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Educational Notes

How this Rule Works

These Rules came into effect January 1, 2009 for all proceedings other than family proceedings. They apply to all such proceedings commenced after that date, and all steps taken in actions after that date, even if the action was commenced prior to January 1. There are a few exceptions relating to outstanding steps in actions that are discussed, below.

The new Rules for family proceedings came into effect on June 30, 2010 and apply to all family proceedings commenced under Part 13, and all steps taken in family proceedings commenced prior to June 30, unless a judge orders otherwise under R.92.08. There are a few exceptions relating to outstanding steps in family proceedings that are discussed, below.

Where an action is commenced before January 1, 2009, Rule 92 sets out a default list of outstanding steps to be completed under the old Rules, unless the parties agree, or a judge orders, otherwise. Steps properly taken under the old Rules are to be treated, as much as possible, as if they conform with the new Rules (R.92.03).

For trials in progress, R.92.08 permits the trial judge to decide which Rules apply.

If the application of R.92 would cause one party to gain an unfair advantage, R.92.08 creates broad saving powers that permit a judge to apply the old or new Rules to all or part of a proceeding.

Rule 92.08 does not require a party or judge to commit to using one set of Rules or the other. Instead, it allows cherry-picking between both sets of Rules in whatever manner will achieve justice in a particular case.

Matters to Which the Previous Rules Continue to Apply

The previous Rules continue to apply to all other proceedings other than family proceedings or actions (such as those commenced by originating notice (application)), started before January 1, 2009.

Steps in Actions – Which Rules Apply?

Rule 92.04 specifies that a number of outstanding steps in both actions and family proceedings are to be completed under the previous Rules, if those steps were started before January 1 (for actions) or June 30 (for family proceedings):

- Answers to demands for particulars;
- Interlocutory applications;
- Disclosure of documents and electronic information in any action where a party has served a list of documents;
- An examination for discovery, where the discovery was agreed to or a notice of examination issued;
- Answers to interrogatories;

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- References;
- Assignment of trial dates, delivery of experts' reports, and discovery in actions where a notice of trial was filed;
- Default judgments in outstanding actions, including those for foreclosure, sale, and possession.

Once the step is completed, the new Rules then apply to the rest of the action, unless otherwise ordered.

Highlights of Changes

Rule 92 is entirely new.

92.01 - Effective date of these Rules and definition

- (1) These Rules take effect on June 30, 2010 for a family proceeding and on January 1, 2009 for all other proceedings, except as provided in this Rule 92.
- (2) In this Rule, "family proceeding" means a proceeding started under Part 13 - Family Proceedings.

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92.02 - Application to outstanding proceedings

- (1) Unless this Rule provides or a judge orders otherwise these Rules apply to all steps taken after the following dates in the following kinds of proceedings:
 - (a) June 30, 2010 in a family proceeding started before that day;
 - (b) January 1, 2009 in an action started before that day.
- (2) The *Nova Scotia Civil Procedure Rules*(1972) apply to all other proceedings started before January 1, 2009 unless a judge orders otherwise.

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Annotations

The settling parties sought court approval of an order implementing two pierring agreements. Although the new *Rules* should have applied, the parties agreed the old *Civil Procedure Rules* (1972) should apply. *Held*, although the new *Rules* would typically apply, the court agreed to apply the old *Rules* for the following reasons: the parties' agreement; Rule 92.02(1) provides for it; and these are pierring agreements. *Sable Offshore Energy Inc. v. Ameron International Corp. et al.* , [2010 NSSC 19](#)

The proceeding was still under case management under the old *Civil Procedure Rules* (1972). The court had already stated the old discovery rule (Rule 18) applied. The applicants applied for disclosure of various documents in the plaintiff's possession. At issue was whether the new or old rules would apply to this motion; and whether relevancy would be determined under the new Rule 14.01(1)(b). *Held*, the new *Rules*, including the more stringent test under Rule 14.01(1)(b) applies. *Halifax Dartmouth Bridge Commission v. Walter Construction Corp. et al.* , [2009 NSSC 403](#)

The plaintiff brought an action in 2004. The trial was set for 2008 but later rescheduled to May, 2009. The defendants accepted the plaintiff's 2007 Offer to Settle on the eve

of trial. At issue was whether the old or new *Civil Procedure Rules* applied. The plaintiff argued the new Rules, 2008 (Rule 70.07) applied. *Held*, on the facts, the old Rules (1972) and Practice Memorandum 7 apply. Most of the period for which prejudgment interest is to be calculated is pre-2009, save for three months and seven days. The old Rules (1972) also apply to the determination of costs.

Awan v. Cumberland Health Authority et al. , [2009 NSSC 295](#)

The plaintiffs sued the respondent landlord for breach of contract, negligence and nuisance. The defendant brought an application for summary judgment and security for costs (based on the plaintiffs' historical lack of cooperation and failures to appear in court). There was some issue as to whether the old (1972) or *Civil Procedure Rules (2008)* applied. *Held*, new rules applied. While the relevant steps in the litigation were likely taken prior to January 1, 2009, then it was appropriate to apply the new rules in assessing the application for summary judgment because the new Rule 13 is much stricter. The court noted the same result (a dismissal of the application) would have been reached under the old rules, but more easily. The court also applied the (new) Rule 45.02(1) (which represents a considerable departure from the old rule (42.01)) in considering the application for security for costs. On the facts, security granted.

