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Part 2 - Civil Proceedings

Rule 3 - Kinds of Proceedings

Educational Notes

This Rule sets out the four basic types of proceedings: actions, applications, judicial review, and appeal. Actions are commenced and regulated under R.4, and applications under R.5. Rule 6 sets out criteria for choosing between the two types of proceeding. Judicial review and appeal are both addressed in R.7.

3.01 - Actions, applications, and judicial or appellate review

A person may claim a civil remedy in the Supreme Court of Nova Scotia by starting any one of the following kinds of proceedings:

- (a) an action, which leads to a trial or an earlier resolution under Part 4 - Alternate Resolution or Determination;
- (b) an application, which leads to a hearing or an earlier resolution under Part 4 - Alternate Resolution or Determination;
- (c) a proceeding for judicial review, or an appeal to the court under legislation.

Rule 4 - Action

Educational Notes

How this Rule Works

Rule 4 is a meaty Rule that covers starting and defending an action, and setting an action down for trial. It collects matters previously dealt with by seven previous Rules. Each part of R.4 is dealt with in turn.

Overview of Rule 4

Starting an action	R.4.02 deals with regular actions R.4.03 deals with the new action for debt R.4.04 addresses expiry and renewal of a notice of action
Defending an action	R.4.05 deals with defences R.4.06 addresses a demand for notice R.4.07 addresses submitting to the jurisdiction
Counterclaims	R.4.08 and 4.12
Crossclaims	R.4.09, 4.10 and 4.12
Third Party Claims	R.4.11 and 4.12
Setting down	R.4.13 to 4.16 set out the procedure for date assignment conferences (DAC)
Post DAC	R.4.17 – 4.21 address exchange of witness lists, the trial readiness conference, reconsideration and adjournment of trial dates, and remedies
Dormant actions	R.4.22 deals with dismissal of dormant actions

Starting an Action

The first change of note is one of nomenclature: the Originating Notice (Action) has now become simply a notice of action, which includes a statement of claim.

Rule 4.02(3) sets out detailed requirements for the notice, which is in Form 4.02A. The most significant change is that the notice must state whether the action falls within Rule 57 – Action for Damages Under \$100,000. Form 4.02B is used for the statement of claim. R.4.02(4) and R.38 codify current best practices in pleading.

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Rule 4.03 creates a new, optional type of action specifically for debts. A notice of action for debt is appropriate for a claim based solely on debt with no interest, interest under an express agreement, or pre-judgment interest under the *Judicature Act*. The notice must include the daily amount of interest accruing to enable the prothonotary to calculate the total due. As with regular actions, the plaintiff must state whether the action falls within Rule 57 – Actions Under \$100,000. Rule 4.03(5) addresses the contents of the statement of claim.

Rule 4.04 changes the practice relating to expiry and renewal of a notice. Notices are now valid for a year (under the previous R.9.07 they expired after 6 months). Notices are easily renewed for a second year on *ex parte* motion up to 14 months after they are filed. After 14 months, in order to obtain renewal, the plaintiff must satisfy a judge on either their reasonable, but unsuccessful attempts to effect service, or that the plaintiff will suffer serious prejudice and no defendant will suffer serious prejudice that cannot be compensated in costs. There is no longer any requirement that the prothonotary apply to dismiss an action other than the 5 year limit in R.4.22.

Defending an Action

Rule 4.05 replaces the previous R.11.01. Rules 38 – Pleading and R.4.05(4) set out the requirements for a statement of defence, which may be in Form 4.05A. The defence must specify which of the facts in the statement of claims are admitted, which are not admitted only because the defendant has insufficient knowledge, and which are denied. There is no Rule corresponding to the previous R.14.14 for deemed denials. Essentially, the Rule codifies best practices in pleadings.

Rule 4.06 allows for a demand for notice where a defendant chooses not to file a defence. It replaces the previous R.12.07.

Rule 4.07 allows a defendant to move to dismiss for want of jurisdiction without submitting to the court's jurisdiction. It is narrower than the previous R.11.05.

Counterclaims, Crossclaims and Third Party Claims

Rule 4.08 replaces the previous Rule 16 – Counterclaims.

Rule 4.09 replaces the previous Rule 17A – Crossclaim, while R.4.10 replaces the previous R.16.02.

Rule 4.11 replaces the previous Rule 17 – Third Party Proceedings.

Rule 4.12 states that all procedures relating to claims and defences apply to counterclaims, crossclaims, and third party claims, but headings should be changed to reflect the nature of the notice. Rule 4.12(c) provides that if there is an inconsistency, the Rule referring specifically to a counterclaim, crossclaim, or third party claim prevails. The Rule also notes that there can be no default judgment against a third party until the main action is determined, unless otherwise permitted.

Date Assignment Conferences and Post-DAC requirements

Rules 4.13 – 4.16 replace the previous notice of trial procedure set out in R.28.05. Date assignment conferences are now available much earlier in the litigation process than under the previous Rules. They may be requested any time after:

- Pleadings have closed;
- Documents and electronic information have been exchanged by all parties;

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- All individual parties have been discovered;
- For corporate parties, at least the designated manager or one other officer or employee has been discovered; and
- Interrogatories to be answered by, or on behalf of any party have been answered.

The court is now willing to hold a date assignment conference while discovery of additional corporate witnesses or non-parties is outstanding, interrogatories are still forthcoming, motions need to be made, and expert reports exchanged.

Rule 4.13(2) allows the court to move ahead with a date assignment conference even before these requirements are satisfied if a party is lagging, an emergency exists, or there is some other good reason.

Date Assignment Requests

The new date assignment request form (Form 4.13) operates like an expanded notice of trial. It includes the following new (or modified) information:

- a. a chronological list of all pleadings, and all orders affecting the future conduct of the action or conduct of the trial (note: not all previous orders, only those affecting future conduct of the action);
- b. a description of the status of discoveries, disclosure, and expert opinion;
- c. a forecast of all steps the party foresees being taken before trial by any party;
- d. a general description of the documents and electronic information to be adduced by all parties;
- e. the number of witnesses that party will call and an estimate of the length of their testimony;
- f. the number of days required for trial, broken down for each parties' case, and an estimate of time for jury selection and deliberation (if applicable);
- g. whether there are any special requirements that need to be accommodated (such as audio-visual equipment, an interpreter, or a trial in the French language);
- h. whether a settlement conference is requested; and
- i. when the party anticipates all parties will be ready for trial.

Rule 4.14 allows a party to object within 10 days and bring a motion for an order refusing the request. In Halifax, this is to be done through the Appearance Day process under R.24, and elsewhere in a motion by teleconference under R.25. The grounds for objecting are set out in R.4.16(5) and could also include an objection on the basis that the party seeking to set trial dates has not complied with the requirements of R.4.13(1).

Rule 4.15 requires each other party to prepare a memorandum for the date assignment judge within 10 days (unless there is an objection) correcting or adding to the information or estimates in the request for trial dates, setting out the number of witnesses to be called and an estimate of the time required for each, the date when the party anticipates being ready for trial, and the parties' election of trial with or without a jury. Rule 4.15 replaces the previous R.28.06(2).

The Date Assignment Conference

Rule 4.16 provides for the prothonotary or judge's assistant to set a date for the conference much faster than under the previous Rules: within 25 days of the request, or 10 days after a motion for an order refusing the conference is dismissed. Typically, date assignment conferences will be held on Fridays and counsel will be expected to make themselves available within a reasonable time.

Date assignment conferences are much more detailed under the new Rules and will take about an hour. They will require significant preparation by counsel and the date assignment judge. In particular, a party who intends to make a motion that will affect the readiness forecast must attend the DAC with details of how the motion will be addressed and managed.

A DAC judge who is able to forecast trial readiness and estimate the length of the trial must set trial dates, which will likely be at least a year in the future, or longer if the parties require it. The judge may also give directions (R.4.16(6)). In addition to setting trial dates, the judge must also set dates for several additional key steps in the proceeding:

- a **trial readiness conference** no less than 40 days before trial;
- a **finish date** no less than 20 days before the trial readiness conference. The finish date is the date by which all pre-trial procedures must be completed. The finish date will fall at least 3 months before trial;
- a **settlement conference** date (if agreed) no less than 10 days before the trial readiness conference. The judge must also fix the type of settlement conference under R.10: ordinary, or trial-like;
- completion dates for other **specific tasks**, if a deadline is advisable;
- additional **conference dates**, if monitoring trial preparation is necessary.

Post DAC Activity

Parties have a positive duty to immediately request a conference to reconsider trial dates, if something happens that will affect trial readiness or the length of the trial.

Rule 4.20 deals with adjournments. A judge may adjourn before the finish date on consent. After the finish date, motions to adjourn must be made to the trial judge where possible. On the motion, the judge must consider and balance prejudice to the party seeking the adjournment, prejudice of the other parties, and prejudice to the public. Rule 4.20 does not import into Nova Scotia a strict no-adjournment policy, like that adopted in Ontario. Rule 4.21 addresses remedies, which include costs consequences.

There is a new requirement in R.4.18 to exchange witness lists at least 2 days before the trial readiness conference. The witness list does not have to be filed with the court. A party may not call a witness not included on their list, except to impeach, unless otherwise permitted. To obtain permission, a party must immediately notify all other parties and the trial judge of the new witness and the reasons why s/he must be called to avoid an injustice. Permission may come with costs consequences. A party who decides not to call a witness on the list must notify all other parties and the trial judge.

At the trial readiness conference, a judge ascertains whether the parties are ready for trial. If they are not, the judge may give directions, including for quick completion of any outstanding tasks, set a date for a late settlement conference (if agreed), or cancel the trial dates (R.4.19).

Dormant Actions

Under R.4.22 the prothonotary must move to dismiss stale actions five years after filing (previously 3 years) if there has been no request for trial dates. There is no longer a notice of intention to proceed – the matter goes before a judge and counsel will need to explain why the action should not be dismissed. This Rule replaces the previous R.28.11.

Highlights of Changes

The most significant change to current practice is that parties can now get trial dates before they are ready for trial. The trade-off is set out in R.4.01(2): counsel will need to do far more preparation for the date assignment conference, manage the litigation to ensure trial readiness, participate in a trial readiness conference, and immediately inform the court of any development that will affect their readiness for trial. Date assignment conferences will become lengthier and more detailed.

There is now a new form of action for debt (R.4.03).

Notices of action are now valid for a year instead of 6 months and can be renewed *ex parte* for another year. If the request comes more than 14 months after filing, counsel must satisfy a judge as to why the action should be renewed (R.4.04).

Parties must now exchange witness lists about two months prior to trial.

Rule 4 provides for mandatory trial readiness conferences in every case, to be held at least 2 months before trial and introduces the concept of a “finish date” at least 3 months before trial, where all parties must be ready.

Parties have a positive duty to inform the court of any changes that affect trial readiness and adjournments may be harder to get, particularly after the finish date. If granted, they will likely attract costs consequences.

Actions are not considered dormant for 5 years (previously 3) but if no trial dates have been requested, the parties must appear before a judge to explain why the action should not be dismissed.

Practice Tip

As with many of the new Rules, R.4 will have the greatest impact on lawyers who do not already follow best practices. Preparation is the order of the day under R.4.

