20 days. Rule 83 eliminates as of right amendments to notices of motion after delivery and in other types of proceedings (the previous R.15.01(a) allowed them right up to 5 days before the hearing of an application.)

After the 10 day window in actions and for all other proceedings, as well as motions, amendments of any document require consent of all parties or permission of a judge. Filing of an amended document gives any responding party the automatic right to amend their response within 10 days as well. A party disentitled to notice must still receive notice of the amendment if it results in a “new or greater claim” (R.83.10).

Rule 83 significantly curtails the ability to add a party after expiry of the relevant limitation period (R.83.04) or to make material amendments to the claim (R.83.11(3)). This recognizes limitation periods as substantive rather than procedural and limits the precedential value of *Clarke v. Sherman*, [1997] N.S.J. No. 196 (S.C.) and *Garth v. Halifax Regional Municipality*. [2006] N.S.J. No. 300 (C.A.)

Affidavits are amended by filing another affidavit explaining and correcting the error (R.83.07(1)) and can be done as of right before the filing deadline passes, but thereafter only by consent or with the permission of a judge.

Other documents are amended using the usual practice of titling the document as “amended” and noting where text has been added or removed (R.83.08).

### 83.01 - Scope of Rule 83

- (1) This Rule allows a party to amend certain documents the party files.
- (2) This Rule requires a party who wishes to amend a court document to obtain permission from the other parties or a judge, except documents may be amended without permission early in an action.
- (3) A party may amend a court document filed by the party, in accordance with this Rule.

### 83.02 - Amendment of notice in an action

- (1) A party to an action may amend the notice by which the action is started, a notice of defence, counterclaim, or crossclaim, or a third party notice.
- (2) The amendment must be made no later than ten days after the day pleadings close, unless the other parties agree or a judge permits otherwise.

### Annotations

The defendants sought to amend the defence to add a new pleading (Rule 83.02). The plaintiffs argued that the proposed amendment would prejudice them in a way that could not be remedied by costs and that the proposed defence had no application on the facts and hence failed to raise a triable issue. *Held*, motion granted; costs of \$900 to the plaintiff, representing a portion of the costs they might incur as a result of the amendment. The court does not decide the viability of the defence on the merits at this stage. The question is whether the proposed defence raises a justiciable issue (i.e., an issue capable of being disposed of judicially). It did here. Any problems remaining after further evidence is obtained can be addressed through other means (such as a motion for summary judgment or to determine a question of law). There was no prejudice that could not be addressed by costs.

*Canada Life Insurance Co. v. Saywood et al.*, [2010 NSSC 87](#)

### **83.03 - Amendment of notice in other kind of proceeding**

A party to a proceeding other than an action may amend the notice by which the proceeding is started, or a notice of contest, participation, or contention, with the agreement of the parties affected by the amendment or with permission of a judge.

### **83.04 - Amendment to add or remove party**

- (1) A notice that starts a proceeding, or a third party notice, may be amended to add a party, except in the circumstances described in Rule 83.04(2).
- (2) A judge must set aside an amendment, or part of an amendment, that makes a claim against a new party and to which all of the following apply:
  - (a) a legislated limitation period, or extended limitation period, applicable to the claim has expired;
  - (b) the expiry precludes the claim;
  - (c) the person protected by the limitation period is entitled to enforce it.
- (3) A notice may be amended to remove a party from a proceeding, but the removed party may make a motion for costs or other relief.

### **83.05 - Amendment of notice of motion**

An amendment to a notice of motion may be made anytime before the notice is delivered to a party, when agreed by each party affected by the amendment, or when permitted by a judge.

### **83.06 - Response to amended document**

- (1) A party to an action who files a document in response to a document that is later amended may amend the response document no more than ten days after the day the responding party is notified of the amendment in accordance with Rule 31 - Notice.
- (2) In any other proceeding, a response document may be filed as the parties agree or a judge permits.

### **83.07 - Correcting other court documents**

- (1) An affidavit is corrected by filing an affidavit explaining and correcting the error before the deadline for filing the uncorrected affidavit, or when the parties agree or a judge permits.
- (2) An order is corrected under Rule 78 - Order.
- (3) Another court document may be corrected by filing an amended document with the agreement of each party affected by the amendment or the permission of a judge.

### **83.08 - Form of amended document**

- (1) An amended document must be prepared in a way that shows all changes to the document, such as by underlining new text and noting where text has been removed or by appending a marked version of the document to a clean version.
- (2) The title of an amended document must be followed by "Amended:" and the date of the amendment.
- (3) An amendment may be made to a statement of claim or defence that forms part of a notice by a document containing the standard heading and the amended statement of claim or statement of defence.
- (4) An amended statement of claim or defence becomes part of the notice to which it relates, although it is not attached.

### **83.09 - Date of amendment**

A document is amended on the day the amended document is filed, unless an order provides otherwise.

### **83.10 - Party disentitled to notice**

All of the following apply to a party who is disentitled to notice and against whom an amendment causes a new or greater claim to be made:

- (a) the party must be included in an agreement of the parties allowing for the amendment;
- (b) the party must be given reasonable notice of a motion for permission of a judge to make the amendment;
- (c) the party must be notified of the amendment in a way provided in Rule 31 - Notice, for parties entitled to notice of an interlocutory step in a proceeding.

### **83.11 - Amendment by judge**

- (1) A judge may give permission to amend a court document at any time.
- (2) An amendment cannot be made that has the effect of joining a person as a party who cannot be joined under Rule 35 - Parties, including Rule 35.08(5) about the expiry of a limitation period.

## Rule 83 - Amendments

- (3) A judge who is satisfied on both of the following may permit an amendment after the expiry of a limitation period, or extended limitation period, applicable to a cause of action:
  - (a) the material facts supporting the cause are pleaded;
  - (b) the amendment merely identifies, or better describes, the cause.

### **83.12 - Amendment by Court of Appeal**

The Court of Appeal may amend a court document, or correct an order of the court, to the same extent as a judge may do so.

## **Rule 84 - Court Records**

### **Educational Notes**

This Rule codifies existing practices involving maintenance and control of the civil index and recording of proceedings. It also allows for motions for the return of exhibits after a proceeding concludes.

