A Capsule Summary: Revision of the Rules of Court in The Province of New Brunswick

On April 1, 1982,[1] the revised *Rules of Court* of New Brunswick came into force. The new rules replaced those based upon the *Orders and Rules of the Supreme Court 1909* which were substantially similar to the *English Judicature Rules of 1883*. The purpose of this comment is to provide a brief explanation of the revision process, including a conceptual summary of the revised rules.

INTRODUCTION

Rule 1.03(1) provides the following interpretive direction:

> These rules shall be liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits.

This paragraph exemplifies the approach and philosophy to the revision process in New Brunswick. The revised rules are clear, concise, and comprehensible. Archaic procedures were discarded and innovative concepts developed. Language was simplified and modernized. The cost of litigation is minimized partially through full, but fair, disclosure of a case prior to trial. The rules are designed for quick and easy reference for all practitioners. As well, the revised rules are found in both official languages of the Province of New Brunswick.

Revision Movement

England completely revised its rules of civil procedure in 1965 and initiated the revision movement. The Province of Alberta quickly followed, completing its revision in 1969. New rules accompanied the institution of the Federal Court of Canada in 1971 when it replaced the Exchequer Court. Nova Scotia completed its revision in 1972, drawing from, *inter alia,* England, the United States of America, and Alberta.

In revising its rules, British Columbia reviewed the rules of most Canadian provinces and a number of American states, as well as England, South Africa, and the Federal Rules of the United States. The project was completed in 1976.

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[1]As of publishing, the scheduled date on which the revised *Rules of Court* will come into force is June 1, 1982. The Department of Justice, Province of New Brunswick, is currently reviewing a number of provisions discussed above, e.g., Examination for Discovery (Rule 22), Offer to Settle (Rule 49). As a result, it is suggested the reader refer to the published *Rules of Court* subsequent to June 1, 1982.

The Province of Ontario, in 1975, commenced a five year revision project. The rules of the above jurisdictions were reviewed and also those of New South Wales. The Committee reported in June, 1980 to the Ontario Legislature. Revised rules are anticipated in 1982.

On April 23, 1979, the Council of the Barristers' Society of New Brunswick struck the Rules Revision Committee, charging it with the initial task of determining the extent to which the procedural rules required revision. The Committee conferred with similar bodies from other jurisdictions. Procedural changes were explained and compared to practice in New Brunswick.

On June 18, 1979, the Committee reported to Council to the effect the New Brunswick rules were in serious need of major review and revision. The Committee recommended the revised rules of Nova Scotia and Ontario serve as models. The following were the aims of the revision process suggested by the Committee:

(a) open disclosure of a case prior to trial;

(b) simplification and modernization of procedure and language;

(c) more convenient, expedient, and less expensive procedures where fairness permits;

(d) minimization of the cost of litigation; and

(e) ease of translation into the French language.

The revision process then began in earnest.

Mechanics

The mechanics of the process deserve comment. The Revision Committee comprised of one justice of the Court of Queen's Bench of New Brunswick, eight practitioners of civil litigation, and three professors of civil procedure, was charged with the task. The Committee drew from a smaller committee of five, all of whom were members of the Revision Committee, including the draftsman, and appropriately entitled the Working Committee. Drafts of all rules were sent for comment to an Advisory Committee, comprised of 37 members including several justices of the Court of Appeal and the Court of Queen's Bench, officials charged with the administration of justice, senior practitioners, and laymen. Comments were received from judges and practitioners outside the jurisdiction including the Right Honourable Sir Robert Megarry, Vice-Chancellor of England, and the Right Honourable Lord Denning, Master of the Roles.

The rules were drafted in the English language and translated into French by the Centre de Traduction et de Terminologie Juridiques of the Université de Moncton. The final report was delivered to the Barristers' Society of New Brunswick on May 1, 1981, which, in turn, referred the report to the Minister of Justice.