4.01 - Scope of Rule 4

- (1) A person may do any of the following, in accordance with this Rule:
 - (a) start an action;
 - (b) defend an action;
 - (c) bring a counterclaim, crossclaim, or third party claim within an action;
 - (d) have an action set down for trial.
- (2) The provisions for having an action set down for trial allow a party to request trial dates before the parties are ready for trial, and the following kinds of requirements are included as a consequence of providing for early assignment of trial dates:

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- (a) parties, counsel, and a judge assigning the trial date are required to make diligent efforts for forecasting when the action will be ready for trial and how many days will be needed;
- (b) a party who becomes aware that the forecast may not be attained has a duty to request a conference with a judge;
- (c) a party has a duty to get ready for trial in the forecasted time and participate in a trial readiness conference.

4.02 - Notice of action

- (1) A person may start an action by filing a notice of action, unless one of the following applies:
 - (a) legislation requires the action to be started by filing a different document, such as the petition required by the Controverted Elections Act;
 - (b) legislation, such as the *Builders' Lien Act*, permits the action to be started by filing a statement of claim without a notice;
 - (c) a creditor chooses to start the action by filing a notice of action for debt under Rule 4.03.
- (2) The notice of action must include a statement of claim as part of the notice.
- (3) The notice of action must contain a standard heading written in accordance with Rule 82 - Administration of Civil Proceedings, be entitled "Notice of Action", be dated and signed, and include all of the following:
 - (a) notice that action has been started for relief described in the attached statement of claim;
 - (b) notice of the deadlines in Rule 31 - Notice for filing a defence;
 - (c) notice that the plaintiff may have default judgment against the defendant, unless the defendant files a notice of defence;
 - (d) a notice that the defendant may file a demand for notice, if the defendant does not defend the action but wishes to have further notice;
 - (e) a statement summarizing the effect of Rule 57 - Action for Damages Under \$100,000, stating how it becomes applicable, and stating whether the action is within the Rule;
 - (f) a statement explaining how documents are filed and the requirement for immediate delivery to each party entitled to notice;
 - (g) if there is only one plaintiff, a designation of an address for delivery of documents to the plaintiff and, if there is more than one plaintiff, a designation of one address for delivery to all plaintiffs or a separate address for each plaintiff;
 - (h) an acknowledgement of the effect of delivery to the designated address and a statement that further contact information is available from the prothonotary;
 - (i) the place of trial designated by the plaintiff in accordance with Rule 47 - Place of Trial or Hearing;
 - (j) the attached statement of claim.
- (4) The statement of claim must notify the defendant of all the claims to be raised by the plaintiff at trial, conform with Rule 38 - Pleading, and include each of the following:
 - (a) a description of the parties;

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- (b) a concise statement of the material facts relied on by the plaintiff, but not argument or the evidence by which the material facts are to be proved;
 - (c) reference to legislation relied on by the plaintiff, if the material facts that make the legislation applicable have been stated;
 - (d) a concise statement of the remedies claimed, except costs.
- (5) The notice of action may be in Form 4.02A, and the statement of claim may be in Form 4.02B.

Forms

Statements of Claim, Counterclaim, Crossclaim, Claim Against Third Party(4.02B),
Notice of Action(4.02A).

4.03 - Notice of action for debt

- (1) A plaintiff who claims only on a debt, and who claims no interest, interest under an agreement that expressly provides for the payment of interest, or prejudgment interest under the *Judicature Act* may start an action by filing a notice of action for debt.
- (2) A plaintiff who files a notice of action for debt may claim prejudgment interest under the *Judicature Act* at five percent a year calculated simply from the day the debt came due.
- (3) A prothonotary may dismiss an action brought by notice of action for debt, if the prothonotary is satisfied the plaintiff makes a claim that is not based only on a debt, such as a claim based on an unliquidated demand.
- (4) The notice of action for debt must be entitled "Notice of Action for Debt", otherwise include everything that is required in a notice of action, and provide each of the following additional statements:
 - (a) a statement of the amount sought on default judgment expressed as the amount of the debt calculated to a recent day, a claim for interest after that day such that the defendant and the prothonotary can calculate the amount from information in the notice including the statement of claim, the amount of Tariff D costs, and a claim for disbursements to be taxed;
 - (b) a statement that the prothonotary will dismiss the action, except the claim for taxed disbursements, if the defendant pays the amount sought for default judgment and delivers a receipt to the prothonotary;
 - (c) a statement that the claim for disbursements may be settled or taxed.
- (5) The statement of claim in a notice of action for debt must notify the defendant of the basis for the claim in debt, conform with Rule 38 - Pleading, and include each of the following:
 - (a) a description of the parties;
 - (b) a concise statement of how the debt was incurred;
 - (c) a concise statement of how the debt came due;
 - (d) a statement of the rate and calculation of any interest claimed;
 - (e) a statement showing the calculation of the amount claimed, including principal, credits, interest, and the total;
 - (f) a statement showing how further interest is to be calculated to the date of judgment.

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- (6) The notice of action for debt may be in Form 4.03A, and the statement of claim may be in Form 4.03B.

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

Forms

Statement of Claim(4.03B), Notice of Action for Debt(4.03A).

4.04 - Expiry and renewal of a notice of action

- (1) A notice of action, including a notice of action for debt, expires one year after the day it is filed, unless a defendant is notified of the action in accordance with Rule 31- Notice.
- (2) A plaintiff may make a motion to renew a notice of action for a second year by filing a notice of motion no more than fourteen months after the day the notice of action is filed.
- (3) The motion may be made *ex parte*, unless a judge orders otherwise.
- (4) A notice of action that is renewed for a second year expires two years after the day it is filed.
- (5) A judge may renew an expired notice of action more than fourteen months after the day the notice of action is filed only if the plaintiff satisfies the judge on either of the following:
 - (a) reasonable efforts were made to notify the defendant of the action by effecting personal service, service could not be effected personally, and the plaintiff will make a motion for a substituted method of giving notice as soon as possible;
 - (b) inadvertence led to the expiry, the plaintiff will suffer serious prejudice if the proceeding is terminated, and no defendant will suffer serious prejudice that cannot be compensated in costs as a result of the delay in notification.

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

Annotations

The plaintiff was driving with the defendant, Johnston, when Johnston's car collided with another car driven by the defendant, White. The plaintiff notified the insurers of both defendants of his claim within 18 months and later filed an action (in 2004). By that time, White was deceased for reasons unrelated to the accident. The plaintiff's counsel made no attempts to serve the statement of claim, or contact the insurers of the defendants, until 2009. The statement of claim was renewed three times under the old *Civil Procedure Rules, (1972)*. The plaintiff moved to renew it again under the new *Civil Procedure Rule, (2008)* Rule 4.04(5)(b). *Held*, the statement of claim is renewed one final time to allow for service on the defendants. Plaintiff's counsel blamed his failure to serve the defendants on inadvertence. His firm's time-sheets confirm it. Although the rule pertaining to the renewal of a notice of action has changed, the test for inadvertence has not changed appreciably. The failure to deal with the notice in a timely manner was an oversight on the lawyer's part and a renewal will allow justice to be done. Efforts to track down witnesses haven't been fully exhausted; the defendants have known about the plaintiff's cause of action since 2003; and they have had time to investigate the claim and prepare to defend against it. The issue of appointing a representative is deferred until the plaintiff contacts the Public Trustee about appointing a representative for the purpose of advancing the litigation.

Grosse v. White et al. , [2010 NSSC 10](#)

4.05 - Defending an action

- (1) A defendant may defend an action by filing a notice of defence.
- (2) The notice of defence must include a statement of defence as part of the notice.
- (3) The notice of defence must contain the standard heading, be entitled "Notice of Defence", be dated and signed, and include all of the following:
 - (a) a statement identifying each defendant filing the defence;
 - (b) a notice that the action is defended on the grounds stated in the attached statement of defence;
 - (c) if the notice is for only one defendant, a designation of an address for delivery of documents to the defendant and, if it is for more than one defendant, a designation of one address for delivery to all defendants who file the notice or a separate address for each defendant;
 - (d) an acknowledgement of the effect of delivery to the designated address and a statement that further contact information is available from the prothonotary;
 - (e) the attached statement of defence.
- (4) The statement of defence must notify the plaintiff of all the defences to be raised at trial, conform with Rule 38 - Pleading, and include each of the following:
 - (a) a statement identifying the defending party;
 - (b) a statement of which of the facts pleaded in the statement of claim are admitted, which are not admitted only because the defendant has insufficient knowledge to admit or deny them, and which are denied;
 - (c) a concise statement of the defendant's version of the material facts, if the defendant will seek to prove a different version of the material facts from those in the statement of claim;
 - (d) a concise statement of the material facts relied on by the defendant for any further defence, but not argument or the evidence by which the material facts are to be proved;
 - (e) reference to legislation relied on by the defendant, if the material facts that make the legislation applicable have been stated.
- (5) The notice of defence may be in Form 4.05A, unless the defendant also counterclaims or crossclaims, and the statement of defence may be in Form 4.05B.
- (6) A notice of defence may be filed before the deadline in Rule 31 - Notice or the time permitted by a judge who sets aside a judgment under Rule 8 - Default Judgment.

Forms

Statements of Defence(4.05B), Notice of Defence(4.05A).

4.06 - Demand for notice

- (1) A defendant who does not have a defence to an action, or does not choose to defend an action, may demand notice of all steps in the proceeding.
- (2) The defendant may demand notice by filing a demand for notice.
- (3) The demand for notice must contain the standard heading, be entitled "Demand for Notice", be dated and signed, and include all of the following:
 - (a) a statement identifying each defendant filing the demand;

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- (b) a notice the demand is made;
 - (c) if the demand is filed by one defendant, a designation of an address for delivery of documents to that defendant and, if the demand is filed by more than one defendant, a designation of one address for all defendants or a separate address for each defendant.
 - (d) an acknowledgement of the effect of delivery to the designated address and a statement that further contact information is available from the prothonotary.
- (4) The demand for notice may be in Form 4.06.

Forms

Demand for Notice(4.06).

4.07 - Lack of jurisdiction

- (1) A defendant who maintains that the court does not have jurisdiction over the subject of an action, or over the defendant, may make a motion to dismiss the action for want of jurisdiction.
- (2) A defendant does not submit to the jurisdiction of the court only by moving to dismiss the action for want of jurisdiction.
- (3) A judge who dismisses a motion for an order dismissing an action for want of jurisdiction must set a deadline by which the defendant may file a notice of defence, and the court may only grant judgment against the defendant after that time.

4.08 - Counterclaim

- (1) A defendant may counterclaim against a plaintiff for any claim the defendant has against the plaintiff.
- (2) The defendant may counterclaim by filing a notice of defence and counterclaim.
- (3) A notice of defence and counterclaim must include a statement of defence and a statement of counterclaim as parts of the notice.
- (4) The notice of defence and counterclaim must be entitled "Notice of Defence and Counterclaim", otherwise include everything that is required in a notice of defence under Rule 4.05(3), and provide all of the following:
 - (a) a notice that a claim is made by the defendant against the plaintiff;
 - (b) a notice that the defendant may have default judgment against the plaintiff on the counterclaim, unless the plaintiff files a statement of defence to counterclaim in the time required by Rule 31 - Notice;
 - (c) the attached statement of counterclaim.
- (5) The statement of counterclaim must notify the plaintiff of all the claims to be raised at trial by the defendant against the plaintiff, conform with Rule 38 - Pleading, and contain everything that is required in a statement of claim under Rule 4.02(4) as if the defendant making the claim were a plaintiff.
- (6) The notice of defence and counterclaim may be in Form 4.08, the statement of defence may be in Form 4.05B, and the statement of counterclaim may be in Form 4.02B.