### **84.01 - Scope of Rule 84**

This Rule provides for maintenance and control of court documents, records of proceedings, and recordings of trials and hearings.

### **84.02 - Civil proceedings index**

- (1) The prothonotaries must maintain a single index of information on all civil proceedings.
- (2) When a proceeding is started, the prothonotary must enter in the civil proceedings index the following information:
  - (a) the registry number, which is made up of the registry code in Rule 32 - Place of Proceeding, followed by the divorce registration number in a divorce application, followed by the proceeding number;
  - (b) the name of each party, and the party's title in the proceeding, and the name of counsel, if any, who represents the party;
  - (c) the title of the originating document;
  - (d) the date the proceeding is started.
- (3) The information must be entered in the civil proceedings index and maintained in a way that allows court staff, counsel, the parties, and members of the public to be able to readily find entries about the proceeding.
- (4) The prothonotary must enter, under the index entry for a proceeding, each of the following:
  - (a) information about a document that is subsequently filed in the proceeding, including the name of the person on whose behalf a document is filed, the title of the document, and the date it is filed;
  - (b) the scheduled and actual time, date, and place of each motion heard by a judge in the proceeding, except motions made orally during the trial of an action or hearing of a proceeding and motions made to the judge without a court reporter being present;
  - (c) the scheduled and actual time, date, and place of a trial or hearing, the days reserved for the trial or hearing, and the actual days of trial or hearing;
  - (d) the outcome of a motion, trial, or hearing;
  - (e) information about a document filed by the court in the proceeding, such as a decision or a notice of prothonotary's motion, including the title of the document and the date it is filed;
  - (f) information about an instrument issued by the court in the proceeding, such as an order or a release of judgment, including the title of the instrument and the date it is issued.

### 84.03 - Recording

- (1) The prothonotary must ensure that court reporters and equipment are available to make an audio-recording of each of the following, or immediately make a report to the Chief Justice when the situation is otherwise:
  - (a) the trial of an action;
  - (b) the hearing of a proceeding;
  - (c) the hearing of a motion;
  - (d) a conference held on record;
  - (e) any other business of the court conducted on record.
- (2) A court reporter must, unless the presiding judge permits otherwise, log the time and subject of each of the following:
  - (a) the commencement, adjournment, resumption, and finish;
  - (b) a decision, ruling, or direction;
  - (c) a motion made orally or an objection;
  - (d) a discussion between counsel, or a party who acts on their own behalf, and the judge;
  - (e) opening of a party's case, closing the case, and rebuttal;
  - (f) swearing or affirming of a witness, direct examination, cross-examination, re-direct examination, examination by the judge, further examination, and excusing of the witness;
  - (g) entry of an exhibit;
  - (h) submissions.
- (3) The time and subject of each of the following must be logged additionally during a trial with a jury:
  - (a) opening of jury selection and the judge's instructions to the jury panel;
  - (b) hearing a request to be excused from the panel, including the name and panel number of the person making the request;
  - (c) calling the proceeding to be tried;
  - (d) jury selection, including the calling of a panel member, a peremptory challenge, the conduct of a challenge for cause, and the selection of a juror;
  - (e) adjournment or discharge of the jury panel;
  - (f) the oath or affirmation of jurors;
  - (g) roll calls or statements by the judge or court reporter that all jurors are present;
  - (h) excluding the jury for a motion or objection, and the return of the jury;
  - (i) instructions to the jury, an order for sequestration, and retirement of the jury for deliberations;
  - (j) a discussion about a jury question, return of the jury, and the instruction;
  - (k) a verdict or answers by the jury;
  - (l) discharge of the jury.

**84.04 - Exhibits**

- (1) The prothonotary must keep control of an exhibit, except a presiding judge may temporarily take custody of an exhibit after notifying the prothonotary.
- (2) The prothonotary may, unless a judge orders otherwise, return an exhibit to a party on whose motion the exhibit was entered, or who filed an affidavit to which the exhibit was attached, no sooner than six months after the day that one of the following occurs:
  - (a) expiry, without an appeal having been started, of the time for appeal to the Nova Scotia Court of Appeal from the order that finally determines all issues in the proceeding;
  - (b) expiry, without an application having been made for leave to appeal, of the time for making an application to the Supreme Court of Canada after the appeal of an order in the proceeding to the Nova Scotia Court of Appeal;
  - (c) dismissal by the Supreme Court of Canada of an application for leave to appeal;
  - (d) final determination by the Supreme Court of Canada.
- (3) A judge who is satisfied that an exhibit cannot be returned to a party may order that the exhibit be destroyed or otherwise disposed of by, or under the supervision of, the prothonotary.
- (4) A judge may order that an exhibit be turned over to a person temporarily or permanently.

**84.05 - Control by the court of documents offsite**

- (1) The prothonotary may make arrangements with the Province of Nova Scotia for the civil proceedings index, an audio recording, or a log to be maintained electronically in a computer owned and operated by the province.
- (2) Arrangements for computer services by the province must be such that access to the information is exclusively through the prothonotary as provided in Rule 85 - Access to Court Records, which restriction extends to an employee of the province who is not a prothonotary or a member of court staff authorized by the prothonotary.
- (3) The prothonotary must report to the court annually about arrangements for computer services by the province and compliance with Rule 85.

## **Rule 85 - Access to Court Records**

### **Educational Notes**

This Rule codifies the court's practices in accordance with the *Charter*. The fundamental principle of open courts continues, with R.85 allowing for confidentiality orders where necessary. Confidentiality provisions in Part 13 – Family Proceedings will prevail over this Rule.

The concept of a confidentiality order includes sealing a document or exhibit, blocking access to all or part of a proceeding, making a publication ban, or allowing a person to be referred to by a pseudonym (R.85.04). The power to exclude the public from a proceeding under s.37 of the *Judicature Act* remains.

A party seeking a confidentiality order or a closed courtroom must make the motion on reasonable notice to the media, unless otherwise ordered (R.85.05), and may use the existing on-line notification service set up for this purpose.

