The Law Society of Manitoba

INCORPORATED 1877 | INCORPORÉ EN 1877

CIVIL PROCEDURE

Chapter 3

Motions and Applications

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A. INTRODUCTION

1. Purpose and Scope of Materials

These materials are an introduction to applications and motions in the Court of King's Bench in Manitoba. Emphasis is on practice, with reference to substantive law when useful for illustration.

The materials discuss regular civil practice in the Court of King's Bench and do not include:

- proceedings under the *Bankruptcy and Insolvency Act*;
- criminal or similar proceedings;
- proceedings under *The Summary Convictions Act*;
- family proceedings; or
- surrogate proceedings.

Proceedings in the Manitoba Court of Appeal and the Federal Court of Canada are addressed in chapter 4 of these materials.

2. The Court of King's Bench Rules

The Court of King's Bench Rules ("the rules") are deemed to be regulations within the meaning of *The Statutes and Regulations Act* (see *The Court of King's Bench Act*, section 93(2)). The current version of the rules came into effect on March 1, 1989 and has been amended a number of times.

The proper use and application of the rules are the keys to successful applications and motions practice, cost-effective client service, and efficient court administration. The rules should be read thoroughly and regularly and relevant portions should be re-read before you bring or respond to an application or motion.

Substantial changes to the civil practice rules came into effect on January 1, 2018. These rule changes had a significant impact on the practice of civil litigation. Always check to see that you are using the current version and review recent practice directions.

As you review, interpret and cite the rules, keep the following considerations in mind:

a) The rules matter and neither an advocate nor a judge is free to ignore them, save where discretion or exceptions are contemplated.

b) Although the rules are intended to be reasonably comprehensive, they may not contemplate every circumstance that can arise. In such cases:

   - Rule 1.04(2) provides that where matters are not provided for, they will be dealt with by analogy to the rules; and

- the court has inherent jurisdiction to regulate its practice and procedure which may only be exercised where the rules are silent: *Montreal Trust Company v. Churchill Forest Industries (Man.) Ltd.*, 1971 CanLII 960 (MB CA).

c) In general, case authority interpreting and applying *the current rules* is more helpful than authority dealing with the pre-1989 rules, although this is not always so, and older case authority addressing principles reflected in both the former and current rules is sometimes helpful*: ABI Biotechnology Inc. v. Apotex Inc.*, 1995 CanLII 16103 (MB CA).

d) Caution is called for when referring to a case or other authority involving the rules of other jurisdictions. The wording of the rules varies from jurisdiction to jurisdiction, even where one jurisdiction has modelled its rules after those of another. Moreover, the fact that a similarly worded rule has received a certain interpretation in another province does not mean the courts in Manitoba will necessarily accept that interpretation.

e) The concept of proportionality was introduced generally into the rules with the 2018 amendments. Rule 1.04(1.1) directs that, in applying the rules, the court is to make orders and give directions that are proportional to the nature of the proceeding, the amount that is probably at issue, the complexity of the issues in the proceeding and the likely expense of the proceeding.

Familiarize your legal and administrative assistants with the most frequently consulted rules, especially rules relating to the service of documents and document format, and encourage them to always consult the rules directly on those matters.

3. Applications and Motions

Applications and motions are different types of proceedings. An application is an originating process. It is used to commence a proceeding in court. In this regard, it is like a statement of claim or a petition. A motion, by contrast, is a process by which the court is asked for relief while the originating process, whether application or statement of claim, is pending. Accordingly, it may seem sensible to consider originating processes, including applications and statements of claim, together, and to treat motions separately.

However, it is convenient to deal with applications and motions together, because they share some common procedural features arising from the fact that both are summary proceedings. This means that, as a general rule, matters that may be dealt with by application or motion will be heard by the court without a trial, and without all of the procedural formality (and evidentiary safeguards) that a trial entails. The evidence relied upon in applications and motions is normally supplied in affidavit form, frequently augmented by transcripts of cross-examinations on affidavits.

In recognition of their procedural similarities, the rules combine the jurisdiction and procedure for motions and applications under Part IX.

> Although the procedural similarity between applications and motions makes it convenient to deal with the two subjects together, they are distinct processes, with different functions, and with important procedural and evidentiary differences.

B. APPLICATIONS - INTRODUCTION

1. General

An application is one of the five originating processes contemplated by the rules for seeking final relief from the court. It is one of the most common. A notice of application (Form 14B) is the document used to commence the application process (Rule 14.05).