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- (7) A notice of defence and counterclaim may be filed before the deadline in Rule 31 - Notice or before the time permitted by a judge who sets aside a judgment under Rule 8 - Default Judgment.

Forms

Notice of Defence and Counterclaim(4.08).

4.09 - Crossclaim

- (1) A defendant may crossclaim against another defendant for a claim of either of the following kinds:
 - (a) a claim that the other defendant is liable to the first defendant for all or part of the plaintiff's claim;
 - (b) a claim that would be consolidated with the plaintiff's action if the defendant commenced an independent action for the same claim.
- (2) The defendant may crossclaim by filing a notice of defence with crossclaim.
- (3) A notice of defence with crossclaim must include a statement of defence and a statement of crossclaim as parts of the notice.
- (4) The notice of defence with crossclaim must be entitled "Notice of Defence with Crossclaim", otherwise include everything required in a notice of defence, and include each of the following:
 - (a) a notice that a claim is made by the defendant against the other defendant;
 - (b) a notice that the defendant may have default judgment against the other defendant on the crossclaim, unless that defendant files a statement of defence to crossclaim within the required time;
 - (c) the attached statement of crossclaim.
- (5) The statement of crossclaim must notify the other defendant of all the claims against the other defendant, conform with Rule 38 - Pleading, and contain everything that is required in a statement of claim under Rule 4.02(4) as if the defendant making the crossclaim were the plaintiff.
- (6) The notice of defence with crossclaim may be in Form 4.09, the statement of defence may be in Form 4.05B, and the statement of crossclaim may be in form 4.02B.
- (7) A notice of defence with crossclaim may be filed before the deadline in Rule 31 - Notice, or before the time permitted by a judge who sets aside a judgment under Rule 8 - Default Judgment.

Forms

Notice of Defence with Crossclaim(4.09).

4.10 - Counterclaim involving third party

- (1) A defendant who claims that a plaintiff and a person who is not a party are both liable to the defendant for the same claim may proceed jointly against them by counterclaiming against the plaintiff under Rule 4.08 and, at the same time, taking action against the third party under Rule 4.11.

- (2) Despite the requirements for the heading of a notice of defence and counterclaim, a notice of defence and counterclaim filed jointly with a notice of claim against third party must contain the same heading as the notice of action with the addition of the name of each third party, described as "Third Party" or "Third Parties".

4.11 - Third party claim

- (1) A defendant may make a claim in an action against a person who is not a party, if the claim against the third party is of one of the following kinds:
 - (a) a claim alleging that the third party is liable to the defendant for all or part of the plaintiff's claim;
 - (b) a claim that would be consolidated with the plaintiff's action if the defendant started a new action against the third party for that claim;
 - (c) a claim jointly against the plaintiff and the third party to which Rule 4.10(1) applies.
- (2) The defendant may start the third party action by filing a notice of claim against third party.
- (3) The notice of claim against third party must include a statement of claim against third party as part of the notice.
- (4) The notice of claim against third party must contain the standard heading varied as required by Rule 82.09(3)(b), of Rule 82 - Administration of Civil Proceedings, to give the name and title of each third party, be entitled "Notice of Claim against Third Party", be dated and signed, and include all of the following:
 - (a) notice that a third party action has been brought for an order described in the attached statement of claim against third party;
 - (b) a reference to each notice filed including the attached pleadings;
 - (c) notice that the defendant may have default judgment against the third party when the main action is determined or a judge allows, unless the third party files a statement of defence in the time required by Rule 31 - Notice;
 - (d) notice that the third party may file a demand for notice, if the third party does not defend the claim but wishes to receive further notice;
 - (e) a statement explaining how documents are filed and the requirement for immediate delivery to each party entitled to notice;
 - (f) the same address for delivery of documents to the defendant as in the defence;
 - (g) an acknowledgement of the effect of delivery to the designated address and a statement that further contact information is available from the prothonotary;
 - (h) an attached copy of each notice, including pleadings that form part of the notice, and the attached statement of claim against third party.
- (5) The statement of claim against third party must notify the third party of all the claims to be raised by the defendant against the third party, conform with Rule 38 - Pleading, and include everything required in a statement of claim under Rule 4.02(4) as if the defendant making the claim were a plaintiff.
- (6) The notice of claim against third party may be in Form 4.11, and the statement of claim against third party may be in Form 4.02B.
- (7) A notice of claim against third party may be filed before the deadline in Rule 31 - Notice for the defendant making the third party claim to file a defence, unless a judge orders otherwise.

Forms

Notice of Claim Against Third Party(4.11).

4.12 - Counterclaim, crossclaim, and third party claim

- (1) All procedures for a plaintiff's claim and a defendant's defence apply to a counterclaim, crossclaim, and third party claim as if the party initiating the claim were a plaintiff and the party defending the claim were a defendant, with each of the following exceptions:
 - (a) a notice filed in response to a counterclaim, crossclaim, or third party claim may be entitled so it refers to the counterclaim, crossclaim, or third party claim, such as "Notice of Defence to Counterclaim";
 - (b) the attached pleading may refer to the counterclaim, crossclaim, or third party claim, such as "Statement of Defence to Third Party Claim";
 - (c) a Rule that refers specifically to counterclaim, crossclaim, or third party claim prevails over other Rules to the extent of any inconsistency;
 - (d) no order for judgment may be made against a third party under Rule 8 - Default Judgment, until the main action is determined, unless a judge permits otherwise.
- (2) A third party may defend a claim in the main action.
- (3) A third party who defends a claim in the main action must attach to the notice of defence both of the following statements of defence:
 - (a) one giving notice to the defendant of all defences to be raised at trial in answer to the third party claim;
 - (b) the other giving notice to the plaintiff of all defences to be raised at trial in answer to a claim in the main action.
- (4) A third party who wishes to bring a proceeding against a further party must file a notice of claim that is the same as a notice of claim against third party except the notice must describe the new party as the fourth party, and a fourth party who wishes to bring a proceeding against a further party must file a notice of claim that describes the new party as the fifth party, and so on.
- (5) A notice of claim against a fourth, fifth, or further party must contain the standard heading varied as required by Rule 82.09(3)(b), of Rule 82 - Administration of Civil Proceedings.

4.13 - Request for date assignment conference

- (1) A party may obtain a date assignment conference to appoint trial dates after pleadings close as provided in Rule 38 - Pleading, and after each party has done all of the following:
 - (a) disclosed documents and electronic information as required;
 - (b) discovered each individual party of whom discovery is required;
 - (c) discovered, from each corporate party of whom discovery is required, at least the designated manager or one other officer or employee;
 - (d) answered interrogatories required to be answered by or on behalf of the party.

Rule 4 - Action

- (2) A party may make a motion for permission to request a date assignment conference before each party has done everything required in Rule 4.13(1), and the party must satisfy the judge on one of the following:
 - (a) a party is lagging in making disclosure or conducting discovery, and the party requesting the conference has made disclosure and conducted the discoveries that party requires;
 - (b) an emergency exists, it can only be resolved by a trial, and it is clear that the parties will be ready for trial when the trial readiness conference is conducted;
 - (c) the efficient administration of justice requires that the conference be held.
- (3) The request for a date assignment conference must include all of the following:
 - (a) the request;
 - (b) the party's election as required by Rule 52 - Trial by Jury;
 - (c) a statement showing that the requirements to obtain a date assignment conference have been satisfied, or that an order for permission to request a date assignment conference has been issued;
 - (d) a chronological list of all pleadings;
 - (e) a chronological list of all orders affecting the future conduct of the action, or the conduct of the trial;
 - (f) a general description of the status of the action, including information about the status of discoveries, disclosure, and expert opinion;
 - (g) a statement of all steps in the proceeding the party making the request foresees being taken by any party before trial, including holding a discovery, delivery of an expert's report, and making a motion;
 - (h) a general description of the documents and electronic information the party foresees being introduced by all parties at trial;
 - (i) the number of witnesses the party expects to call and an estimate of the length of testimony by each;
 - (j) an estimate of the number of days required for the trial and a breakdown stating the number of days attributed to each party's case and any jury selection and deliberations;
 - (k) whether special requirements need to be accommodated;
 - (l) whether a settlement conference is requested;
 - (m) when the party anticipates all parties being ready for trial.
- (4) A copy of each pleading and each order affecting the future conduct of the action, or the conduct of the trial, must be attached to the request for a date assignment conference.
- (5) The request for a date assignment conference may be in Form 4.13.

Forms

Request for Date Assignment Conference(4.13).

4.14 - Objecting to request for date assignment conference

- (1) A party who objects to trial dates being set may make a motion for an order refusing the request for a date assignment conference, unless the request is permitted by a judge under Rule 4.13(2).

Rule 4 - Action

- (2) The party who makes the motion must do one of the following no more than ten days after the day the request for a date assignment conference is delivered to the objecting party, and the hearing of the motion must be set no more than fifteen days after the day of delivery:
 - (a) file an appearance day notice in accordance with Rule 24- Appearance Day Motion, if the motion is to be heard at Halifax;
 - (b) request a judge to provide a time and date for the motion to be heard by teleconference in accordance with Rule 25 - Motion by Appointment, if the motion is not to be heard at Halifax;
 - (c) request a judge to permit the motion be brought by other means.
- (3) On the hearing of the motion, a judge may do any of the following:
 - (a) refuse the request for trial dates;
 - (b) dismiss the motion;
 - (c) delay the holding of a date assignment conference, give directions on steps to be completed before the conference, set a deadline for filing a memorandum for the date assignment judge, and set a delayed date and time for the conference.

4.15 - Memorandum for date assignment judge

- (1) A party to whom a request for a date assignment conference is delivered, and who does not obtain an order refusing the request, must file a memorandum for the date assignment conference judge by the following deadlines:
 - (a) no more than ten days after the day the request is delivered, if the party does not make a motion in the required time for an order refusing the request or the request is permitted by a judge;
 - (b) no more than ten days after the day of the dismissal of a motion for an order refusing the request;
 - (c) as directed by a judge who delays the holding of a conference.
- (2) A memorandum for the date assignment judge must contain all of the following information:
 - (a) any correction of, or addition to, the information or estimates in the request for trial dates;
 - (b) the number of witnesses the party expects to call and an estimate of the length of testimony by each;
 - (c) when the party anticipates being ready for trial;
 - (d) if applicable, the party's election of trial with or without a jury.
- (3) A memorandum for the date assignment judge may be in Form 4.15.

Forms

Memorandum for Date Assignment Judge(4.15).