Flewelling v. Scotia Island Property Ltd. et al. , [2009 NSSC 94](#)

The plaintiff brought an action in 2004. The trial was set for 2008 but later rescheduled to May, 2009. The defendants accepted the plaintiff's 2007 Offer to Settle on the eve of trial. At issue was whether the old or new *Civil Procedure Rules* applied. The plaintiff argued the new *Rules (2008)* (Rule 70.07) applied. *Held*, on the facts, the old *Rules (1972)* and Practice Memorandum 7 apply. Most of the period for which prejudgment interest is to be calculated is pre-2009, save for three months and seven days. The old *Rules (1972)* also apply to the determination of costs.

Awan v. Cumberland Health Authority et al. , [2009 NSSC 295](#)

92.03 - Document and step in action preserved

On a motion, in a trial or hearing, and in connection with any other step taken after June 30, 2010 in a family proceeding started before that day, or after January 1, 2009 in an action started before that day, both of the following apply:

- (a) each notice, pleading, affidavit, order, and other document filed in the action under the *Nova Scotia Civil Procedure Rules (1972)* must be treated, as nearly as possible, as if it conformed with these Rules;
- (b) each step taken in the family proceeding, or action, and completed before June 29, 2010 in the family proceeding, or January 1, 2009 in the action, must be treated, as nearly as possible, as a step taken under these Rules.

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92.04 - Outstanding interlocutory steps

Each of the following steps that is outstanding in a family proceeding on June 30, 2010, or in an action on January 1, 2009, must be completed under the *Nova Scotia Civil Procedure Rules (1972)*, unless the parties agree or a judge orders otherwise:

- (a) answers to a demand for particulars delivered before the date;
- (b) an interlocutory or interim application;

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- (c) the disclosure of documents and electronic information in an action in which a party has served a list of documents before the date;
- (d) an examination for discovery agreed to, or for which a notice of examination is issued, before the date;
- (e) answers to interrogatories delivered before the date;
- (f) a reference made before the date;
- (g) the assignment of trial dates, delivery of an expert's report, and discovery in a divorce proceeding in which a party files a request for trial date and certificate of readiness before the date, and in an action in which a party files a notice of trial before the date;
- (h) default judgment, including for foreclosure, sale, and possession, on a claim made in an action started before that date;
- (i) all steps in an undefended or uncontested divorce proceeding.

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92.05 - Notice in an outstanding action

- (1) The *Nova Scotia Civil Procedure Rules* (1972), rather than Rule 31 - Notice, apply to both of the following in a family proceeding started before June 30, 2010, or an action started before January 1, 2009:
 - (a) giving notice of the action to a person after the date;
 - (b) a motion for a default judgment made after the date.
- (2) An address for service given before June 30, 2010 in a family proceeding, or January 1, 2009 in any other proceeding, is treated as a designated address under these Rules.
- (3) A party to a family proceeding started before June 30, 2010, or an action started before January 1, 2009, who has not stated an address for service, or who has ceased to be assured of receiving a document delivered to the address for service, must designate an address for delivery.

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92.06 - Actions under \$100,000

Rule 57 - Action for Damages Under \$100,000 does not apply to an action started before January 1, 2009, but a motion may be made under Rule 58 - Action for Claim Valued Under \$100,000.

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92.07 - Registry number on headings

The prothonotary at Halifax may direct that the registry number in the heading of each proceeding be changed to show the new registry codes in Rule 32 - Place of Proceeding.

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92.08 - Directions to apply present or former Rules

- (1) A judge who presides at a trial or hearing of a family proceeding started before June 30, 2010 may direct which of these Rules and which of the Rules in the *Nova Scotia Civil Procedure Rules* (1972) apply to the trial or hearing.
- (2) A judge who is satisfied that the application of this Rule 92 to a family proceeding started before June 30, 2010, or any other proceeding started before January 1, 2009, causes one party to gain an unfair advantage over another party may order either of the following:
 - (a) these Rules apply to the proceeding, or a part of the proceeding, despite Rules 92.02(2), 92.04, and 92.05(1);
 - (b) the *Nova Scotia Civil Procedure Rules* (1972) apply to the proceeding, or a part of the proceeding, despite Rule 92.02(1).

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Annotations

The infant plaintiff sustained serious injuries in a school bus accident. The jury found the defendants not liable. Costs were in issue. The parties agreed the *Rules* and 1989 Tariffs applied. *Held*, as the parties have agreed, Rule 77 applies. Despite the discretion in Rule 92.08 (2) to use the 1972 *Rules*, there is no evidence determining costs under these *Rules* would result in an unfair advantage to one party. The 1989 Tariffs apply because they were the ones in effect when the action was started.

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

The plaintiff failed to prove the defendant's actions caused his alleged injuries. Costs were in issue. The action was started in 2004, the notice of trial filed in 2008 and the trial started in 2009. *Held*, the 2008 *Rules* apply to the determination of costs. Under Rule 92.02 (8), the defendant will not gain an unfair advantage over the plaintiff if this happens.

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