Rule 85.06 blocks access to documents until privilege or confidentiality is determined. The current practice is to forward the material to the prothonotary in a sealed envelope marked with party's name and style of cause, with a written request that it be placed before the judge hearing the matter.

Rule 85.07 addresses confidentiality in *FOIPOP* appeals. Rule 85.09 allows the prothonotary to keep contact information separate and decline to provide it if to do so could compromise a person's security.

### **85.01 - Scope of Rule 85**

- (1) This Rule recognizes the need for the court's records to be open to the public, and provides exceptionally for a record to be kept confidential.
- (2) The provisions for confidentiality in Part 13 - Family Proceedings, which are to protect a child, prevail over this Rule.
- (3) Court records must be made accessible to the public, directly and through the media, in accordance with this Rule.
- (4) A court record may be made the subject of an order for confidentiality, in accordance with this Rule.

### **85.02 - Access to court record of proceeding**

- (1) A person who wishes to find a document, recording, or exhibit in a proceeding may require the prothonotary to provide information about the proceeding from the civil proceedings index or give the person access to the index so the person can find the information.
- (2) A person who provides all of the following may require that the prothonotary permit the person to have access to court records of, and evidence in, a proceeding:
  - (a) the registry number of the proceeding or sufficient information so the prothonotary can find the document, exhibit, or recording;
  - (b) a fee or charge provided for by law;

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- (c) an undertaking under Rule 85.03, if a copy of an audio-recording is required and a judge does not except the person from the requirement for an undertaking.
- (3) The access a person may require under Rule 85.02(2) is satisfied by provision of whichever of the following the person requests:
  - (a) inspection of a document or exhibit, or photographing an exhibit, under conditions that protect the integrity of the evidence;
  - (b) delivery of a copy of a document, an audio-recording of a proceeding, or an exhibit capable of being copied by the prothonotary.
- (4) The prothonotary must refuse to comply with a requirement to provide access to court records or evidence that results in a breach of a confidentiality order or in a serious risk to the integrity of a record or evidence.
- (5) The prothonotary must defer complying with a requirement for access to court records or evidence when a judge or court reporter has custody of a required document or exhibit temporarily for use in connection with the proceeding.
- (6) A request for access to court records or evidence temporarily in the control of a judge or a court reporter may be made to the judge in accordance with Rule 87 - Communication With a Judge.

### **85.03 - Broadcasting audio recording**

- (1) The prothonotary must require a person who demands a recording to undertake not to broadcast or distribute all or part of the recording, unless a judge orders otherwise.
- (2) A judge who hears a motion to except a person from giving an undertaking not to broadcast or distribute a recording must consider all relevant factors, including whether the open court principle is fully served by the person's ability to listen to and quote from the recording and, if the open court principle is not fully served by the ability to quote from the record, each of the following:
  - (a) whether the broadcast or distribution may affect the conduct of, or the determination of an issue in, an ongoing proceeding;
  - (b) the affect of the broadcast or distribution on the person whose voice is sought to be broadcast, or a recording of whose voice is sought to be distributed;
  - (c) if the recording sought by the person who makes the motion includes testimony, it is presumed unless the contrary is established that frequent broadcast of testimony may have an adverse affect on the willingness of a truthful witness to come forward and on the way in which a person testifies.

### **85.04 - Order for confidentiality**

- (1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the Canadian Charter of Rights and Freedoms and the open courts principle.
- (2) An order that provides for any of the following is an example of an order for confidentiality:
  - (a) sealing a court document or an exhibit in a proceeding;

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- (b) requiring the prothonotary to block access to a recording of all or part of a proceeding;
  - (c) banning publication of part or all of a proceeding;
  - (d) permitting a party, or a person who is referred to in a court document but is not a party, to be identified by a pseudonym, including in a heading.
- (3) A judge who is satisfied that it is in accordance with law to make an order excluding the public from a courtroom, under Section 37 of the *Judicature Act*, may make an order for confidentiality to aid the purpose of the exclusion.

### **85.05 - Notice of motion for confidentiality order**

- (1) A party who makes a motion for an order for confidentiality, or to exclude the public from a courtroom, must give reasonable notice to representatives of media, unless a judge orders otherwise.
- (2) The notice to media representatives may be given by using the service provided by all courts in Nova Scotia for giving notice to the media through the internet.
- (3) A judge who excepts a party from having to give notice to media representatives must file a report of the decision with the prothonotary at Halifax.
- (4) The prothonotary at Halifax must do both of the following with judges' reports of a decision to except notice to media representatives:
  - (a) make the reports available for inspection and provide a copy on demand, unless the report itself is sealed;
  - (b) respond to a person who asks about the number of reports that are sealed in a calendar year.

### **85.06 - Privileged documents**

- (1) Nothing in these Rules diminishes the power of a judge who must determine a claim that a document is privileged, or otherwise subject to a confidentiality protected by law, to keep the document confidential until the determination is made.
- (2) A judge who must determine a claim that a document is privileged, or otherwise subject to a confidentiality protected by law, may do any of the following without the document being marked as an exhibit, made part of the public court record, disclosed to the party who contests the claim, or made available to the public:
  - (a) personally take control of the document;
  - (b) give directions to the prothonotary or any other member of court staff for storing the document, keeping it separate from court records, and doing with it only as the judge further directs;
  - (c) read, view, or listen to the document for the purpose of making the determination.
- (3) A document taken control of and kept confidential by a judge is not part of the public court record and need not be made the subject of a confidentiality order.
- (4) A judge who takes control of a document and determines that it or part of it is not privileged, and that it is not otherwise subject to a confidentiality protected by law, must do both of the following:

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- (a) maintain control of the document long enough for the party who claims privilege to make a motion for a confidentiality order pending appeal;
  - (b) place the document or the part on the court record, unless a confidentiality order is in effect pending appeal.
- (5) A judge who takes control of a document and determines that it or part of it is privileged must make a sealed record for review by the Court of Appeal.
  - (6) The sealed record must include everything determined to be privileged, and everything else delivered to the judge for the determination must be placed on the record.
  - (7) The party who claims privilege may make a motion for the sealed record to be delivered to the party in the time referred to in Rule 84.04, of Rule 84 - Court Records.