4.16 - Date assignment conference

- (1) The prothonotary must notify the parties of the time and date of a date assignment conference by the following deadlines:

Rule 4 - Action

- (a) no more than twenty-five days after the day the request is filed, if no party makes a motion in the required time for an order refusing the request or the request is permitted by a judge under Rule 4.13(2);
 - (b) no more than ten days after the day a motion for an order refusing the request is dismissed.
- (2) The prothonotary must notify the parties of the location of the conference, or that it will be held by teleconference.
- (3) Outside of Halifax, a judge may give the notice of the conference or direct that notice be given by a member of the judge's office instead of the prothonotary.
- (4) A party who intends to make a pre-trial motion that may materially affect a forecast of trial readiness must do both of the following:
 - (a) before the date assignment conference, fully inform themselves regarding how much time it will take for the motion to be presented;
 - (b) at the date assignment conference, advise the judge of the nature of the intended motion, the intended evidence in support of the motion, the plan for proceeding with the motion, and a proposed deadline by which all documents will be filed.
- (5) The judge may refuse to set trial dates if the information provided by the parties before or during the conference is insufficient to forecast when the case will be ready for trial or to estimate the length of the trial.
- (6) The judge who is able to forecast trial readiness and estimate the length of a trial may give directions about the course of the proceeding and the conduct of the trial, and must do each of the following:
 - (a) set the dates for trial;
 - (b) set a trial readiness conference date no less than forty days before the first day of trial;
 - (c) fix a finish date at no less than twenty days before the day set for the trial readiness conference, as the date when all pre-trial procedures are to be finished;
 - (d) fix a completion date for any specific task, if the judge considers that a deadline is advisable to ensure readiness for trial;
 - (e) if a settlement conference is to be held, determine whether an ordinary or trial-like settlement conference should be conducted and set a date for a settlement conference no less than ten days before the day set for the trial readiness conference.
- (7) A judge who is satisfied that monitoring trial preparation generally, or monitoring performance of a task specifically, is necessary to ensure trial readiness may set dates for additional conferences.

4.17 - Reconsideration

A party who becomes aware, after the date assignment conference, of information that materially affects the forecast of trial readiness or the estimate of the length of trial, must immediately request a conference to reconsider the trial dates.

4.18 - Witness list

- (1) A party must, two days before the trial readiness conference, deliver to each other party a list of the witnesses the party intends to call at trial, except a witness the party will call only to impeach the credibility of another expected witness.
- (2) A party may only call at trial a witness named on the party's witness list, unless the witness is called only to impeach the credibility of another witness or the trial judge permits the party to call the witness in order to avoid an injustice.
- (3) A party who determines to seek permission to call a witness not on the party's witness list must immediately notify all other parties and the trial judge of the determination and the grounds for asserting that the witness must be called in order to avoid an injustice.
- (4) A judge who permits a party to call a witness not on the party's witness list may order the party to indemnify each other party for expenses resulting from the permission, including expenses resulting from an adjournment if that is a result.
- (5) A party is not required to call each person on the party's witness list, but a party who decides not to call a person on the list must immediately notify all other parties and the trial judge.

4.19 - Trial readiness conference

- (1) At a trial readiness conference, a judge must ascertain whether all pre-trial procedures were completed by the finish date and confirm that the parties are ready for trial.
- (2) A trial readiness conference judge who finds the parties are not ready for trial must cancel the trial dates, unless justice requires otherwise.
- (3) The trial readiness conference judge may give directions for the course of the proceeding to trial, order quick completion of a pre-trial procedure the judge finds is not complete, and set a date for a settlement conference if a late settlement conference is warranted and the parties consent.

4.20 - Adjournment of trial dates

- (1) A judge may adjourn trial dates before the finish date, if all parties agree the party seeking the adjournment would suffer a greater prejudice in proceeding with the trial than other parties would suffer by losing the trial dates.
- (2) A motion for an adjournment after the finish date must be made to the trial judge, unless a judge has not been assigned or the trial judge is not available.
- (3) A judge hearing a motion for an adjournment after the finish date must consider each of the following:
 - (a) the prejudice to the party seeking the adjournment, if the party is required to proceed to trial;
 - (b) the prejudice to other parties, if they lose the trial dates;
 - (c) the prejudice to the public, if trials are frequently adjourned when it is too late to make the best use of the time of counsel, the judge, or court staff.

4.21 - Remedies for refusal, cancellation, or adjournment

A judge who refuses to appoint dates for trial, cancels trial dates, or adjourns a trial may do any of the following:

- (a) order a party to do anything necessary so the court may appoint trial dates;
- (b) set a date for a date assignment conference;
- (c) give directions on what must be done before a party can make another request for trial dates;
- (d) order a party who failed to file a memorandum for a date assignment judge to indemnify another party for expenses caused by the failure;
- (e) order a party whose conduct caused the refusal, cancellation, or adjournment, to indemnify another party for the expense of preparing for and participating in the date assignment conference, trial readiness conference, or motion for an adjournment, and the expenses caused by the refusal, cancellation, or adjournment;
- (f) order a party whose conduct contributed to the refusal, cancellation, or adjournment to indemnify another party in proportion to the contribution.

4.22 - Dormant actions to be dismissed

- (1) The prothonotary must make a motion to dismiss an action five years after the day the notice of action is filed, if no trial date is set and no request for trial dates is outstanding.
- (2) The motion must include dismissal of any counterclaim, crossclaim, or third party claim in the action.

Rule 5 - Application

Educational Notes

How this Rule Works

This Rule addresses proceedings previously referred to as commenced by Originating Notice (Application), but R.5 has a much broader scope than the previous R.37. It reflects a move away from the view that a traditional trial is the only way to adjudicate fairly. It also recognizes that in many cases, the party seeking relief would rather have it expeditiously, even at the cost of sacrificing some of the panoply of protections available in a traditional trial. Rule 5 gives parties a choice.

The word “application” now has a specific meaning in the Rules. What we previously thought of as interlocutory applications in chambers are now referred to as motions, and are dealt with in R.22-30. Applications in family proceedings will be dealt with under the forthcoming Part 13, with no word on whether the terminology will change.

Rule 5 contemplates three different types of applications, based on the time required for the hearing:

- a. **ex parte applications;**
- b. **applications in chambers** (regular or appointed time); and
- c. **applications in court.**

The basic procedure is one of a summary trial. It will be familiar to counsel who have previously used the Originating Notice (Application) or who have litigated in family proceedings where both interim and variation hearings are conducted by cross-examination on affidavits, followed by argument.

Ex Parte Applications

Ex parte applications are addressed in R.5.02, which replaces the previous R.37.04. The Rule makes minor modifications to the information required and requires all of the material along with a brief, to be filed at least 2 days before the hearing date. Form 5.02 is used for *ex parte* applications.

Applications in Chambers

Rules 5.03-5.06 govern originating applications made on notice in chambers. These applications are defended by filing a notice of contest under R.5.04.

Regular time – refers to applications that will take less than half an hour and will not require cross-examination. (The time cut off was previously an hour under Practice Memorandum 2). Ten days notice to all respondents is required, and service must be effected in accordance with Rule 31 – Notice.

Appointed Time – refers to applications that will take longer than half an hour, but less than half a day, or where cross-examination is required. It corresponds to what was previously known as special time chambers. Twenty-five days notice to all respondents is required, with notice effected in accordance with Rule 31 – Notice.

Rule 5.05 codifies best practices including taking reasonable steps to make sure the time selected is convenient to all involved, limiting the contents of a rebuttal affidavit

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to true rebuttal, and giving notice of intent to cross-examine. Rule 5.06 sets deadlines for filing briefs.

Applications in Court

Rules 5.07-5.09 govern applications in court, a new type of proceeding intended as a speedy, flexible alternative to a trial. The court expects that applications in court under R.5 will proceed to hearing considerably faster than actions under R.4, or even actions under \$100,000 in R.57 and R.58. Another feature in favour of applications in court is that there is no presumptive time limit for discovery, as there is under R.57.10(3).

Unlike the previous R.9.02, substantial disputes of fact are permitted, if they can be resolved in a summary way.

An application in court is commenced using Form 5.07 and is accompanied by a motion for directions that must be heard no more than 25 days after filing. (This will necessitate prompt service on the responding parties.) Motions for directions are heard in chambers, by appointment, or by conference, as the judge directs (R.5.09(1)).

The motion for directions is accompanied by an affidavit, which may come from counsel, containing the details necessary for the court to fix a hearing date. The applicant's affidavits need not accompany the notice, but the applicant must set out the names of witnesses who will provide affidavits and describe the subjects about which each witness could give evidence.

Judges have broad case management powers on the motion for directions (R.5.09(2)), including ordering disclosure, permitting or limiting discovery, ordering cross-examination out of court, limiting the subjects of or time for cross-examination at the hearing, setting dates for filing affidavits and briefs, setting the hearing date, and giving any other necessary directions. The Rule does not refer to settlement conferences, and the language of 5.09(2)(n) speaks only of organizing the application, but there is no obvious reason why a settlement conference could not be ordered under R.5.

As with an application in chambers, an application in court is defended by filing a notice of contest within 5 days (R.5.08). The notice requires fairly detailed knowledge of the case including the status of disclosure, whether discovery is requested, a list of the respondent's witnesses and all other possible witnesses known to the respondent, along with the subjects of each witness's evidence. As with the application, R.5.08 does not require that the respondent actually file affidavits at this point.

Rules Common to all Applications

Rule 5.10 allows a respondent to move to dismiss for want of jurisdiction without submitting to the jurisdiction of the court.

Rule 5.11 provides that late affidavits are not permitted without permission of a judge and may result in costs consequences.

Rule 5.12 specifies that the party filing an affidavit must pay the expense of presenting the witness for cross-examination, unless otherwise agreed or ordered.

Rule 5.13 states that hearsay is not permitted, except in *ex parte* applications where the affidavit is prepared in accordance with the requirements for information and belief in Rule 39 – Affidavit.

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Rule 5.14 creates a hybrid between default and summary judgment for situations where the respondent does not appear at the hearing. The applicant must prove proper service and disclose all communications with each respondent about the application. If the affidavits and other evidence appear to support granting the order, the court may grant it.

Rule 5.15 addresses consequences for a failure to comply with R.5 or directions given under it that result in prejudice to another party. The consequences include dismissal or granting of the application and costs.

Rule 5.16 allows for consolidation and severance.

Rule 5.17(1) allows respondents to move for a new time, date or place of hearing.

Rule 5.17(2) allows any party (not just the applicant) to apply to continue an application in chambers as an application in court. Continuing an application in court can allow for expanded documentary and electronic disclosure, discovery, and other procedural steps. (Rule 6 deals with motions to convert applications to actions.)

Rule 5.18 requires the prothonotary move to dismiss stale applications where no hearing date has been set five years after filing.

Highlights of Changes

The Originating Notice (Application) has become simply a notice of application. A new document called a notice of contest in Form 5.04 or 5.08 is required to defend an application.

The process of dealing with originating applications in chambers is preserved, but the deadline for regular matters has been shortened to a half hour from an hour, and appointed time matters are limited to a half day. All other applications become applications in court, with expanded options for disclosure and discovery.

Another new feature of applications in chambers is the prospect of cross-examining out of court and filing a transcript (R.5.05(6)).

Practice Tips

Disclosure in the chambers application process is limited to exchange of affidavits with cross-examination in or out of court. Applications in court allow for a much broader range of disclosure through the lists of possible witnesses and subjects of their evidence and through the motion for directions, which allows for disclosure of documents and electronic information, discovery, substitution of will say statements for affidavits and disclosure of expert opinions. (R.5.02-5.06 on chambers applications do not specifically address the subject of expert opinion.)

Some of the filing deadlines for applications in chambers are short. For example, the notice of contest and respondents' affidavits must be filed 5 days after notification of the proceeding for regular time chambers and 10 days for appointed time chambers. Rebuttal affidavits must be filed within 2 days after the respondent's affidavit is delivered. Notice of intent to cross-examine is required within 1 day after an affidavit is delivered, immediately for rebuttal affidavits.