The revision process continued. The revised rules were referred by the Minister of Justice to the Statutory Rules Committee, pursuant to the *Judicature Act*, R.S.N.B. 1973, c. J-2 which made further amendments and modifications. As well, the Revision Committee again reviewed the revised rules to simplify and clarify the final product.

With the exception of the costs of translation, major funding was provided by the New Brunswick Law Foundation. As well, each individual member made substantial contributions of time and effort without recompense.

Approach

Initially, the Revision Committee intended to adopt the revised Rules of Nova Scotia. However, on reflection, it was decided to use the revised Rules of Ontario as a model. The Ontario rules were the product of a recent five year intensive study with maximum contribution from the Bench and Bar preceded by extensive research. As well, the Rules of Ontario drew from those of Nova Scotia. Finally, the Committee felt the jurisdiction of Ontario would presumably provide access to a large body of precedents, with timely and ample publishing. New Brunswick was fortunate to have the full co-operation of the members of the Ontario Committee, as well as the Nova Scotia Committee.

Reference was also made to the rules of several jurisdictions, including all provinces in Canada, the Federal Court of Canada, the United Kingdom, New South Wales, and the Federal Rules of the United States.

In following the Ontario rules, the Committee quickly learned the needs of New Brunswick did not consistently correspond to those of Ontario. Geographical size, population, court structure and administration, numbers in the Bench and Bar, and prior practice often differed. Of substantial concern were the differences in statutory provisions.

Therefore, the Ontario rules were generally adopted to New Brunswick. Format and numbering were preserved where possible to enable easy reference to precedent. However, a number of the Ontario rules were unacceptable. In those instances, the Committee drafted appropriate rules *ab initio*. In various areas, procedures unique to the common law were developed.

CONCEPTUAL SUMMARY

Institution of Action

Actions formerly commenced by "Writ of Summons" are now commenced by "Notice of Action" with a Statement of Claim attached. Where the solicitor has insufficient time to draft a Statement of Claim, an action may be commenced by filing a Notice of Action, followed by filing a Statement of Claim within 30 days, and then serving both documents together.

The "Appearance" is eliminated. A defendant must respond to a Statement of Claim with either his Statement of Defence or a Notice of Intent to Defend.

Proceedings formerly commenced by Originating Summons are commenced by Notice of Application. Such is also used in most matters formerly instituted by petition. Rule 16.04 enumerates instances in which the Notice of Application may be used.

Parties

Unincorporated associations are permitted to sue or be sued.

A party may, by Notice of Application, seek a declaration of rights dependent upon the interpretation of a statute, order-in-council, regulation, or municipal bylaw.

Service

Service by certified mail is permitted in Canada, but if no defence is filed or the plaintiff does not receive an acknowledgement of receipt, service in the usual manner is required. The rules regarding service on various types of parties are simplified.

The categories in which service out of the jurisdiction is permitted is expanded. No application for leave to issue or serve the originating process out of the jurisdiction is required. Applications for leave are only necessary in those cases not falling within the enumerated categories.

Default

The practice of "noting default" of a defendant who fails to deliver a Statement of Defence is substituted for the former practice of signing interlocutory judgment. A defendant noted in default, except in specific instances, is not entitled to notice of subsequent steps in the proceeding.

After default is noted, default judgment may be entered in actions for debt, recovery of possession of land, or recovery of chattels. Claims for unliquidated damages will proceed to trial, but provision is made for proof of damages by affidavit where there is no defence. In other cases, default judgment may only be obtained on motion.

Summary Disposition

Any party may apply to the court for summary judgment.

Expanded provision is made for determination of questions of law by way of a stated case.

Pleadings

No leave is required to make a crossclaim or a third party claim. Orders for directions are not usually required as the revised rules include standard provisions.

Matters arising after commencement of an action may be pleaded.

A person not a party to the proceeding can claim an interest in the subject matter of the proceeding and apply to the court for leave to intervene.

Discovery of Documents

While a party may claim privilege from discovery with respect to a document, as a general rule he may not use such document at trial unless he abandons his claim of privilege and serves a copy of the document at least ten days prior to trial.