2. Jurisdiction

> Every court proceeding shall be commenced by an action except where the rules or a statute otherwise provide (Rule 14.02). A statement of claim is the originating process that must be used to commence an action, with some specific exceptions as set out in Rule 14.03.
>
> Applications may only be used in specific circumstances identified either by the rules or by statute. Rules 14.05(2) and 14.05(3) authorize commencement of a proceeding by application in specific circumstances.

The establishment of different processes for seeking relief in the court has largely to do with an effort to include procedural rules and safeguards that are appropriate to certain types of matters. The rules contemplate that disputes involving complicated or contested facts will generally be dealt with by action, commenced by statement of claim, where the fact-finding role of the court is facilitated by relatively detailed rules of evidence and procedure, especially those relating to discovery and trial. Disputes where the facts are not contested are well-suited to resolution by the summary procedure by which applications are determined.

Even where an application is authorized by the rules, the court may still order a trial, preceded by the filing of a statement of claim where the resolution of factual issues is not suited to the summary process of applications: *Kim et al. v. Lakeview Hotel Development Inc. et al.*, 1997 CanLII 23067 (MB KB).

Rule 38.03 requires that all applications be made to a judge, as distinct from an associate judge or other court officer. (Note that there is an exception for an interpleader application being made where no other proceeding has already been commenced. In such a situation, under Rule 43.03(1) the application may be made to an associate judge.)

3. Procedure

Form 14B is the notice of application form established by the rules for use in most applications. Applications made under *The Expropriation Act,* R.S.M. 1987, c. E190 must be in Forms 77A and 77B.

The parties to an application are described as applicant or applicants and respondent or respondents.

The rules require that the notice of application state the statutory provision or rule under which the application is made.

4. Service

The applicant must serve all respondents with copies of the notice of application and all supporting material, except where an application may be brought without notice.

The provisions of Rule 16 governing service of an originating process apply to applications. Under Rule 16.01 applications must be served personally, or by an alternative to personal service. Rules 16.02 and 16.03 set out the requirements of personal service and alternatives to personal service.

The Hague Service Convention is in force in Manitoba and compliance is required. The Hague Service Convention applies if a person to be served with a court document resides outside Canada in a contracting state under the Convention and that person's address is known. Rule 16.04(1) which permits substitutional service or dispensing with service and Rule 16.08(1) which allows for validating service do not apply in this situation. (Rules 16.04 (1.1) and 16.08(2)).

The service must be done in compliance with the *Convention* under Rule 17.05.1. When the Convention applies, Rule 17.05.2(2) sets out the requirements for proving service. Rule 69.01 deals with how default judgment can be granted where the Convention applies.

Rule 38.05(3) provides that where the application is made on notice, a notice of application must be served at least 14 days before the date on which the application is to be heard, unless the court abridges the time for service.

C. MOTIONS – INTRODUCTION

1. General

Rule 1.03 defines "motion" as a motion in a proceeding or an intended proceeding. "Proceeding" is itself defined as an action or application.

> A motion is a request for relief made to the court within the context of a proceeding that has typically already commenced. A motion is not an originating process. A notice of motion (Form 37A) is the form prescribed by the rules for the commencement of a motion.

Motions are common in the context of actions, and less so, in applications.

2. Jurisdiction

Motions are used to ask the court for a wide variety of relief that a party to an action or application may think necessary in the course of the litigation. The relief sought must fall within the jurisdiction of the court to grant, but is otherwise broad in scope.

The relief sought may directly reflect the substance of the main litigation, for example, where a party asks in its statement of claim for a permanent injunction against another party and, by motion, asks for an interlocutory injunction until the action is finally determined (months or years hence). The relief sought may be more procedural, such as where parties disagree on whether questions posed on examination for discovery are proper, and a motion is made asking the court to determine that issue.

> Although all judges of the Court of King's Bench have jurisdiction to hear any motion that is properly before the court, Rule 37.03 provides that motions for those matters that are within the jurisdiction of an associate judge shall be made to an associate judge unless an associate judge is not available, a judge grants leave, or an associate judge refers a pending motion to a judge.