5.01 - Scope of Rule 5

- (1) As provided in these Rules, an application is an original proceeding and a motion is an interlocutory step in a proceeding.
- (2) This Rule provides for an *ex parte* application, an application in chambers, and an application in court.
- (3) The application in chambers is heard in a short time, and it is scheduled at a time when chambers is regularly held or at an appointed time.
- (4) The application in court is for longer hearings, and it is available, in appropriate circumstances, as a flexible and speedy alternative to an action.
- (5) A person may make an application or respond to an application, in accordance with this Rule, except an application in a family proceeding is made and responded to as provided in Part 13 - Family Proceedings.

5.02 - *Ex parte* application in chambers

- (1) A person may apply for an *ex parte* order, if it is appropriate to seek the order without notice to another person.
- (2) The person may apply for an *ex parte* order in chambers by filing an *ex parte* application.
- (3) The *ex parte* application must contain a standard heading written in accordance with Rule 82 - Administration of Civil Proceedings, be entitled “ *Ex Parte* Application”, be dated and signed, and include all of the following:
 - (a) a description of the order applied for;
 - (b) a statement explaining why it would be appropriate for the judge to grant the order without notice to other persons;
 - (c) a concise statement of the grounds for the order, including the material facts the applicant seeks to establish and a reference to legislation relied on by the applicant;
 - (d) a reference to each affidavit relied on by the applicant, identified by the name of the witness and the date the affidavit is sworn or affirmed;
 - (e) the time, date, and the place for the application;
 - (f) if there is only one applicant, a designation of an address for delivery of documents to the applicant, and if there is more than one applicant, a designation of one address for delivery to all applicants or a separate address for each applicant;
 - (g) an acknowledgement of the effect of delivery to the designated address and a statement that further contact information is available from the prothonotary.
- (4) The *ex parte* application may be in Form 5.02.
- (5) The applicant must file the *ex parte* application, and the referenced affidavit, and deliver a brief for the judge hearing the application, at least two days before the day of the hearing of the application.

Forms

Ex Parte Application(5.02).

5.03 - Application in chambers on notice

- (1) A person may apply for an order on notice to another person by filing a notice of application in chambers.
- (2) The notice of application in chambers must contain a standard heading written in accordance with Rule 82 - Administration of Civil Proceedings, be entitled "Notice of Application in Chambers", be dated and signed, and include all of the following:
 - (a) notice that the applicant applies to a judge for an order and a description of the order applied for;
 - (b) a concise statement of the grounds for the order, including the material facts the applicant seeks to establish, and a reference to legislation or points of law relied on by the applicant;
 - (c) a reference to each affidavit relied on by the applicant and notice that further affidavits may be filed by the applicant before the deadline in this Rule;
 - (d) notice of the deadlines for the respondent to file a notice of contest and an affidavit, and a statement that filing the notice of contest entitles the respondent to notice of further steps in the application;
 - (e) notice of the time, date, and place of the hearing;
 - (f) notice that the judge may proceed in the absence of the respondent if the respondent or counsel does not attend the hearing;
 - (g) a statement explaining how documents are filed and the requirement for immediate delivery to a party entitled to notice;
 - (h) if there is only one applicant, a designation of an address for delivery of documents to the applicant and, if there is more than one applicant, a designation of one address for delivery to all applicants or a separate address for each applicant.
- (3) The notice of application may be in Form 5.03.

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Forms

Notice of Application in Chambers(5.03).

5.04 - Notice of contest of chambers application

- (1) A respondent may contest an application in chambers by filing a notice of contest.
- (2) The notice of contest must contain the standard heading, be entitled "Notice of Contest (Chambers Application)", be dated and signed, and include all of the following:
 - (a) a statement that the application is contested and indicating which of the material facts in the applicant's grounds are admitted, which are denied, and which are neither admitted nor denied only because the respondent does not have sufficient information to admit them;
 - (b) a concise statement of further grounds relied on by the respondent, including material facts the respondent seeks to establish, and a reference to legislation relied on by the respondent;
 - (c) a reference to each affidavit relied on by the respondent, identified by the name of the affiant and the date the affidavit is sworn;
 - (d) if the notice is for only one respondent, a designation of an address for delivery of documents to the respondent and, if it is for more than one respondent, a

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designation of one address for delivery to all respondents or a separate address for each respondent;

- (e) an acknowledgement of the effect of delivery to the designated address and a statement that further contact information is available from the prothonotary.
- (3) The notice of contest may be in Form 5.04.

Forms

Notice of Contest (Chambers Application)(5.04).

5.05 - Chambers application

- (1) A person may make an application in chambers at any time when chambers is regularly held, if the person is satisfied the hearing will take less than a half-hour and cross-examination will not be required.
- (2) A person may make an application in chambers at a time appointed by a judge or the prothonotary, if the person is satisfied that the hearing will take less than a half-day.
- (3) The applicant must take reasonable steps to select a time convenient for each respondent's counsel and each respondent who acts on their own.
- (4) The applicant must limit a rebuttal affidavit to new points raised by the respondent's affidavit.
- (5) A party who receives an affidavit and wishes to cross-examine the witness must file a notice to that effect.
- (6) A judge may order that a witness be cross-examined outside the hearing and set deadlines for conducting the cross-examination and filing a transcript.
- (7) A party must deliver a brief for the judge hearing the application, unless the judge permits otherwise.

5.06 - Chambers application deadlines

- (1) The applicant must notify each respondent of the application in chambers in accordance with Rule 31- Notice, no less than ten days before the day of a hearing in chambers that is regularly held or twenty-five days before the day of a hearing at an appointed time and date.
- (2) Documents must be filed by the deadlines in the following table:

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Document	Regular time	Appointed time
notice of application	10 days before date of hearing	25 days before date of hearing
applicant's affidavit	10 days before date of hearing	25 days before date of hearing
notice of contest	5 days after date of notification	10 days after date of notification
respondent's affidavit	5 days after date of notification	10 days after date of notification
rebuttal affidavit	2 days after day affidavit is delivered	2 days after day affidavit is delivered
notice cross-examination is required	1 day after affidavit is delivered, except immediately after rebuttal affidavit	1 day after affidavit is delivered
applicant's brief	3 days before date of hearing	5 days before date of hearing
respondent's brief	2 days before date of hearing	3 days before date of hearing
reply brief	1 day before date of hearing	1 day before date of hearing.

5.07 - Application in court

- (1) A person may make an application in court by filing a notice of application in court.
- (2) A person who files a notice of application in court must, in the notice, provide for a motion for directions to be given by a judge, including the appointment of a time and date for the application to be heard.
- (3) The date for hearing the motion for directions must be no more than twenty-five days after the day the notice of application is filed.
- (4) The motion for directions must be supported by an affidavit, which may be an affidavit of counsel, addressing all of the following:
 - (a) whether there are any persons who are not parties but who may have an interest in the matters raised by the application;
 - (b) whether the list of possible witnesses in the notice of application is complete;
 - (c) the extent to which the applicant has disclosed documents and electronic information to the respondents and, if disclosure is not complete, the applicant's plan for completing disclosure;
 - (d) whether the applicant anticipates discovering any witness;
 - (e) if the application will involve a series of hearings, an estimate of the number of hearings and when each could occur;
 - (f) if the application concerns events that are unfolding, a description of the events and the expected course of the events;
 - (g) if the application concerns alleged rights that could be eroded over time, an explanation of the rights, how they may be eroded, and the consequences for the applicant;
 - (h) all information known to the applicant that could significantly affect the estimate of time needed to prepare for the hearing and the length of the hearing itself.
- (5) A notice of application in court must be entitled "Notice of Application in Court" and otherwise include everything required in a notice of application in chambers, with each of the following modifications:

Rule 5 - Application

- (a) instead of a reference to each affidavit relied on, it must identify the witnesses whose affidavit the applicant intends to file and describe the subjects about which each witness could give evidence;
 - (b) it must include a notice of a motion for directions and to appoint the time, date, and place for the application to be heard, and a reference to the affidavit filed in support of the motion;
 - (c) it must notify the respondent of the deadline for the respondent to file a notice of contest and that the judge may proceed with the motion if the respondent, or counsel for the respondent, does not attend the hearing;
 - (d) the statement about proceeding in the absence of the respondent must refer to attendance at the hearing of the motion for directions.
- (6) The notice of application in court may be in Form 5.07.

N.S. Gaz. Pt. 1, [03/04/2009](#)

[Editor's note: From the Courts: Form 5.07 under the sub-heading "You may participate" currently reads "You may file with the court a notice of contest, and any affidavit for the motion for directions, no less than five days after this notice is delivered to you..." The "five days" should read "15 days" to conform with amended Rule 5.08(1). The judges will consider amending the form in October to reflect this change. In the meantime please vary from the form, as is permitted by Rule 95.03.]

Forms

Notice of Application in Court(5.07).

5.08 - Notice of contest of application in court

- (1) A respondent who wishes to contest an application in court must file a notice of contest no more than fifteen days after the day the respondent is notified of the application in accordance with Rule 31 - Notice.
- (2) A notice of contest for an application in court must be entitled "Notice of Contest (Application in Court)" and otherwise include everything required in a notice of application in chambers, except instead of a reference to an affidavit, it must identify the witnesses whose affidavit the respondent intends to file, identify all other possible witnesses known to the respondent not already identified by the applicant, and describe the subjects about which each identified witness could give evidence.
- (3) The notice of contest of an application in court may be in Form 5.08.

N.S. Gaz. Pt. 1, [02/10/2010](#)

Forms

Notice of Contest (Application in Court)(5.08).

5.09 - Motion for directions and to set time, date, and place

- (1) A motion for directions may be heard in chambers, by appointment, or by conference, as the prothonotary or a judge directs.

Rule 5 - Application

- (2) The judge who hears a motion for directions may do any of the following:
 - (a) permit an amendment to the notice of application or notice of contest;
 - (b) ascertain whether there are interested persons who are not parties and, if necessary, adjourn the motion until an interested person is made a party;
 - (c) ascertain the extent to which parties have searched for and made disclosure of documents, electronic information, or other evidence and, if necessary, order disclosure;
 - (d) order discovery, limit the time for discovery, and direct who may discover whom;
 - (e) ascertain witnesses from whom each party is likely to produce an affidavit, inquire into any requirement for cross-examination of a likely witness;
 - (f) order a party to produce an intended affiant as a witness to be cross-examined at the hearing, or out of court with a transcript;
 - (g) limit the duration or subjects for cross-examination;
 - (h) determine whether an expert opinion may be admitted and order disclosure;
 - (i) permit a witness to testify instead of swearing or affirming an affidavit and order disclosure of the witness' anticipated evidence, such as by ordering delivery of a will say statement, or order discovery of the witness;
 - (j) ascertain whether it is likely that there will be evidentiary issues the court must determine;
 - (k) set dates for filing the applicant's affidavits, the respondent's affidavits, any applicant's rebuttal affidavits, the applicant's brief, the respondent's brief, and a reply brief;
 - (l) set the time, date, and place for the hearing of the application;
 - (m) if the application requires a series of hearings, determine whether the same judge should preside in court over each hearing and either set dates for each hearing or set the date for the first hearing and leave further scheduling to the court;
 - (n) give any other directions or make any order needed to organize the application.
- (3) A judge may amend or supplement directions.

5.10 - Lack of jurisdiction

- (1) A respondent who maintains that the court does not have jurisdiction over the subject of an application, or over the respondent, may make a motion to dismiss the application for want of jurisdiction.
- (2) A respondent does not submit to the jurisdiction of the court only by moving to dismiss the application for want of jurisdiction.
- (3) A judge who dismisses a motion for an order dismissing an application for want of jurisdiction must set a deadline by which the respondent may file a notice of contest.