Provisions are included to obtain discovery of relevant documents from persons who are not parties to the proceeding.

Insurance coverage will be disclosed by a party (who shall also produce the policy for inspection, if necessary). Insurance coverage is also subject to Examination for Discovery, but such information is not admissible at trial unless in issue in the action.

An Affidavit of Documents shall contain, in addition to the items formerly required, a list of all documents which the deponent believes to be in the possession of a person not a party to the action. Further, the affidavit will be endorsed by the solicitor for the deponent certifying that he has fully explained to the deponent the necessity of making full

and fair disclosure and that the solicitor has no knowledge of any relevant document which is not disclosed.

A Discovery is deemed to be "continuing" until trial, so that any new documents required by a party must be disclosed automatically.

Examination for Discovery

Where a corporation is examined on discovery, the examining party selects the officer, director, or manager thereof, although the corporation may apply for an order that some other officer, director or employee be examined instead. Examination for Discovery can take the form of an oral examination or, at the option of the examining party, written questions and answers. Employment of both forms requires consent of the parties or an order of the court.

The scope of examination has been broadened to include evidence and the names and addresses of potential witnesses. Cross examination is also permitted, except as to credibility.

Opinions of experts are subject to discovery, except those of experts who will not testify at trial.

Non-party witnesses may be discovered with leave of the court, including expert witnesses retained by parties in preparation for contemplated or pending litigation, unless the party undertakes that he will not call the expert as a witness at trial.

Discovery may be conducted before an action is commenced for the purpose of establishing the identity of an intended defendant, with leave of the court.

Examinations

Where an examination is conducted in an official language other than that understood by the witness, the clerk is responsible for appointing an interpreter at no cost to the parties. If the person does not understand either official language, it is the responsibility of the examining party to provide a competent interpreter.

Documents produced on examination are numbered, subject to admissibility at trial.

Objections to any questions asked on an examination can be referred to a judge for a quick ruling, referred to the court for ruling without argument, ruled on by the court under the former procedures, or the

question can be answered subject to the objection being made to admissibility at trial.

Control is given to the court to ensure examinations are conducted in good faith, in a reasonable manner, and that abuse of the witness does not occur.

Transcripts of examinations are to be prepared by numbering each question consecutively. The original transcript is sent to the solicitor for the party having carriage of the action, who must produce it at trial. The transcript is not to be filed until the trial, when reference is made to it.

Preservation of Property

Property held by virtue of a lien can be released in exchange for the monies alleged to be owing which are then placed in trust.

Medical Examinations

Where the physical or mental condition of any party to an action is in issue, the court may order a medical examination and the report is admissible at trial, although the doctor, if required, must attend to orally testify.

Motions and Applications

Interlocutory applications formerly made by summons or notice of motion will be made by Notice of Motion. In effect, the distinction between court and chambers is eliminated. Such does not affect the manner in which the hearing is to be conducted, but is to simplify procedure.

With the consent of the parties, or on direction of the court, a motion can be heard by conference telephone.

Before the motion is heard, all parties must exchange each of his respective affidavits and the judge must be provided with a record. The hearing of all motions shall be open to the public except in certain circumstances where the judge can also ban publication.

A Notice of Application is similarly completed and, on the hearing, the judge can direct the trial of a particular issue. On such order, the application is treated as an action.

On motions, affidavits can contain statements as to information and belief. However, on applications, the facts deposed to must be within the personal knowledge of the deponent, except on non-contentious issues. A non-party who refuses to give an affidavit for a motion or application can be examined and the transcript used at the hearing. Cross examination is also permissable.

Interlocutory Injunctions

An interlocutory injunction or mandatory order may be made before the institution of proceedings. When made without notice, an injunction can be granted for a period not exceeding ten days. The applicant is deemed to have given his undertaking for any loss sustained.

The *Mareva* injunction is codified to allow the court to restrain any person against whom the claim is made from disposing of or removing assets from the jurisdiction.