### **85.07 - Freedom of Information and Protection of Privacy Act**

- (1) For the purpose of Section 49 of the *Judicature Act*, an appeal under the *Freedom of Information and Protection of Privacy Act* may be started by filing a notice of appeal that conforms with Rule 7 - Judicial Review and Appeal and, as nearly as possible, the regulations under the *Freedom of Information and Protection of Privacy Act*.
- (2) A judge who gives directions, under Rule 7 - Judicial Review and Appeal, for an appeal under the *Freedom of Information and Protection of Privacy Act* may include directions about delivery to the judge assigned to hear the appeal of a sealed package containing the documents claimed to be subject to a confidentiality protected by the Act.

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

### **85.08 - Access to court records in general**

- (1) A judge, a judge's assistant, the prothonotary, a deputy prothonotary, and a member of court staff authorized in writing by the prothonotary may have direct access to all court documents, unless the access is prevented by an order for confidentiality.
- (2) No other person may have direct access to court records, unless the access is under an agreement approved by the court.
- (3) An agreement permitting direct access for an analysis of court records, or of the business of the court, must contain terms about each of the following:
  - (a) the purpose of the analysis;
  - (b) diligence in making an accurate analysis;
  - (c) the intended distribution of the analysis or of a report on it;
  - (d) provision of the analysis or a report on the analysis to the Chief Justice before other persons receive it;
  - (e) the date direct access terminates.

**85.09 - Personal information**

- (1) The prothonotary may keep separate from the civil proceedings list a record of personal information given to the prothonotary for making contact with counsel, a party, or a person who is not a party.
- (2) The prothonotary may give the personal information to a party who wishes to contact the counsel, party, or other person, unless the prothonotary is satisfied that providing the information may compromise the security of a person.
- (3) The prothonotary is not required to give the personal information or access to the record of it to a person who is not a party or court staff.

## **Rule 86 - Judicial Communication Across Borders**

### **Educational Notes**

This Rule is the first time the court has made Rules authorizing the conduct of multi-jurisdictional joint hearings and conferences and allowing for simultaneous transmission of evidence in support of a hearing held in another jurisdiction. Rule 86 will be particularly useful in multi-jurisdictional class proceedings under R.68, cross-border insolvency cases, and applications under the *Hague Convention* for the return of abducted children.

### **86.01 - Scope of Rule 86**

This Rule allows both of the following:

- (a) communications between the Supreme Court of Nova Scotia and a court in another jurisdiction to assist either or both courts with the just determination of a claim or enforcement of a remedy;
- (b) coordination and harmonization of a proceeding with a proceeding before a court in another jurisdiction, if the other court agrees and the two proceedings are, despite formal differences, related by common issues or parties.

### **86.02 - Motion for joint communications or hearings**

- (1) A party may make a motion that a judge request a court in another jurisdiction to engage in communications, hold a joint conference in related proceedings, or hold a joint hearing in related proceedings.
- (2) A judge may convene a conference with the parties, under Rule 26 Conference, to consider requesting or responding to a request for communications, holding a joint conference in related proceedings, or holding a joint hearing with a court in another jurisdiction in related proceedings.

### **86.03 - Organizing communications, or joint conferences or hearings**

- (1) A judge may authorize the prothonotary, or a member of the judge's staff, to do any of the following:
  - (a) respond to a request from an authorized representative of a court in another jurisdiction for communications with the Supreme Court of Nova Scotia;
  - (b) make a request to a representative of a court in another jurisdiction for communications;
  - (c) provide copies of court documents to the other court;
  - (d) organize a conference of a judge of the court with a judge, or other judicial official, of the other court;
  - (e) give notice of a joint conference to parties in either jurisdiction, in the manner required of a party under Rule 31 - Notice, or as directed by the judge;
  - (f) organize, and give notice of, a joint hearing in related proceedings;

- (g) do anything else to assist with communication or coordination by the courts;
- (2) A judge may direct a party, or an officer of the court such as a receiver or a referee, to do any of the following:
  - (a) cooperate with the prothonotary, or a member of the judge's staff, to organize communications between the courts;
  - (b) provide technical services for a joint conference, or a joint hearing;
  - (c) provide copies of court documents to the other court;
  - (d) file documents with the other court;
  - (e) assist a party before the other court, or the court itself, in obtaining evidence;
  - (f) give notice, make disclosure, or provide copies of court documents to a person who is a party before the other court;
  - (g) do anything else to assist with communication or coordination by the courts.
- (3) A judge may communicate directly with a judge, other judicial official, or a representative of the other court to organize communications between the courts.
- (4) A judge who makes a direct communication under Rule 86.03(3) must either include the parties in the communication or report to the parties afterward.

#### **86.04 - Joint conference**

- (1) A judge may appoint a time and date for the judge to be available for a conference held jointly with a judge or other judicial official of another court.
- (2) A conference that is organized to assist the just determination of a claim or the enforcement of a remedy in a proceeding before the Supreme Court of Nova Scotia or to coordinate or harmonize related proceedings must include the parties to the Nova Scotia proceeding, except a party who chooses not to participate, who has become disentitled to notice, or who a judge determines must be excluded.
- (3) The joint conference may be held by teleconference.
- (4) The provisions of Rule 26 - Conference about what a judge may do at a conference, and recording the conference, apply to a joint conference.

#### **86.05 - Joint hearing**

- (1) A judge may appoint a time, date, and place for the judge and the parties to a Nova Scotia proceeding to be available for a hearing conducted jointly with a judge or other judicial official of another court and the parties to a proceeding in the other jurisdiction.
- (2) A joint hearing may be held by teleconference, with the judge in Nova Scotia sitting in a courtroom and with a court reporter recording and logging the hearing.
- (3) A joint hearing may be held by joint sitting, but if the joint sitting is in the other jurisdiction the hearing must be accessible by the public in Nova Scotia.
- (4) A joint hearing conducted with a judge of the Supreme Court of Nova Scotia sitting in another jurisdiction is taken to be accessible by the public in Nova Scotia, if all of the following apply:
  - (a) the hearing is transmitted to a courtroom in Nova Scotia, as with a teleconference;
  - (b) the courtroom is open to the public;

- (c) the joint hearing is recorded and logged in the same way as any hearing in a courtroom.