Associate judges are court officers (formerly known as masters) appointed under section 11.1 of *The Court of King's Bench Act* with jurisdiction to hear any motion in a proceeding except for those motions listed in Rule 37.02(2)(a) to (g). While occasionally overlooked, this rule is enforced fairly consistently. It is only in the circumstances set out in Rule 37.02(2)(a) to (g) where a motion must be made to a judge.

The recent amendments introduce several provisions that qualify the general jurisdiction of the associate judge to hear motions. The requirement for mandatory case conferences for expedited actions under former Rule 20A has now been repealed and associate judges will hear all motions within their jurisdiction in connection with expedited actions unless and until such action becomes subject to the Pre-Trial Management Rules (Rule 50*)*. Pre-trials are addressed in more detail in chapter 4 of these materials.

Rule 50 applies to all actions, including expedited actions, and Rule 50.05(2) provides that, unless otherwise directed by the Chief Justice or designate, the pre-trial judge must hear all motions arising in the action.

Procedure

Although the rules contemplate that a motion may be initiated orally, motions are almost always made in writing by notice of motion in Form 37A under Rule 37.01. In practice, motions made orally to the court are generally heard only where:

- there is an extraordinary urgency that justifies dispensing with the rule requiring that motions be in the prescribed form (extremely rare); or
- the relief sought is minor, the other party consents to the granting of the relief, and to prepare a formal notice of motion would entail an unnecessary expenditure of time or money.

However, with the increasing importance of proportionality one might expect to see an increased acceptance of oral motions, especially as part of the pre-trial process which includes bringing some motions before the pre-trial judge.

A notice of motion (Form 37A) is the document used to bring a motion. That document has several purposes, including:

- to identify for the court and the other parties the relief sought, and the grounds and evidence relied upon;
- to give notice of the date and time of the hearing;
- to create a permanent record of the motion for both the court file and appeal purposes.

Under Rule 37.06(2.1) the court may make an order on consent without a notice of motion being filed. However, a requisition must be filed in place of a notice of motion and the court fees payable for filing a notice of motion must still be paid.

3. Service of Notices of Motion

Motions, together with all supporting material, must be served on any person or party who will be affected by the order sought. Rule 37.06(6) provides that in general motions must be served at least four days before the date on which the motion is to be heard. It is important to remember Rule 3.01(b) provides that where a period of fewer than seven days is prescribed, holidays shall not be counted. Exceptions in cases of motions made without notice and urgent matters are contemplated by Rule 37.06.

D. EVIDENCE ON APPLICATIONS AND MOTIONS

1. General

Although evidence on applications and motions can be presented in many forms, it is most frequently provided through affidavits of appropriate witnesses. Evidence in affidavit form is introduced to the court by filing the affidavit in court in accordance with the rules.

The use of affidavit evidence in connection with applications and motions is consistent with the summary nature of those processes.

Affidavit evidence may be tested and challenged, to some extent, through cross-examinations on affidavits. Where that occurs, the transcript of the cross-examination must be filed in evidence as well. Unlike the limited use of transcripts of examination for discovery, the entire cross-examination transcript is considered as evidence. Counsel must consider whether to cross-examine and, if so, what questions should be asked. It is not an examination for discovery and should not be treated as such.

Rule 39.03(1) allows for a person other than an expert to be examined as a witness before the hearing of a motion or application. In addition, Rule 39.03(4) permits witnesses to be called to give oral evidence at the hearing of an application or motion with leave of the court. This occurs infrequently, although often enough that counsel should be aware of the rule.

2. Affidavits - Form

An affidavit is a document in a form prescribed by the rules containing the sworn or affirmed statement of a witness, who is sometimes described as a deponent. The document is organized into numbered paragraphs. The format requirements of an affidavit are set out in Rule 4.07 and Form 4D.

A *Practice Direction* issued in August 2012 requires that all affidavits filed in the Court of King's Bench (General and Family Divisions) must comply with the following:

(a) Typing must be font size 14;

(b) Pages must be numbered;

(c) Exhibits must be separated by tabs with sequential numbers or letters; and

(d) Pages and exhibits must be fastened or secured sufficiently to remain intact.

Affidavit evidence should always be sworn in the first person.

The beginning of the body of the affidavit should set out the name and occupation of the deponent, as described in Form 4D. If the deponent is a party to the proceeding or an officer or agent of a party, that also should be stated at the beginning.

In practice, affidavits are normally sworn or affirmed after the originating process, whether action or application, has been commenced. Rule 39.01(7) permits the swearing of affidavits in advance of the commencement of the proceeding. Where that occurs, it is advisable to state in the affidavit the fact that it is to be used in support of an intended proceeding.