Appointment and Confirmation of Receivers

Provision is made for the appointment of a receiver, either where an instrument provides for such or to carry out a judgment or order. As well, in certain circumstances, a privately appointed receiver may be brought under the jurisdiction of the court by confirmation of his appointment.

The order appointing or confirming a receiver has been standardized to include basic provisions. The rules also provide for the removal of a receiver who has defaulted in his duties.

Lis Pendens

A lis pendens becomes a "Certificate of Pending Litigation" which can be issued by the clerk without notice. The same can also be revoked or amended by order of the court.

Interpleader

Interpleader proceedings are simplified.

Replevin

Replevin becomes an "Interim Recovery of Personal Property". It is completed by motion, with or without notice, and requires the posting of security equal to 1.25 the value of the property. Where made on notice, the sheriff delivers the property to the plaintiff. Where made without notice, the sheriff takes the property and detains it for ten days before delivering it to the plaintiff. If the property in question has been hidden by the defendant, the court can order the sheriff to take any other personal property of the defendant in its place. Any person with information regarding such property can be ordered to answer questions under oath in respect thereto.

Venue of Trial

Trial takes place in the judicial district where the action is commenced, although venue can be changed on motion.

Entry of Actions

Actions are set down for trial after all pretrial procedures are completed by any party who serves and files a Notice of Trial and a copy of the Trial Record. Prior to the appropriate Motions Day, the clerk delivers a list of all proceedings with tentative dates for trial or hearing and, unless notice is given otherwise, the court confirms those dates on Motions Day. Therefore, attendance is only required by those solicitors who wish to change the tentative dates.

A trial date can be fixed at any time in special circumstances, either summarily on motion or by consent.

If a matter has not been entered for trial within one year subsequent to filing of the Statement of Defence, all parties are brought before the court to justify the delay.

Pretrial Procedures

Issues in any action can be severed and tried separately with leave of the court.

The offer to consent to suffer judgment is now known as an "Offer to Settle". It can be made by either the defendant or plaintiff with appropriate cost sanctions. As well, a co-defendant can make an "Offer to Contribute" to the other defendant.

A pretrial conference may be ordered on the motion of any party or the judge. The pretrial judge can preside at the trial only if settlement or compromise of liability or damages is not discussed at the conference. Such conferences can also be held during trial, but with the same proviso.

Pretrial briefs are required to be delivered to the judge and to each party four days prior to trial.

The Notice to Admit Facts has been retained.

Expert witnesses will not be allowed to testify at trial without leave of the court unless a report is submitted no later than the Motions Day setting out the substance of the proposed testimony. With the consent of the parties, the report is admissible in evidence without the necessity of the testimony of the expert.

Commission Evidence

An expert may be examined before trial in lieu of calling him at trial and the examination may be recorded on video tape.

Commission evidence has been simplified and again can be recorded on video tape.

Expert Inquiry

On motion by any party or on consent, the court can appoint an independent expert to conduct an inquiry and report on any question of fact or opinion relevant to an issue.

Court Advisors

On consent of all parties, the court may appoint an advisor to the court with respect to the facts in issue.

Trial

At the trial the court reporter maintains a list of exhibits.

On request of any party, a witness may be excluded from the courtroom until his testimony is completed.

The order of presentation of evidence is codified.

At the conclusion of a plaintiff's case, a defendant may move for dismissal, but the court will only consider the motion if the defendant elects not to call evidence.

Where witnesses appear to be evasive, the party calling that witness can examine him by means of leading questions.

Evidence can be given at trial by affidavit unless attendance of the deponent is required for cross examination.

The subpoena is abolished and replaced by a "Summons to Witness".

Any party may require the attendance of an adverse party and call him as a witness and cross examine him, unless his counsel undertakes to call him.

Civil juries have been retained in the same circumstances as permitted under the former rules.

References

The court may refer any question or issue of fact to a referee, who shall report his findings to the judge for consideration.

Accounting

Procedures are adopted for the taking of an account.