5.11 - No supplementary affidavits

- (1) A party to an application may only file an affidavit within the deadlines under this Rule or set by a judge giving directions, unless a judge hearing the application permits an affidavit to be filed later.

Rule 5 - Application

- (2) On a motion to allow a later affidavit, the judge must consider all of the following:
 - (a) the prejudice that would be caused to the party who offers the affidavit, if the application proceeds without that affidavit;
 - (b) the prejudice that would be caused to other parties by allowing the affidavit to be filed, including the prejudice of an adjournment if that would be a result;
 - (c) the prejudice caused to the public if applications are frequently adjourned when it is too late to make the best use of the time of counsel, the judge, or court staff.
- (3) A judge who allows a late affidavit may order the party filing the affidavit to indemnify each other party for expenses resulting from the filing, including expenses resulting from any adjournment.

5.12 - Expense of cross-examination

The party who files an affidavit must pay the expense of presenting the witness for cross-examination, unless the parties agree, or a judge orders, otherwise.

5.13 - Rules of evidence on an application

The rules of evidence, including the rules about hearsay, apply on the hearing of an application and to affidavits filed for the hearing except a judge may, in an *ex parte* application, accept hearsay presented by affidavit prepared in accordance with Rule 39 - Affidavit.

5.14 - Failure to appear

- (1) If no parties appear at the hearing of an application, or on a motion for directions, the judge may dismiss the application without costs unless the parties provide a joint submission for another disposition and the judge accepts the submission.
- (2) A judge who is satisfied on all of the following may grant an order summarily disposing of an application against a respondent:
 - (a) the respondent is notified of the application under Rule 31 - Notice;
 - (b) the respondent either files no notice of contest or fails to appear at the hearing of the application or on the motion for directions;
 - (c) the applicant discloses to the judge all communications between the applicant and the respondent about the application;
 - (d) the evidence supports the granting of the order.

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5.15 - Failure to comply

A judge may provide each of the following remedies, if a party causes prejudice to another party by failing to do anything required by a judge or this Rule:

- (a) dismiss the application, if the applicant causes the prejudice;
- (b) grant the application, if the respondent causes the prejudice;

Rule 5 - Application

- (c) order the party who causes the prejudice to indemnify another party for expenses caused by the failure;
- (d) make any other order to restore the other party to the position the party would have been in had the failure not occurred.

5.16 - Consolidation and severance

A judge may order two or more applications be heard together, a claim in an application be heard separately from another, or the claim against one respondent be heard separately from another respondent.

5.17 - Disagreements about time and place

- (1) A respondent who disagrees with the estimate of time required for an application in chambers or the time, date, or place selected for an application in chambers, or a motion for directions on an application in court, may make a motion for a new time, date, or place.
- (2) A party to an application in chambers may move to continue the application as an application in court.

5.18 - Dormant applications dismissed after five years

The prothonotary must make a motion to dismiss an application for which no hearing date is set five years after the day the notice of application is filed.

Rule 6 - Choosing Between Action and Application

Educational Notes

How this Rule Works

This Rule provides guidance on choosing between actions and applications, and a process for converting one to the other.

The general rule is that the person commencing the proceeding may choose what type of proceeding to commence, unless legislation dictates a particular type of proceeding (R.6.01).

Any party (including the party who started the proceeding) can move to convert an action into an application, or *vice versa* under R.6.02. On a motion to convert, the party seeking to have the matter determined by action bears the burden of proof (R.6.02(2)) and must provide all of the information required by R.6.03.

Rules 6.02(3)-6.02(6) create a presumption in favour of an application or an action, depending on the circumstances of the case.

An application is presumed preferable if a party's substantive rights will erode over time, or in special proceedings such as corporate reorganizations. Factors militating in favour of an application include:

- if the parties can quickly ascertain who their important witnesses are;
- if they can be ready to be heard in months, rather than years;
- if the hearing is of predictable length and content;
- if credibility can be assessed based on affidavits, permitted direct, and cross-examination.

Relative cost and delay are also relevant factors that will generally favour an application.

An action is presumed preferable if:

- the presumption in favor of an application does not apply; and
- a party reasonably seeks a trial by jury; or
- it would be unreasonable to require early disclosure about witnesses, such as witnesses called only to impeach credibility.

Factors militating in favour of an action include cases where:

- the parties require the disclosure and discovery process to ascertain who the important witnesses will be;
- the parties require years to prepare for trial;
- the content and length of the matter are not yet predictable;
- credibility cannot be properly assessed without a traditional trial.

Highlights of Changes

The previous Rules required proceedings that met the criteria in R.9.02 to be commenced by Originating Notice (Application). Rule 6 leaves that discretion with the commencing party, subject only to a motion by another party to convert the proceeding.

The previous R.37.10(e) allowed a judge to convert a proceeding commenced by Originating Notice (Application) to an action. Rule 6 allows the conversion to go both ways.

Practice Tip

Take some time to really examine and compare the various kinds of proceedings in terms of cost, delay, disclosure rights and obligations, and modes of trial or hearing. Factor in the Rules that can shorten a proceeding or narrow the issues, such as determination of a question of law under R.12, summary judgment under R.13, admissions under R.20, and consolidation or separation under R.37.

6.01 - Choice of proceedings

A person may choose to start an action or an application as the person is satisfied would be appropriate, unless legislation under which the proceeding is started requires only one kind of proceeding.

6.02 - Converting action or application

- (1) A judge may order that a proceeding started as an action be converted to an application or that a proceeding started as an application be converted to an action.
- (2) A party who proposes that a claim be determined by an action, rather than an application, has the burden of satisfying the judge that an application should be converted to an action, or an action should not be converted to an application.
- (3) An application is presumed to be preferable to an action if either of the following is established:
 - (a) substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, and the erosion will be significantly lessened if the dispute is resolved by application;
 - (b) the court is requested to hold several hearings in one proceeding, such as with some proceedings for corporate reorganization.
- (4) An action is presumed to be preferable to an application, if the presumption in favour of an application does not apply and either of the following is established:
 - (a) a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right;
 - (b) it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.
- (5) On a motion to convert a proceeding, factors in favour of an application include each of the following:
 - (a) the parties can quickly ascertain who their important witnesses will be;
 - (b) the parties can be ready to be heard in months, rather than years;
 - (c) the hearing is of predictable length and content;
 - (d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.

- (6) The relative cost and delay of an action or an application are circumstances to be considered by a judge who determines a motion to convert a proceeding.

Annotations

The applicant municipality sought to change the way their share of school board funding is determined. The present arrangement had been in place since 1982, and the change involved \$1,000,000. They chose to apply by way of an application under Rule 5.07. The respondents moved, under Rule 6.02, to have the application converted to an action. *Held*, motion denied. The respondents have not established the factors in favor of an application are outweighed by any factor supporting a conversion to an action. The factual issues are secondary to legal issues, which strongly favors the application route. The matter will not take years to decide. While it is a multi-million dollar issue, there is no need to create a cumbersome, drawn out proceeding. Cross examination is more than enough to allow the court to assess credibility. The evidence will be predominantly documentary; the issues are clearly defined; and since most relevant events happened 20 plus years ago there will be questions about reliability more so than credibility. Any potential prejudice arising from difficulties locating witnesses/records can be addressed by revisiting the current deadlines.

Kings (County of) v. Berwick (Town of) et al. , [2009 NSSC 398](#)

The applicant started an application against the respondent claiming wrongful dismissal. The application would be proceeding on the basis of affidavits and cross-examination. The respondent applied under Rule 6.02 to convert the application to an action, seeking to have the matter proceed by way of a trial. They argued there are issues of significant credibility and that proceeding by way of affidavit will deprive the judge of the opportunity to assess witnesses during direct examination and will permit counsel to lead. They also argued the action process would be more likely to focus the range of evidence and thus minimize costs. *Held*, the matter will proceed by way of application. Decisions made under the old rules about the use of applications as opposed to actions must be approached with caution. The new *Rules* promote the speedy, efficient and cost effective resolution of matters. They now: provide for applications to be heard “in court” as opposed to “in chambers” (Rule 5.01(4)); allow for the filing of concise statements of grounds, akin to pleadings (Rules 5.07(5)/5.08(2)); and allow for significant judicial management (Rule 5.09). Contested matters such as this can proceed by way of an application provided the critical factors set out in Rule 6.02(5)(a), (b) and (c) are met. Here: (a) the important witnesses have been ascertained, (b) the parties can be ready to be heard in months rather than years; and (c) predictions can reasonably be made of the length/content of the hearing. Credibility can be adequately assessed by considering the evidence (especially that given under cross-examination) as a whole. Proportionality is also a serious concern. Rule 6.02(2) puts the onus on the proponent of the action. The respondent has failed to prove that an action is the preferable way to proceed, regardless of the new, simplified procedures for actions under \$100,000 found under Rule 57.

Brodie v. Jentronics Ltd. , [2009 NSSC 399](#)

The defendant section B insurer moved to convert the plaintiff’s action for loss of income benefits to an application pursuant to Rule 6.02. In her submissions, the plaintiff indicated she wanted a jury trial. *Held*, motion denied. A party has a substantive right to a jury trial unless there are cogent reasons to deny it (eg. the case involves issues of law, scientific or technical issues, or extensive/complex evidence). Here there were none. The test in Rule 6.02(b) is met. It would be “unreasonable to deprive” the plaintiff of her substantive right to a trial by jury given there are no cogent reasons to do so.

Keeping v. Portage La Prairie Mutual Insurance Co. , [2009 NSSC 362](#)

6.03 - Evidence for converting an application

- (1) A party who makes a motion to convert an application to an action must, by affidavit, provide all of the following:
 - (a) a description of the evidence the party would seek to introduce;
 - (b) the party's position on all issues raised by the application;
 - (c) disclosure of all further issues the party would raise by way of either a notice of contest, if the proceeding remains an application, or a statement of defence, if the proceeding is converted to an action.
- (2) Despite Rule 6.03(1), a party who wishes to withhold disclosure of evidence the party will produce only to impeach a witness need not describe the evidence, or the investigations to be undertaken to obtain the evidence.

Rule 7 - Judicial Review and Appeal

Educational Notes

How this Rule Works

This Rule deals with three separate subjects:

- a. **judicial review** in R.7.05-7.11;
- b. ***habeas corpus*** in R.7.12-7.18; and
- c. **appeal** to the Supreme Court in R.7.19-7.24.

Rule 7 does not deal with Summary Conviction Appeals under the *Criminal Code* or *Summary Proceedings Act*, R.S.N.S. 1989, c.450, both of which are dealt with in Rule 63 – Summary Conviction Appeals. Appeals to the Nova Scotia Court of Appeal are addressed in Rule 90 – Civil Appeal and Rule 91 – Criminal Appeal.

In Rule 7, “decision” is broadly defined to include actions taken, or purportedly taken, under legislation, omissions to take required action, and failure to make a decision.

Rules 7.25-7.29 apply to all judicial reviews and appeals. They provide for the appellant to pay for the appeal book (R.7.25), allow for consolidation of judicial reviews or appeals at the motion for directions (R.7.26), provide a procedure where a party seeks to introduce fresh evidence (R.7.27), and allow for a stay pending the outcome of the appeal or judicial review (R.7.28). Rule 7.29 allows the prothonotary to move to dismiss stale appeals, judicial reviews, and notice for *habeas corpus* where no hearing date is set in five years.