#### **86.06 - Conduct of joint hearing by teleconference**

- (1) A judge may set the terms for the conduct of a joint hearing by teleconference in consultation with the judge or other judicial official in the other jurisdiction.
- (2) The consultation may be by conference.
- (3) The terms may be set by approving an order of the other court stating the terms, or making an order that sets the terms subject to the approval of the other court.
- (4) The terms must cover each of the following subjects:
  - (a) simultaneous transmission of the proceedings to each court;
  - (b) transmission of such quality that a witness is as good as present in the other courtroom, if credibility is in issue;
  - (c) simultaneous introduction of duplicate exhibits or a system for transmitting images of exhibits in one courtroom to the other;
  - (d) simultaneous delivery or filing of court documents, such as a brief or an affidavit;
  - (e) who is to pay for transmission services that are not provided by the court;
  - (f) joint rulings on issues of evidence or procedure, and exclusion from consideration by the judge of the Supreme Court of Nova Scotia of evidence ruled to be inadmissible in Nova Scotia but ruled to be admissible by the judge in the other jurisdiction;
  - (g) whether submissions by a person who is a party in one jurisdiction, and not the other, are to be made during the joint hearing or separate from it;
  - (h) communications between the judges, or the judge and a judicial official, to coordinate the joint hearing, to resolve procedural or administrative issues, or to provide coordinated orders;
  - (i) any circumstances in which the judges, or the judge and the judicial official, may communicate without notice to, or participation by, the parties.

#### **86.07 - Translation and interpretation**

A judge who makes an order under this Rule 86 for communications, a conference, or a hearing that involves uses of a language not understood by the judge, counsel, or a party may make an order on terms similar to those permitted by Rule 48 - Translation, Interpretation, and Assistance.

#### **86.08 - Foreign law**

- (1) A judge who participates in a joint hearing may accept the guidance of the other judge, or the judicial official, about the laws of and practices in the other jurisdiction, unless a party successfully objects.

## Rule 86 - Judicial Communication Across Borders

- (2) The provisions of Rule 54 - Supplementary Rules of Evidence about proof of the law of another province or a territory, and proof of the law of a foreign state, apply on a joint hearing.

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

### **86.09 - Temporary standing**

- (1) A judge may permit a person who is not a party to a Nova Scotia proceeding but who is a party to a proceeding in another jurisdiction, or an officer of the other court such as a receiver or referee, to be heard by the judge on a specified issue.
- (2) A person does not submit to the jurisdiction of the court only by appearing, with permission, to be heard on a specified issue.

### **86.10 - Lifting stay of proceeding**

A judge may except from a stay of proceedings a related proceeding in another jurisdiction that is the subject of mutual communication, a joint conference, or a joint hearing.

### **86.11 - Variation and withdrawal**

A judge may vary a direction, withdraw a direction, or withdraw an approval after giving reasonable notice to the court in the other jurisdiction.

## Rule 87 - Communicating with a Judge

### Educational Notes

This Rule limits the manner in which parties and their counsel may communicate with a judge about a proceeding. The Rule does not apply to communications unrelated to a proceeding (e.g. a request to speak at a conference.)

There are four situations where sending correspondence to a judge is permitted:

- a. to accompany a court document that must be delivered to a judge;
- b. to provide information requested by a judge;
- c. to comply with a Rule or order requiring that something be delivered to a judge; or
- d. to a case management judge appointed under R.26.

Permission to deliver correspondence to a judge must be sought and received prior to communicating with a judge in any other situation, whether by correspondence, telephone or e-mail, including correspondence delivered with documents to be filed with the court.

It is acceptable to seek permission to correspond with a judge while in open court, or during a conference. Rule 87.05 codifies the practice of requesting after-hours contact information for a judge so as to be able to inform the judge if there is a settlement or if an emergency arises. Parties and counsel may also seek permission to communicate with a judge through the Prothonotary or the judge's assistant. The Rules also offers a means to contact a judge outside of normal business hours in the event that an emergency motion is necessary.

Rule 87 specifies that all correspondence to a judge must also be immediately delivered to any other party entitled to notice. Parties or counsel who receive permission to communicate other than by correspondence must make their best efforts to include all other parties entitled to notice, and if they cannot include them, must report on their communication with the judge to each other party as soon as possible thereafter.

The previous Rules did not address communication with a judge, but communication with the court is addressed in Chapter 10.12 of the *Legal Ethics Handbook* :

### Unilateral communications with the court

**10.12**The lawyer has a duty not to initiate or indulge in unilateral communications with the court concerning the matter currently before the court without the consent of all other counsel involved. Delivering of pre-trial memoranda or other material to the court without contemporaneously delivering it to other counsel is deemed to be a violation of this Rule.

Rule 87 applies the same limitations to self-represented litigants. It codifies the current practice in some ways (e.g. requesting permission through the judge's assistant; requesting after-hours contact information to be able to advise the judge of a settlement or emergency motion; always copying the other parties). In other ways, it limits the ability of counsel to correspond with the court to very narrow circumstances and specifically prohibits the practice of copying the judge with correspondence directed at another party, a situation that was of concern to the court.

### **87.01 - Scope of Rule 87**

A person may communicate with a judge about a proceeding, in accordance with this Rule.

### **87.02 - Communicating in writing**

- (1) A party may deliver correspondence for a judge to accompany a court document that must be delivered to the judge, to provide information requested by the judge, or to comply with a Rule or order requiring that something be delivered to a judge rather than filed.
- (2) A party to a proceeding may deliver correspondence to a case management judge appointed under Rule 26.02, of Rule 26 - Conference.
- (3) Otherwise, a person may only deliver correspondence about a proceeding to a judge with the judge's permission.
- (4) Delivery of correspondence includes delivering a copy of correspondence addressed to anyone other than the judge for whom the copy is delivered.