Security for Costs

Security for costs is retained for plaintiffs ordinarily resident out of New Brunswick, as well as for nominal plaintiffs or "shell" corporations.

Taxation of Costs

Taxation of costs between party and party is abolished in most instances in favour of the trial judge determining the amount of costs as part of his Reasons for Judgment. For his guidance, a large scale of fees is provided where the amounts vary according to the amount involved and the degree of difficulty.

Taxation of disbursements is retained if the same cannot be agreed, but a simple tariff is provided to encourage settlement.

Judgments

The term "Judgment" has been reserved for formal judgments. A judge will give an order or decision directing judgment.

Motions to vary decisions are retained.

Enforcement of Judgments

Judgments will be enforced by an "Enforcement Order". Provision is made for the sale of chattels by the sheriff by whatever means he believes will obtain the best price, subject to an order of the court.

Judgment debtors are subject to examination to aid enforcement, without the necessity of a court order. As well, the court may order the examination of a transferee of property from the judgment debtor and any other person. Failure to attend the examination, to answer a proper question, or to obey a judgment may give rise to a contempt order, an order for sequestration, or a fine.

Civil Appeals

Leave to appeal interlocutory orders or decisions is required.

Appeals are commenced by filing within 30 days of the date of the order or decision the appropriate notice. When the appellant has filed all necessary material and the court reporter has filed the original transcript of evidence, the appeal is "perfected" and entered for hearing.

The sittings of the Court of Appeal will be monthly with the exception of July, August, and December, although the court may order that an appeal be heard immediately.

The powers of the Court of Appeal are set out in detail; special powers are given to an appellate judge to expedite appeals, reduce expense, and to order substituted service.

Criminal Appeals

The criminal appeal rules parallel those for a civil appeal.

Provision is made for prisoner appeals, appeals in writing in lieu of appealing in person, and release from custody pending appeal.

Summary Conviction Appeals

All summary conviction appeals are to the Court of Queen's Bench and again parallel the civil appeal rule. Such will be entered for hearing on the appropriate Motions Day.

Mortgage Foreclosure

Foreclosure proceedings pursuant to the *Rules of Court* are abolished.

Vendor and Purchaser Applications

Provision is made for submission to the court of questions arising from an agreement for the sale of real property.

Judicial Review

Certiorari, mandamus, prohibition, quo warranto, and motions to set aside awards are now completed under one rule entitled "Proceeding for a Judicial Review" and instituted by Notice of Application.

An application must be commenced within three months, with provision for extension, and may be made returnable before the Court of Queen's Bench or the Court of Appeal.

An order for judicial review may provide for any of the remedies given by the former proceedings.

Quick Ruling Procedure

Rule 77 provides a special procedure resulting in a quick and inexpensive adjudication of a dispute which is non-compulsory and non-binding. Employment of the procedure can have an effect on costs if the unsuccessful party insists upon a full proceeding.

A quick ruling may be requested before or after a proceeding has been started, provided that the parties either agree on the facts and issues or agree the facts and issues will be determined.

On hearing the dispute, a judge may conduct the hearing in any manner he deems fair; ask questions of the parties, their solicitors, or other persons in attendance; and hear oral evidence.

If the judge decides to make a quick ruling, and all parties agree, it can be entered as a judgment of the court. If the unsuccessful party does not accept the quick ruling, he can proceed to prosecute or defend his action in the normal manner. However, if the decision subsequent to trial is less favourable than the quick ruling, he must then pay usual costs to the other party with additional costs of 50 per cent.

The quick ruling is not subject to appeal. The judge who makes a quick ruling cannot participate in any subsequent proceeding involving the same dispute.

CONCLUSION

As is noted, the revised *Rules of Court* in many respects include concepts radically different from those formerly employed in New Brunswick. On the other hand, some of the former procedures have been adopted and modified. The dual tests of time and costs will determine if the rules revision project achieved its objectives. Hopefully, in New Brunswick today, the practicing lawyer is provided with a comprehensible body of rules which govern every possible problem that can arise. The provision of such was no small task indeed.

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