The formalities of swearing or affirming affidavits are dealt with in sections 62 through 68 of *The Manitoba Evidence Act*. The method of administering an oath is prescribed in section 14 of that Act. Section 14 reads as follows:

> *An oath may be administered to any person while that person holds in his hand a copy of the Old or New Testament, without requiring him to kiss it.*

Section 64(4) of *The Manitoba Evidence Act* and the rules contain provisions for the swearing or affirmation of affidavits by blind or illiterate witnesses or those who required the use of an interpreter (see Rules 4.07(7) and (8)).

It is important to note that, while an affidavit for use in a proceeding in Manitoba may be sworn outside of Manitoba, it must be sworn before a notary public for the jurisdiction in which it is sworn, or some other official as set out in section 63(1*)* of *The Manitoba Evidence Act*. That person must complete the jurat, located at the end of the body of the affidavit, and the stamp on every exhibit appended to the affidavit. The seal of that person must be impressed on the jurat and the stamp located on each exhibit. Section 63(1)(d) of *The Manitoba Evidence Act* now allows a commissioner for taking affidavits to administer oaths outside the province. A commissioner will not usually have a seal of office and this amendment will make it much easier to secure affidavits from outside the province, particularly from individuals in remote communities.

Affidavits frequently contain references to exhibits. In the vast majority of cases, exhibits are attached to the affidavit itself and are identified consecutively by letters. Rule 4.07(3) permits exhibits to be filed separately, which is useful for bulky exhibits.

Develop the practice of being meticulous in having affidavits sworn or affirmed, and ensure that your legal or administrative assistant does likewise. When sending an affidavit to be sworn or affirmed elsewhere (such as in another province), provide detailed instructions for the proper completion of the jurat and the exhibit stamps to avoid the expense and delay that will result if the affidavit is improperly sworn.

3. Affidavits - Contents

The rules respecting the contents of affidavits are important. They are intended to ensure that evidence supplied in affidavit form at the summary hearings of applications and motions is reliable. The rules differ somewhat between applications and motions.

Rules 4.07(2) and 39 deal with the contents of affidavits.

The fundamental characteristic of the content of an affidavit, as with all evidence, is relevance. The contents of an affidavit to be used on an application or motion must be relevant to some matter or issue that will arise for determination in the application or motion.

The scope of admissible evidence includes properly qualified expert opinion evidence. See *Lexogest Inc. v. Manitoba (Attorney General)*, 1990 CanLII 7942 (MB KB).

> Rule 4.07(2) requires that affidavits be limited to statements of facts within the personal knowledge of the deponent, or to other evidence that the deponent could give if testifying in court unless the rules otherwise provide. Exhibits attached to affidavits must also be admissible and supported by an appropriate factual foundation.

See *Beaudoin v. Conley* reported as *T.L.B. et al. v. R.E.C.*, 2000 MBCA 83 (CanLII) at paragraph 11. As noted below, the rules do provide otherwise in some circumstances.

The rules permit, in some circumstances, the presentation of affidavit evidence that would offend the hearsay rule and the first portion of Rule 4.07(2). In this regard, Rules 39.01(4) and 39.01(5) permit evidence based upon information and belief with specified restrictions, although what is permitted in applications and motions differs.

In applications, Rule 39.01(5) provides that evidence based on information and belief may be used only as to uncontentious facts. In the case of motions, Rule 39.01(4) allows statements of the deponent's information and belief on all relevant matters, including contentious factual matters. In both processes, the source of the information and the fact of the belief must be specified in the affidavit. This requirement is designed to enhance the reliability of the evidence by allowing the responding party to investigate, verify, or challenge the evidence: See *Griffin Steel Foundries Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers*, 1977 CanLII 1634 (MB CA); *Hydro Electric Board (Man.) v. Inglis (John) Co. et al.*, 1996 CanLII 18261 (MB KB).

Material that **may not** be introduced into evidence in affidavits (or otherwise) includes the following:

- argument about the facts - where a deponent does not accept evidence offered in another affidavit, it is sufficient to have the deponent state the facts as the deponent

recalls them. It is neither necessary nor proper to include argument over the facts in the affidavit;

- expressions of personal opinion - opinions are not facts. Except for circumstances where lay or expert opinions would otherwise be relevant and admissible, expressions of personal opinions are not admissible and should not be included in affidavits;
- argument about the law - affidavits should be limited to factual evidence, and are no place for legal argument.