### **87.03 - Other means of communicating**

A person may communicate directly with a judge about a proceeding by means other than correspondence, such as by telephone or e-mail, only if the judge expressly permits the communication.

### **87.04 - Obtaining permission**

A party who needs to communicate out-of-court with a judge about a proceeding, other than by filing or delivering a court document, may request permission when the judge is in open court or holds a conference, or by directing the request to the prothonotary or the judge's assistant.

### **87.05 - Emergencies outside business hours**

- (1) A party may request a judge who presides at a pretrial or prehearing conference to provide a means for contacting the judge outside business hours to report a settlement or deal with an emergency in relation to the trial or hearing.
- (2) A person who does not have permission to contact a judge but who must make a motion outside business hours under Rule 28 - Emergency Motion, may obtain the permission in one of the following ways:
  - (a) if the motion is to be heard by a judge at the Law Courts in Halifax, or by a judge of the Family Division, request the commissionaire at the Law Courts to cause a message to be relayed to a judge;
  - (b) if the motion is to be heard by a judge outside Halifax, and not in the Family Division, contact the person designated by the court to relay a message to a judge in an emergency.

**87.06 - Unilateral communications**

- (1) A party who delivers correspondence to a judge must immediately deliver a copy to each other party entitled to notice of the communication under Rule 31.14, of Rule 31 - Notice.
- (2) A person who has a judge's permission to communicate with the judge by means other than correspondence must make best efforts to include each party entitled to notice in the communication and, otherwise, must report on the communication to each of those other parties as soon as possible afterward.

## Rule 88 - Abuse of Process

### Educational Notes

This Rule provides a procedure for controlling abuses of the court's process and allows for a wide range of remedies, including dismissal or judgment, a stay, indemnification, striking or amending a pleading, expunging or sealing an affidavit, or an injunction. Vexatious litigants may be restrained from commencing further proceedings without permission of the court (R.88.02). Rule 88.05 allows the court to determine whether a claim amounts to an abuse of process before the rest of the claim is determined.

Rule 88 makes clear that unsustainable pleadings should be challenged under Rule 13 – Summary Judgment, rather than as an abuse of process.

### 88.01 - Scope of Rule 88

- (1) These Rules do not diminish the inherent authority of a judge to control an abuse of the court's processes.
- (2) This Rule does not limit the varieties of conduct that may amount to an abuse or the remedies that may be provided in response to an abuse.
- (3) This Rule provides procedure for controlling abuse and allows for an injunction to stop an abusive litigant from bringing proceedings in the future without permission of a judge.

### 88.02 - Remedies for abuse

- (1) A judge who is satisfied that a process of the court is abused may provide a remedy that is likely to control the abuse, including any of the following:
  - (a) an order for dismissal or judgment;
  - (b) a permanent stay of a proceeding, or of the prosecution of a claim in a proceeding;
  - (c) a conditional stay of a proceeding, or of the prosecution of a claim in a proceeding;
  - (d) an order to indemnify each other party for losses resulting from the abuse;
  - (e) an order striking or amending a pleading;
  - (f) an order expunging an affidavit or other court document or requiring it to be sealed;
  - (g) an injunction preventing a party from taking a step in a proceeding, such as making a motion for a stated kind of order, without permission of a judge;
  - (h) any other injunction that tends to prevent further abuse.
- (2) A person who wishes to make a motion under section 45B of the *Judicature Act* may do so by motion in an allegedly vexatious proceeding or a proceeding allegedly conducted in a vexatious manner, or by application if there is no such outstanding proceeding.

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

### Annotations

This application was made under *Civil Procedure Rules (1972)*, Rule 14.25. Several parties in several related actions applied to have the plaintiff NBFL's pleadings struck as an abuse of process and proceedings stayed. This complex litigation had already

resulted in settlements between NBFL and a number of parties. The applicants argued the motion should be granted on the basis of: NBFL's conduct following a dismissal of their motion to amend pleadings (eg., motions they've brought and the refusal to entertain settlement with the applicants); their refusal to disclose the terms of the settlement agreements; and Warner, J.'s findings of bad faith in dismissing the motion to amend. *Held*, application denied; costs to NBFL in the cause. NBFL brought what appeared to be legitimate motions on their face, and they were still pending before the court. There is no obligation on a party to entertain settlement. While the court has a lingering concern over NBFL's tactics, that is not the test for abuse of process and the ultimate remedy of a stay. This was not one of those clearly exceptional cases warranting the drastic remedy of a stay. Even if there had been an abuse of process, a stay should only be granted if no other remedy can remove the abuse. Here other actions were taken at prior proceedings which had the effect of remedying any potential abuse. The outcome of pending motions may cast NBFL in a different light, but they must be decided on their merits before any conclusions can be made in that regard. *National Bank Financial Ltd. v. Potter et al.* , [2010 NSSC 214](#)

### **88.03 - Unsustainable pleading**

- (1) It is not an abuse of process to make a claim, or raise a defence or ground of contest, that may on the pleadings alone be unsustainable, and such a claim, defence, or ground may be challenged under Rule 13 - Summary Judgment.
- (2) A party or the prothonotary may make a motion to strike a pleading on the basis that it amounts to an abuse of process.

### **88.04 - Motion by prothonotary**

A prothonotary's motion to dismiss a proceeding on the basis of abuse may be made in appearance day chambers.

### **88.05 - Separation of allegation that proceeding is abusive**

- (1) A judge may order that a defence or ground of contest alleging that a claim is an abuse of process be separated from the other issues raised in a proceeding and be tried or heard before the rest of the proceeding is determined.
- (2) A judge who is required to decide whether to separate a defence or ground of contest alleging abuse of process must consider all relevant factors, including each of the following:
  - (a) whether facts to be found by the judge who determines the allegation of an abuse of process will also be in issue when the rest of the proceeding is determined;
  - (b) if some facts will remain in issue, whether the benefit of avoiding a risk of contradictory findings of fact outweighs the disadvantage of continuing a proceeding, and conducting a trial or hearing in a proceeding, under an allegation that the proceeding itself is an abuse of the court's process.
- (3) A judge who orders separation of a defence or ground of contest based on abuse of process may give directions for the determination of the defence or ground and, in

## Rule 88 - Abuse of Process

an action, the directions may include that the determination continue under Rule 5 - Application.