Judicial Review

The judicial review process has become much more common than it was in the 1970s when the previous Rules came into effect. The court developed practices for dealing with judicial review but for the most part, these practices were not codified. Rule 7 addresses that gap and creates a structure anchored by an initial motion for directions.

Applications for judicial review are commenced by filing a Notice for Judicial Review in Form 7.05 within 25 days after the decision is communicated, or 6 months of it being made. The notice must include detailed information about the proceeding and the grounds for review (R.7.05(4)). It is accompanied by a motion for directions, which must be heard no later than 25 days after the notice is filed. The applicant must obtain the date for the motion for directions and file the application no more than one day after receiving the date and time from the court (R.7.06).

The applicant must then notify each respondent and the applicable Attorney-General in accordance with the procedures set out in Rule 31 – Notice. The decision-making authority is a respondent (R.35.04) and must, within 5 days after being notified of the application, produce the record, make arrangements to produce it, or undertake to appear on the motion for directions (R.7.09). The decision-making authority is subject to costs consequences if it fails to comply.

An application for judicial review is defended by filing a notice of participation in Form 7.08 no more than 10 days after receiving notification.

Rule 7 - Judicial Review and Appeal

At the motion for directions, a judge can give any directions necessary to organize the judicial review (R.7.10).

Rule 7 is silent on the procedure to be followed at the review application itself. The remedies in Rule 7.11 are reflective of the common law, including dismissal, setting aside the decision and any legal process flowing from it, an injunction, a declaration, or any relief formerly available by prerogative writ.

Habeas Corpus

Any person under detention may file a notice for *habeas corpus* in Form 7.12 to have the legality of his or her detention determined by the court. Rules 7.12-7.18 replace the previous R.58.

The strict time lines under the previous R.58.14 have been abandoned in favour of judicial discretion but R.7.13 makes clear that such matters take priority over all other business of the court. An application for *habeas corpus* is followed immediately by the court providing a date to give directions under R.7.14. Abuse of *habeas corpus* is treated as an Abuse of Process under R.88.

Rule 7.15 provides that bail may be granted pending the outcome of the application, consistent with s.11(e) of the Charter. Bail was not addressed in the previous Rule, perhaps because the application was meant to proceed rapidly to a determination. Rule 7.15 leaves open the question of what procedure should be followed at a bail hearing, and whether it would be similar to hearings under s.515(10) or reviews under s.520 of the *Criminal Code*.

Appeal

Rules 7.19-7.24 govern appeals brought to the Supreme Court under legislation, unless the legislation or regulations establishes procedures to be followed (R.7.04).

An appeal is commenced by filing a detailed notice of appeal in Form 7.19 no more than 30 days after the decision under appeal is communicated to the appellant, or six months after it is made. Both deadlines are extendable under R.2.03 where circumstances warrant.

The notice of appeal must provide for a motion for directions to be heard no more than 25 days after the notice is filed (R.7.19(2)) which requires the appellant to obtain a date and time immediately before filing the notice (R.7.21).

The appellant must notify each respondent no less than 10 days before the motion for directions. A notice of cross-appeal or contention must be filed no less than 1 day before the motion for directions (R.7.20).

Rule 7.24 sets out the contents of the appeal book, including the transcript (or agreed portions).

Highlights of Changes

Features common to each process include a detailed notice commencing the proceeding followed quickly with a motion for directions to organize it and fix a hearing date. The amount of required information means that counsel for applicants and appellants will need to organize the case promptly. The 25 day time limit for hearing

Rule 7 - Judicial Review and Appeal

the motion for directions means counsel will have to make themselves available on relatively short notice.

The previous R.56 contained very little detail about the mechanics of applications for judicial review. The addition of forms will be particularly useful in proceedings involving self-represented litigants.

The deadline for filing a notice of judicial review is considerably shorter than under the previous R.56.06. It now must be filed within 25 days of the decision being communicated, or six months after the decision (or failure to decide) is made (R.7.05(1)). However, the deadline is now extendable under R.2.03(1)(c). The previous R.56.06 did not permit extensions.

Practice Tip

Appeals from the Small Claims Court are conducted pursuant to the regulations made under the *Small Claims Court Act*, which prevail over R.7. No motion for directions is necessary.

7.01 - Interpretation in Rule 7

In this Rule,

“decision”, includes all of the following:

- (i) an action taken, or purportedly taken, under legislation,
- (ii) an omission to take action required, or purportedly required, by legislation,
- (iii) a failure to make a decision;

“decision-making authority” includes anyone who makes, neglects to make, takes, or neglects to take a decision.

7.02 - Scope of Rule 7

- (1) This Rule provides procedures for a judicial review by the court, or an appeal to the court.
- (2) This Rule applies to each of the following:
 - (a) judicial review of a decision within the supervisory jurisdiction of the court;
 - (b) review of a decision under legislation authorizing review other than by appeal;
 - (c) *habeas corpus* for civil detention, and an application for *habeas corpus* to which the *Criminal Code* applies is started under Rule 64 - Prerogative Writ;
 - (d) an appeal to the court in accordance with legislation, except a summary conviction appeal is provided for in Rule 63 - Summary Conviction Appeal.
- (3) A person may seek judicial review or bring an appeal, in accordance with this Rule.

7.03 - Processes leading to hearing

- (1) A person may seek judicial review, except *habeas corpus*, by filing a notice for judicial review under Rule 7.05.

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- (2) A person may start an application for *habeas corpus* by filing a notice for *habeas corpus* under Rule 7.12.
- (3) A person may start an appeal by filing a notice of appeal under Rule 7.19.

7.04 - Legislation prevails

The provisions of legislation, such as the regulations under the *Small Claims Court Act*, establishing procedures to be followed on a judicial review or an appeal prevail over an inconsistent provision of this Rule.

7.05 - Judicial review application

- (1) A person may seek judicial review of a decision by filing a notice for judicial review before the earlier of the following:
 - (a) twenty-five days after the day the decision is communicated to the person;
 - (b) six months after the day the decision is made.
- (2) A person who files a notice for judicial review must include, in the notice for judicial review, a notice of motion for directions to organize the judicial review.
- (3) The date for hearing of the motion for directions must be no later than twenty-five days after the day the notice is filed.
- (4) The notice must contain a standard heading written in accordance with Rule 82 - Administration of Civil Proceedings, be entitled "Notice for Judicial Review", be dated and signed, and include all of the following:
 - (a) a notice that the applicant requests judicial review of a decision including the name of the decision-making authority, the date of the decision, and the legislative or other authority under which the decision was made or which requires the decision to be made;
 - (b) the date when the decision was communicated to the applicant;
 - (c) if available, an attached copy of the decision or documents showing what decision was made and, otherwise, an attached summary of the decision;
 - (d) a concise statement of the grounds for the review;
 - (e) a description of the order the applicant seeks;
 - (f) a notice that a respondent may participate in, and be entitled to notice of further steps in the judicial review, if the respondent files a notice of participation no more than ten days after the day the respondent is notified of the proceeding for judicial review;
 - (g) a statement of what the record will include, when it is likely to be produced, and whether the applicant believes there will be any difficulty obtaining it;
 - (h) a notice of the obligations of the decision-making authority under Rule 7.09;
 - (i) a statement of whether the applicant will make a motion for a stay or other interim remedy;
 - (j) a statement explaining how documents are filed and the requirement for immediate delivery to a party entitled to notice;

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- (k) if there is only one applicant, a designation of an address for delivery of documents to that applicant and, if there is more than one applicant, a designation of one address for delivery to all applicants or separate addresses for each;
 - (l) notice of a motion for directions and the appointment of a time, date, and place for the judicial review to be heard;
 - (m) an acknowledgement of the effect of delivery to the designated address and a statement that further contact information is available from the prothonotary;
 - (n) notice that the judge and the court may proceed in the absence of the respondent if the respondent, or the respondent's counsel, does not attend the hearing of the motion for directions.
- (5) The notice for judicial review may be in Form 7.05.

Forms

Notice for Judicial Review(7.05).

7.06 - Date for motion for directions

- (1) A person who wishes to start a proceeding for judicial review must request the prothonotary appoint a time and date for the motion for directions to be heard.
- (2) Outside of Halifax, the request may be made to the prothonotary or a judge.
- (3) The prothonotary, or a member of the judge's office, must immediately appoint a time and date for the motion to be heard.
- (4) The date must be no more than twenty-five days after the day the request is made, unless the parties agree or a judge orders otherwise.
- (5) The applicant must file the notice no more than one day after the day the prothonotary provides a time and date.

7.07 - Notification

The applicant must notify all of the following persons in accordance with Rule 31 - Notice, not more than ten days after the day the notice for judicial review is filed:

- (a) each respondent;
- (b) the Attorney-General of Canada, if the decision-making authority is appointed or employed by anyone under an enactment of Parliament;
- (c) the Attorney-General of Nova Scotia, if the decision-making authority is appointed or employed by anyone under an enactment of the Nova Scotia Legislature.

7.08 - Participation by respondent

- (1) A respondent who wishes to participate in a proceeding for judicial review must file a notice of participation.
- (2) A notice of participation must be filed no more than ten days after the day the respondent is notified of the proceeding in accordance with Rule 31 - Notice.

Rule 7 - Judicial Review and Appeal

- (3) A notice of participation must contain the standard heading, be entitled "Notice of Participation", be dated and signed, and include all of the following:
 - (a) a statement giving notice of the participation;
 - (b) a concise statement of the respondent's position on the review, including whether the respondent supports the decision in whole or in part and, if in part, the part the respondent does not support;
 - (c) if the person contends that the decision under review is justified by grounds different than those expressed in the decision or should be reviewed on grounds different than the applicant's grounds, a concise statement of the alternate grounds;
 - (d) an acknowledgement of the effect of delivery to the designated address and a statement that further contact information is available from the prothonotary;
 - (e) if the notice is for only one respondent, a designation of the address for delivery of documents to the respondent and, if it is for more than one respondent, a designation of one address for delivery to all respondents, or, a separate address for each respondent.
- (4) The notice of participation may be in Form 7.08.

Forms

Notice of Participation(7.08).

7.09 - Production of record by decision-making authority

- (1) The decision-making authority must file with the court, and deliver to the applicant, one of the following no more than five days after the day the decision-making authority is notified of the proceeding for judicial review:
 - (a) a complete copy of the record, with copies of separate documents separated by pages with numbered or lettered tabs;
 - (b) a statement indicating that the decision-making authority has made arrangements with the applicant to produce the record, providing details of those arrangements, and estimating when the record will be ready;
 - (c) an undertaking that the decision-making authority will appear before the judge at the time of the motion for directions and seek directions concerning the record.
- (2) A decision-making authority who gives reasons orally without a record must include in the record a summary of the reasons and the decision-making authority's certificate that the summary is accurate.
- (3) A judge may grant an injunction against a decision-making authority who fails to comply with this Rule 7.09, and the judge may order the authority to indemnify each other party for expenses resulting from the failure, including expenses caused by an adjournment if that is a result.