4. Drafting Issues

Success in prosecuting or defending a proceeding depends in large part on identifying the facts that are necessary to establish a party's position at law and presenting those facts in evidence in a manner that will maximize their impact.

> It is impossible to overstate the importance of the first element; identifying the facts that will establish a party's position in law. Whether facts have been reported to counsel through one or a series of investigator's reports, or obtained directly through enquiries with parties and witnesses, it is critical to identify those facts which at law justify the granting or denial of the relief sought, as the case may be.

Normally this requires that legal research necessary to form and provide an opinion on a party's legal position be undertaken *before* the preparation of application or motion materials, including affidavits. As counsel approaches the task of identifying the necessary facts, they should consider that the facts identified, if accepted by the court, must be sufficient to permit and persuade the court to grant the relief requested, or to deny that relief, according to the party's position.

It is at least inconvenient, time-consuming, and expensive, and at worst, fatal to a party's position to discover at or near to the time of the hearing of an application or motion that the affidavit evidence does not refer to an important or perhaps critical fact that could have been included. While adjournments and filing of supplementary affidavits are sometimes permitted by the court, they are discretionary.

> The second element, effective presentation of the facts, is equally important. While a patient and diligent associate judge or judge may sort through poorly presented or confusing affidavit evidence and come to the correct result anyway, a clear, well-written and organized presentation of the evidence makes the court's task in finding the facts and applying the law simpler, facilitates argument by counsel, and generally enhances the chances of success.

Favourable facts which, if accepted, would entitle a party to certain relief will be of no use or value if they are obscured by poor drafting.

Common drafting errors in this regard include:

- inclusion of irrelevant material;
- inclusion of otherwise inadmissible material;
- inclusion of information which is repetitive or redundant;
- failure to use proper grammar;
- presentation of evidence in a confusing or illogical order.

Consideration should be given to the issue of which witness or witnesses should provide evidence by affidavit. Although the rules permit the inclusion of evidence that is based on information and belief, in many cases it will be more sensible to file two or more separate affidavits from different deponents whose evidence will be based purely on personal knowledge, rather than an affidavit from one deponent whose evidence will be based in part on information and belief. This is because evidence based on information and belief is inherently less reliable than evidence based on personal knowledge. This has long been recognized by the hearsay rule.

Generally speaking, lawyers should avoid being involved in situations where they swear and file affidavits in proceedings in which they act. Counsel cannot be both advocate and witness in the same case. If the situation requires that an affidavit must be sworn by counsel, that affidavit should only deal with uncontentious matters. Even so, counsel should think twice before concluding that any fact is uncontentious, and twice again before acting on that conclusion. It can be time-consuming and embarrassing for lawyers to be cross-examined by colleagues on the opposite side when an 'uncontentious' fact turns out to be contentious.

Moreover, the giving of evidence by counsel can lead to a determination of whether counsel (and their firm) should be removed as the lawyer of record in light of counsel's involvement as a witness, or whether an evidentiary privilege, otherwise serving to protect a client's information, has been waived in whole or in part.

> Counsel should also review Chapter 5.2 of the *Code of Professional Conduct*, which deals with the topic of "The Lawyer as Witness". Counsel should similarly be careful not to have legal assistants or other support staff swear affidavits on contentious or potentially contentious matters unless they have specific personal knowledge of the matters on which they are giving evidence.

5. Challenging Affidavit Evidence

Challenges to affidavit evidence typically are concerned with one of two objectives:

1. to deal with the material contained in an affidavit that is considered inadmissible, grounds for which may include irrelevance, argument, opinion, or information and belief (hearsay) in certain circumstances;
2. to challenge the facts asserted in the affidavit.

To deal with material improperly included in an affidavit, counsel's first task is to identify and assess the impact of the offending material. Counsel should be concerned that unless the matter is raised and an objection is taken, improperly included material may be taken into consideration by the court, to the potential detriment of a party. Although the court may disregard such information, either on its initiative or at the request of counsel, parties should not assume that it will do so. Rather, counsel should decide whether or not to challenge the admissibility of the offending material and, if so, how to conduct that challenge.