## Rule 89 - Contempt

### Educational Notes

This Rule replaces the previous R.55 and is similar in many respects, but now brings the Rules into conformity with the *Charter*. Rule 89.03 sets out the procedure where a judge cites a person for contempt. The notice requires more detailed information than the previous Rule. Rules 89.04-89.05 provide for a contempt motion in a proceeding, with a judge's permission. Rule 89.06 permits a freestanding contempt application, also with permission. Rules 89.07-89.12 govern the hearing and R.89.13 sets out the available remedies.

Rule 89.02 provides that a contempt order will not follow a failure to pay money pursuant to an order, unless the order expressly provides for contempt, or is for family maintenance or support.

Rule 89.04 now specifies who may move or apply for a contempt order. The notice provisions no longer expressly provide for substituted service or dispensing with service. The previous Rule required an *ex parte* leave application. Permission is still required and it appears implicit that permission may still be sought *ex parte* since the Rule does not provide for notice at that stage. Rule 89.07 makes clear that contempt matters must proceed expeditiously. Rule 89.07(2) sets a 10 day deadline for making the motion or application after receiving permission (previously 20 days.)

Rule 89.11 provides for warrants for arrest and now sets out the situations where a warrant may issue. It specifies that a Sheriff need not execute the warrant unless a judge is available to deal with the individual (R.89.11(4)). Rule 89.11(6) expressly provides a right to bail. Rule 89.09 incorporates some of the same rights offered an accused person under the *Criminal Code*.

### 89.01 - Scope of Rule 89

- (1) This Rule provides procedures for starting and conducting a contempt citation, motion, or application.
- (2) Rules outside this Rule apply to contempt processes, including the contempt hearing, with both of the following exceptions:
  - (a) a judge's direction for the conduct of the process prevails over another Rule;
  - (b) a Rule that cannot be adapted to the requirements of the Canadian Charter of Rights and Freedoms for a criminal or penal proceeding has no application to the contempt process.

### 89.02 - Contempt and order for payment of money

A contempt order may not be granted to punish a failure to pay money, unless the failure is in violation of either of the following kinds of orders:

- (a) an order for family maintenance or support;
- (b) an order for recovery of money that expressly provides that a failure to turn over, or pay, funds may be punished as contempt.

### **89.03 - Citation by judge**

- (1) A judge may start a contempt process by citing a person who is before the judge.
- (2) A judge may order a person to appear before the judge for the purpose of being cited for contempt or, if the judge is satisfied the person will not obey the order, order the sheriff to bring the person before the judge.
- (3) A citation for contempt must be given orally in open court by the judge who starts a contempt process.
- (4) The judge must notify the person alleged to be in contempt of the time, date, and place of the contempt hearing, provide a precise description of the conduct alleged to be contemptuous, and advise the person of all of the following:
  - (a) the person is presumed innocent until the contrary is proved beyond a reasonable doubt;
  - (b) the judge will preside at the hearing and determine whether the person is guilty of contempt, unless the judge decides that another judge should do so;
  - (c) if contempt in the face of the court is alleged and the judge is to determine the contempt proceeding, the judge's knowledge of what took place is part of the evidence;
  - (d) the person has the right to retain and instruct counsel and to be represented by counsel at the hearing;
  - (e) a person who cannot afford counsel may apply to Nova Scotia Legal Aid, and court staff will provide contact information;
  - (f) the person is entitled to present evidence and make submissions at the hearing;
  - (g) the person is required to attend the hearing and failure to attend may result in arrest.
- (5) The judge may request the person's promise to attend at the appointed time, date, and place, or order the person to do so.
- (6) The judge may provide particulars of the alleged contemptuous conduct in writing after the citation.

### **89.04 - Motion or application by person other than judge**

- (1) A person other than a judge may not make a motion for, or apply for, a contempt order, unless a judge permits.
- (2) A party, the prothonotary, a person appointed by the court to perform an act on behalf of the court, the Attorney General of Nova Scotia, or another interested person may make a motion for permission to do either of the following:
  - (a) make a motion for a contempt order in a proceeding to which the conduct alleged to be contemptuous relates;
  - (b) start an application for a contempt order, if the conduct alleged to be contemptuous does not relate to a proceeding.

#### **Annotations**

The plaintiff alleged the defendant breached an order restraining him from communicating with shareholders to solicit the exercise/non-exercise of proxy votes. The plaintiff brought an *ex parte* motion, under Rule 89.04 of the *Civil Procedure Rules*

(2008), seeking leave to bring a motion for contempt. At issue was whether such a motion must or can be brought on an *ex parte* basis or whether the defendant is entitled to notice. The predecessor rule under the *Civil Procedure Rules (1972)* expressly permitted an *ex parte* application; the new rule is silent. The Nova Scotia Barrister's Society's Educational Notes for these *Rules* suggest this means the new Rule 89.04 does not require notice. *Held*, contrary to the educational notes, notice must be given. Motion adjourned to allow for service. The defendant's "interests" (Rule 22.03(1)(a)) are potentially affected at every stage of the contempt application, including the motion for leave.

*National Bank of Canada v. Weir*, [2009 NSSC 287](#)

### **89.05 - Notice of motion for contempt order**

- (1) A person who has permission to make a motion for a contempt order may file a notice under Rule 23 - Chambers Motion, in the proceeding to which the alleged contemptuous conduct relates.
- (2) A notice of motion for a contempt order must contain the standard heading of the proceeding, be entitled "Notice of Motion for Contempt Order", be addressed to the person sought to be held in contempt, and include all of the following:
  - (a) a statement that the person making the motion moves for an order holding the person in contempt and punishing the person for the contempt, including the full name of both persons;
  - (b) the time, date, and place at which the motion will be heard;
  - (c) the same information a judge provides for a citation about the presumption of innocence, right to counsel, and participation in the hearing;
  - (d) a reference to each affidavit relied on by the party, identified by the name of the affiant and either the date it was sworn or a brief description of the contents;
  - (e) a statement that the person has the right to require an affiant to be present at the hearing for cross-examination;
  - (f) a statement that the person may present evidence by filing an affidavit or calling a witness at the hearing.
- (3) The notice of motion for a contempt order may be in Form 89.05.
- (4) A person who files a notice of motion for a contempt order must give notice of the motion to the person sought to be held in contempt in accordance with provisions for giving notice of a proceeding to a party in Rule 31 - Notice, as if the notice of motion were an originating document.
- (5) The notice of motion must be delivered in sufficient time that the applicable deadlines in Rule 23.11, of Rule 23 - Chambers Motion, can be met.