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7.10 - Directions for judicial review

A judge hearing a motion for directions may give any directions that are necessary to organize the judicial review, including a direction that does any of the following:

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- (a) settles what will make up the record and whether something is part of the record;
- (b) assigns responsibility to prepare, file, and deliver the record;
- (c) directs the format in which the record will be produced, and whether a party must receive a paper copy of a record that is in electronic format;
- (d) provides for the protection of information claimed to be privileged or otherwise subject to a confidentiality protected by law, delivery of the information to the judge who determines the claim, and maintenance of a record for review by the Court of Appeal, under Rule 85 - Access to Court Records;
- (e) allows an amendment to the notice for judicial review or a notice of participation;
- (f) directs whether there are interested persons who are not parties and, if necessary, adjourns the motion until an interested person is made a party or joins an interested person as a respondent;
- (g) rules on the admissibility of evidence sought to be introduced at the review hearing;
- (h) provides for the introduction of admissible evidence by affidavit or otherwise, and provides for any reply affidavits, cross-examination at the hearing, or cross-examination outside court with a transcript;
- (i) sets deadlines for filing the record, the applicant's brief, the respondent's brief, and any reply brief of the applicant;
- (j) directs further appearances before a judge, if necessary, and directs whether those appearances will be before the same judge and whether they will be in chambers, in conference, or at appearance day;
- (k) appoints the time, date, and place for the hearing of the judicial review.

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7.11 - Order following review

The court may grant any order in the court's jurisdiction that will give effect to a decision on a judicial review, including any of the following orders:

- (a) an order dismissing the proceeding;
- (b) an order setting aside the decision under review, or part of it, and terminating any legal process flowing from the decision, or the part;
- (c) an injunction preventing a respondent from doing anything, or requiring a respondent to do anything;
- (d) a declaration that the respondent lacks the authority or has authority to do something;
- (e) an order providing anything formerly provided by prerogative writ.

7.12 - Notice for *habeas corpus*

- (1) A person under detention may require the court to review the legality of the detention by filing a notice for *habeas corpus*.
- (2) For the purpose of the *Liberty of the Subject Act*, a notice for *habeas corpus* is an application for an order in lieu of a writ of *habeas corpus ad subjiciendum*, including an order nisi and an order in the nature of certiorari.

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- (3) The Attorney General of Canada or the Attorney General of Nova Scotia, or both of them, must be respondents if the detention has any connection with the government of Canada, the government of Nova Scotia, or both.
- (4) The notice must contain a standard heading written in accordance with Rule 82 - Administration of Civil Proceedings, be entitled "Notice for *Habeas Corpus*", be dated and signed by the applicant, the applicant's counsel, or an agent approved by a judge, and, unless the applicant cannot obtain the information, include all of the following:
 - (a) the name and place of detention;
 - (b) the names of, or offices held by, individuals holding the applicant on behalf of the respondent;
 - (c) any reasons given to the applicant for the detention;
 - (d) information about what prevents the applicant from leaving the place of detention;
 - (e) the request for *habeas corpus* ;
 - (f) the grounds on which the applicant contends that the detention is illegal;
 - (g) a statement that information about the means for communicating with the applicant and the respondent have been given to the prothonotary.
- (5) A notice for *habeas corpus* may be in Form 7.12.
- (6) A prothonotary must not refuse to file and act on a document purporting to seek review by way of *habeas corpus*, unless a judge concurs in writing.

Forms

Notice for Habeas Corpus(7.12).

7.13 - Order for *habeas corpus*

- (1) *Habeas corpus* takes priority over all other business of the court.
- (2) When a notice for *habeas corpus* is filed, a judge must immediately do all of the following:
 - (a) appoint the earliest practical time and date and a place for a judge to give directions on the course of the proceeding;
 - (b) order any person detaining the applicant to bring the applicant before the judge at the set time and date;
 - (c) order a respondent to produce all documents relating to the detention immediately to the court;
 - (d) cause the parties to be notified of the time, date, and place of the hearing for directions.
- (3) An order to bring the applicant before a judge may include the statement, "Failure to obey this order may lead to contempt proceedings."
- (4) The order may be in Form 7.13.

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Forms

Habeas Corpus(7.13).

7.14 - Directions to determine legality of detention

A judge giving directions as a result of an order for *habeas corpus* may provide directions necessary for a quick and fair determination of the legality of the applicant's detention, including any of the following:

- (a) set a date for the court to determine the legality of the detention;
- (b) order a person detaining the applicant to bring the applicant before the court for the hearing;
- (c) set dates for filing affidavits and briefs;
- (d) order production of a document not already produced;
- (e) order attendance of a witness for direct examination, if the evidence is not obtained by affidavit;
- (f) order attendance of a witness for cross-examination;
- (g) determine what documents will constitute the record;
- (h) start a proceeding, under Rule 89 - Contempt, against a person who receives an order to bring the applicant before the judge or produce a document and fails to make every reasonable effort to comply with the order;
- (i) adjourn the proceeding and make any order necessary to obtain the presence of the applicant.

7.15 - Interim release on *habeas corpus*

A judge may order bail for an applicant.

7.16 - Final determinations following *habeas corpus*

A judge may release or remand the applicant on determining whether or not the detention is legal.

7.17 - Abuse of *habeas corpus*

- (1) A person who applies for *habeas corpus* commits an abuse of process if both of the following apply:
 - (a) the detention has already been determined to be legal by the court;
 - (b) no new ground has arisen since the determination.
- (2) The abuse may be dealt with under Rule 88 - Abuse of Process.

7.18 - Other forms of *habeas corpus*

This Rule does not apply to the powers of the court or a judge regarding *habeas corpus ad testificandum*, the powers under Rule 50 - Subpoena, or any power of a judge or the court to order prisoners to be transported for attendance at court.

7.19 - Notice of appeal

- (1) A person may bring an appeal under legislation that provides for an appeal to the court or a judge by filing a notice of appeal before the earlier of the following:
 - (a) thirty days after the day the decision is communicated to the person;
 - (b) six months after the day the decision is made.
- (2) A person who files a notice of appeal must, in the notice, provide for a motion to be heard no more than twenty-five days after the day the notice of appeal is filed, for directions and for setting a time and date when the appeal is to be heard.
- (3) The notice of appeal must have a standard heading written in accordance with Rule 82 - Administration of Civil Proceedings, be entitled "Notice of Appeal", be dated and signed, and include all of the following:
 - (a) a notice that the appellant appeals a decision, including a reference to the legislation authorizing the appeal, the name of the decision-making authority, and the date of the decision;
 - (b) the date on which the decision was communicated to the appellant;
 - (c) if available, an attached copy of the decision and, otherwise, an attached summary of the decision;
 - (d) a concise statement of all grounds of appeal;
 - (e) a description of the order the appellant seeks;
 - (f) a description of the arrangements for production of the record, the expected content of the record, and when the record will be produced;
 - (g) if there is only one appellant, a designation of an address for delivery of documents to the appellant and, if there is more than one appellant, a designation of one address for delivery to all appellants or separate addresses for each;
 - (h) a statement explaining how documents are filed, the requirement for immediate delivery to the appellant and other parties entitled to notice;
 - (i) an acknowledgement of the effect of delivery to the designated address and a statement that further contact information is available from the prothonotary;
 - (j) notice of a motion for directions and for the appointment of a time, date, and place for the appeal to be heard;
 - (k) a notice that the judge may proceed in the absence of the respondent, and the court may determine the appeal if the respondent, or the respondent's counsel, does not attend the motion for directions.
- (4) The notice of appeal may be in Form 7.19.
- (5) A copy of a written decision that is appealed from must be filed with the notice of appeal.
- (6) The appellant must notify each respondent in accordance with Rule 31 - Notice no less than ten days before the day the motion for directions is to be heard.

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Forms

Notice of Appeal(7.19).

7.20 - Cross-appeal and contention

The provisions under Rule 90 - Civil Appeal, made from time to time by judges of the Court of Appeal for a cross-appeal and a contention, are incorporated as if the text were included in this Rule 7, except the notice of cross-appeal, and the notice of contention, must be filed no less than one day before the day the motion for directions is to be heard.

7.21 - Date for motion for directions

- (1) A person who wishes to start an appeal must request the prothonotary to appoint a time and date for the motion for directions to be heard.
- (2) Outside of Halifax, the request may be made to the prothonotary or a judge.
- (3) The prothonotary, or a member of the judge's office, must immediately appoint a time and date for the motion to be heard.
- (4) The date must be no more than twenty-five days after the day the request is made, unless the parties agree, or a judge directs, otherwise.
- (5) The party making the request must file the notice of appeal immediately after the prothonotary assigns a date.

7.22 - Notification

The appellant must notify each other party of the motion for directions in accordance with Rule 31 - Notice not more than ten days after the day the notice of appeal is filed.

7.23 - Directions for an appeal

The judge hearing the motion for directions for an appeal may do any of the following:

- (a) appoint a time, date, and place for hearing the appeal;
- (b) make an order settling each respondent's address for delivery;
- (c) set dates for filing the appeal book, the appellant's brief, the respondent's brief, and an appellant's brief in reply to arguments on a cross-appeal or notice of contention;
- (d) give the kinds of directions referred to in Rule 7.10.

7.24 - Appeal Book

The appeal book must include all of the following, unless a judge orders otherwise:

- (a) copies of all documents by which the proceeding under appeal was initiated;
- (b) copies of pleadings or documents similar to pleadings;
- (c) the decision under appeal, if it is not included in the transcript;
- (d) any agreed statement of facts on which the decision was made;
- (e) if there is a record, all of the following:
 - (i) a transcript of the hearing under appeal, or such excerpts as the parties may agree or the judge may direct,

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- (ii) copies of documentary exhibits,
 - (iii) copies of documents that were considered by the decision-making authority, but were not marked as exhibits,
 - (iv) a list of exhibits that are not documentary;
- (f) copies of written orders or directions given by the decision-making authority in the course of the proceeding under appeal;
- (g) any other material a judge directs be included in the book.

7.25 - Applicant or appellant, to pay expenses of the record

The applicant for judicial review, or the appellant, must pay for transcriptions and duplications provided in the record.

7.26 - Consolidation of judicial review or appeal

- (1) A judge may order two or more proceedings for judicial review or appeal to be consolidated, or heard together.
- (2) A motion for consolidation, or hearing together, must be made at the same time as the motion for directions, unless a judge orders otherwise.

7.27 - Evidence on judicial review or appeal

- (1) A party who proposes to introduce evidence beyond the record on a judicial review or appeal must file an affidavit describing the proposed evidence and providing the evidence in support of its introduction.
- (2) An applicant for judicial review, or an appellant, must file the affidavit when the notice for judicial review or the notice of appeal is filed, and a respondent must file the affidavit no less than five days before the day the motion for directions is to be heard.
- (3) A motion for permission to introduce new evidence must be made at the same time as the motion for directions, unless a judge orders otherwise.

7.28 - Stay pending judicial review or appeal

- (1) A judge may stay a decision under judicial review or appeal and any process flowing from the decision until the determination of the judicial review or appeal.
- (2) A motion for a stay must be made at the same time as the motion for directions, unless a judge orders otherwise.
- (3) The motion must be made by notice of motion in accordance with Rule 23 - Chambers Motion, although it is mentioned in the notice of appeal or notice for judicial review.
- (4) A judge may grant an interim stay until the hearing of a motion for a stay.
- (5) The judge may grant any order, including an injunction, as may be necessary to effectively stay a decision.

7.29 - Dismissal of dormant review

The prothonotary must make a motion to dismiss a judicial review, *habeas corpus*, or appeal five years after the notice for judicial review, notice for *habeas corpus*, or notice of appeal is filed, if no hearing date is set.