A challenge to information improperly included in an affidavit may be made in two ways. First, counsel can object orally at the time of the hearing to the acceptance of the offending material into evidence based on admissibility. Counsel should be prepared to identify the grounds of the objection by explaining the reason why the offending information is inadmissible.

Although this objection may be raised during argument, it is preferable to raise the issue at the beginning of the hearing. In the normal course, notice should be given to opposing counsel in advance of the hearing.

The second method of contesting information that is believed to be improperly included in an affidavit is to bring a motion to strike out or expunge the offending portions. Rule 25.11 permits the court, on motion, to strike out or expunge a pleading or other document (which includes affidavits) on grounds including the following:

- it might prejudice or delay the fair trial of the action;
- it is scandalous, frivolous, or vexatious;
- it is an abuse of the process of the court.

A motion to strike out or expunge portions of an affidavit is brought in the usual form of motion (Form 37A).

Rule 25.11(4) provides that a motion to expunge must be heard at the same time as the substantive application or motion is heard, unless the judge or associate judge determines that there are exceptional circumstances requiring the motion to expunge to be heard at an earlier date. This is in keeping with the process stated by Justice Scurfield in *The Winnipeg*

School Division No. 1 v. The Winnipeg Teachers' Association of the Manitoba Teachers' Society, 2007 MBQB 23 (CanLII).

Where a motion to expunge all or part of an affidavit is filed for a motion which will be heard by an associate judge, the motion to expunge must be heard by the associate judge who hears the substantive motion (Rule 25.11(3)).

Challenging facts asserted in an opposing affidavit by cross-examination is an old and respected component of the fact-finding process of the civil courts. Although regulated to some extent, the right to cross-examine witnesses, including deponents of affidavits, has been strongly preserved by the court and rules. This type of challenge is typically done in either or both presentation of contradictory affidavit evidence and cross-examination.

Counsel should always keep in mind the potential effect of challenging facts asserted in an affidavit. Because motions and applications are summary processes and are typically determined without trial, there is little opportunity to assess credibility. Accordingly, sometimes the mere fact of contradiction on a material point will affect the merits of the motion or application, without a determination of the fact in dispute. This arises often in motions practice in general, and in summary judgment motions in particular.

Cross-examination on affidavits is governed by Rule 39.02 which seeks:

- to reduce the incidence of delay; and
- to deal with the reality that, because most cross-examinations take place before court reporters, judges and associate judges who subsequently read a transcript of the cross-examination are not in a strong position to assess credibility.

Cross-examination may be conducted as of right, and without leave of the court, where all of the following conditions are met:

- under Rule 39.02(1), the party has served all affidavits on which it intends to rely;
- under Rule 39.02(1), any examination of a witness called on under Rule 39.03 has been conducted;
- under Rule 39.02(3), the party has asserted the right and convened the examination with due diligence; and
- the person to be examined resides in Manitoba.

Rule 39.02(2) provides that a party who has cross-examined may not file any further affidavits without leave of the court or consent of the other party. The court will only grant leave in certain limited circumstances. See *News Datacom Ltd. v. Love*, 2002 MBQB 88 (CanLII), [2002] M.J. No. 153 (QL).

The value of a well-considered and well-executed cross-examination on an affidavit is demonstrated in *La Caisse Populaire de Le Salle Credit Union Ltd. v. River Ridge Properties Ltd.* 1997 CanLII 22905 (MB CA).

Rule 34 deals with compelling the attendance of a witness at a cross-examination on an affidavit, conduct of the cross-examination, and use of the transcript. This rule impacts both examinations for discovery and cross-examinations on affidavits.

> The rules provide that in the case of a cross-examination on an affidavit, the court reporter shall prepare and complete a transcript of the proceedings within a reasonable time after completion of the examination. Thus, if a cross-examination on an affidavit takes place, a transcript must be prepared. Rule 34.16(3) specifically provides that the reporter must prepare copies of the transcript of the cross-examination for service on all adverse parties and for filing in court.

The examining party must pay the court reporter. Rule 39.02(4) sets out the examining party's duties:

- to order copies of the transcript for the court and the party being examined;
- to file a copy of the transcript with the court;
- to provide a copy of the transcript to the party being examined free of charge; and
- other than on a motion for summary judgment or a contempt order, pay the party and party costs of the party being examined in respect of the cross-examination, regardless of the outcome of the proceeding, unless the court orders otherwise.