### **Forms**

Notice of Motion for Contempt Order(89.05).

### **89.06 - Notice of application for contempt order**

A person who has permission to apply for a contempt order may file a notice that conforms with Rule 5 - Application, conforms with any directions provided by the judge who gives permission, and contains all of the applicable information a judge must provide on a citation.

### **89.07 - Time for hearing, notice, and filing**

- (1) A judge, a member of the judge's staff, or the prothonotary who appoints a time for a contempt hearing must select the earliest available date that is consistent with all of the following:
  - (a) the need to swiftly respond to a contempt in the face of the court, if that is alleged;
  - (b) the need to respond without undue delay to contempt that is not in the face of the court;
  - (c) the right to a speedy hearing;
  - (d) the degree of complexity of the contempt process;
  - (e) a reasonable time for the person alleged to be in contempt to retain and instruct counsel, and for the person or counsel to prepare for the hearing.
- (2) A person who obtains permission to make a motion for, or start an application for, a contempt order must file the notice of motion, or application, no more than ten days after the date of the order giving permission, unless a judge orders otherwise.
- (3) The person alleged to be in contempt must be notified of the motion or application as soon as possible.

### **89.08 - Compelling attendance for motion or application**

- (1) A judge may order a person against whom a contempt order is sought, or an officer, director, or manager of a corporation against whom the order is sought, to attend at the time, date, and place appointed for the contempt hearing.
- (2) A person who is ordered to attend a contempt hearing must be given notice of the order by personal service.

### **89.09 - Disclosure and silence**

A person against whom a contempt proceeding is started is entitled to the same disclosure, and to exercise the same right to remain silent, as a person against whom an information is laid under the *Criminal Code*.

### **89.10 - Discovery**

No person may examine a witness on discovery about any subject relevant to an outstanding citation, motion, or application for a contempt order, unless a judge permits.

### **89.11 - Arrest, detention, and release**

- (1) A judge may issue a warrant for the arrest of a person against whom a contempt order is sought in either of the following circumstances:
  - (a) the person is notified of an order requiring the person to attend the contempt hearing, is present when such an order is made orally, or agrees on record to attend the hearing, but fails to attend at the time, date, and place appointed for the hearing;

## Rule 89 - Contempt

- (b) it is likely that the person will be found to be in contempt, that the person will repeat contemptuous behaviour, and that a party will suffer serious loss as a result of the repetition.
- (2) An arrest warrant for a contempt hearing must contain the standard heading, be entitled "Arrest Warrant for Contempt Hearing", be addressed to the sheriff for the municipality in which the person resides, and include all of the following:
    - (a) the judge's findings by which the warrant is authorized;
    - (b) a direction that the sheriff arrest the person and bring the person before a judge on the day of the arrest;
    - (c) a direction to the sheriff to inform the person promptly of the reasons for the arrest, the purpose of the arrest and detention, and the person's right to retain and instruct counsel without delay;
    - (d) a direction to assist the person to seek, or communicate with, counsel if assistance is required.
  - (3) The arrest warrant for a contempt hearing may be in Form 89.11.
  - (4) The sheriff is not obligated to execute the warrant, unless a judge is available on the day of the arrest and at a time when the person can be brought before the judge.
  - (5) A judge before whom an arrested person is brought may do any of the following:
    - (a) release the person on the person's promise to attend a contempt hearing, or to refrain from contemptuous behaviour and abide by conditions of the person's release;
    - (b) obtain the person's promise, but continue the detention until the promise is made as a bond secured against property, secured against money paid to the prothonotary, or guaranteed by sureties approved by the judge in an amount set by the judge;
    - (c) remand the person to a lock-up facility until the time and date of a bail hearing or the contempt hearing.
  - (6) A person who is arrested and detained for a contempt hearing is entitled to bail on the same principles as a person who is detained for the trial of a summary conviction offence under the *Criminal Code*.

### Forms

Arrest Warrant for Contempt Hearing (89.11).

### 89.12 - Conduct of hearing

- (1) A contempt hearing may be conducted in accordance with the directions of the presiding judge and in accordance with the Rules outside this Rule 89 that are applicable under Rule 89.01(2).
- (2) The judge may give directions that adapt those of the Rules that must be adapted to conform with the provisions of the Canadian Charter of Rights and Freedoms applicable to criminal or penal proceedings rather than civil proceedings.

**89.13 - Penalties for contempt**

- (1) A contempt order must record a finding of guilt on each allegation of contempt for which guilt is found and it may impose a conditional or absolute discharge, a penalty similar to a remedy for an abuse of process, or any other lawful penalty including any of the following:
  - (a) an order that the person must abide by stated penal terms, such as for house arrest, community service, or reparations;
  - (b) a suspended penalty, such as imprisonment, sequestration, or a fine suspended during performance of stated conditions;
  - (c) a fine payable, immediately or on terms, to a person named in the order;
  - (d) sequestration of some or all of the person's assets;
  - (e) imprisonment for less than five years, if the person is an individual.
- (2) A contempt order may provide that a penalty ceases to be in effect when the person in contempt causes contemptuous behavior to cease, or when the person otherwise purges the contempt.
- (3) A contempt order may provide for, or a judge may make a further order for, the arrest and imprisonment of an individual, or sequestration of the assets of a corporation, for failure to abide by penal terms, fulfill conditions of a suspended penalty, or comply with terms for payment of a fine.

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

**89.14 - Discharge and variation of contempt order**

A judge may discharge or vary a contempt order.