The rules are designed to encourage the careful use of the right to cross-examine on an affidavit and to discourage essentially unnecessary or unhelpful cross-examinations and the additional cost and delay they may cause.

> The affidavit and the cross-examination should be considered as one piece of evidence and the court must have the opportunity to peruse both the affidavit and the transcript of the cross-examination on that affidavit.

The attendance of a deponent for cross-examination on an affidavit is compelled by service of a notice of examination in Form 34A. It is a general form, which may be used for cross-examination on an affidavit as well as examination for discovery.

Although in practice cross-examinations on affidavits are generally scheduled through counsel by consent of the parties and the witnesses, it is nevertheless advisable to serve a notice of examination in all cases. By doing so, it will be possible to ask the court, on motion, for an order compelling attendance if, notwithstanding the agreed schedule, the deponent does not attend for cross-examination. This is particularly so where the deponent is not a party but rather is a witness on whose evidence a party relies. Also, with the increasing

number of self-represented litigants, there is often less willingness or ability to schedule cross-examinations by consent and the practice of properly serving the notice of examination has increasing importance.

Rule 34.04(2) provides that the notice of examination shall be served on the lawyer for the party who filed the affidavit or on the party if they are self-represented.

Attendance money is required under Rule 34.04(5)(a) where the person to be examined does not reside within the judicial centre. Otherwise, attendance money is not required.

Persons to be cross-examined and all parties to the proceeding are entitled to ten days' notice of the cross-examination under Rules 34.05 and 34.06, unless they agree or the court orders otherwise.

Rule 34.07(1) makes provision for an order for the cross-examination of persons who reside outside of Manitoba.

The notice of examination must address the issue of documents. Rule 34.10(2)(b) specifies that the person being examined must bring to the examination and produce for inspection all documents and things in the person's possession, control and power that are not privileged and that are specified in the notice of examination.

In many cases, it will be prudent to ask for all documents and things in the notice of examination, although as a general rule it is desirable to avoid overly broad requests to produce documents.

Rule 34.10(3.1) requires a person being cross-examined on an affidavit to provide the examining party with copies of all the specified documents at least 10 days before the date of the cross-examination or as soon as reasonably possible if the cross-examination has been scheduled less than 10 days before it is to take place. The examining party is required to pay reasonable costs for producing copies of the documents unless the court orders otherwise (Rule 34.10(3.2)).

According to common law practice, persons being cross-examined on affidavits were not required to give undertakings, unlike the practice of giving undertakings at an examination for discovery. However, Rule 39.03.1 provides that the court may order a party being cross-examined, or a non-party, to provide information or documents requested by undertaking, where:

- the undertaking relates to an important issue in the application or motion;
- it would not be overly onerous or expensive to obtain the information or documents; and
- the provision of the information or documents would significantly assist the court in determining the application or motion.

All three factors must be present for the court to make a production order under this rule.

6. Other Evidence

The rules contemplate that, in addition to evidence by way of affidavit and transcripts of cross-examination on affidavit, evidence can be placed before the court in four manners.

Although in practice, the evidence is normally provided by way of affidavit, under Rule 39.03(4) the court may allow evidence to be given *viva voce* (i.e., live) at the hearing in an appropriate case.

Rule 39.03(1) also permits the examination of a person as a witness before the hearing of a pending application or motion and the use of the transcript of that person's evidence at the hearing. Note that experts may not be examined as witnesses before hearings of pending motions or applications. Rule 39.03(1) reads as follows:

> *...a person, other than an expert, may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of the person's evidence available for use at the hearing.*

Rule 39.04 permits the use of the transcript of an examination for discovery at the hearing of a motion (not an application). The usefulness of this form of evidence on a contested motion is doubtful and should be considered carefully before a decision is made not to file affidavit evidence. See *Pearson v. Plester*, 1995 CanLII 16278 (MB CA), and *Hanson v. Keystone Ford Sales Ltd.*, 1997 CanLII 22949 (MB KB), appeal dismissed 1997 CanLII 2323 (MB CA). Rule 31.11 provides guidance as to how discovery may be used as evidence.

Finally, admissions made under a request to admit under Rule 51 may be used on motions.

Although the rules make specific reference to these forms of evidence, counsel should keep in mind that evidence can also be provided by agreement in the form of an agreed statement of facts. This is often used in trials of actions and sees some use in applications where the facts giving rise to the dispute are not contentious. For example, where the dispute arises out of the proper interpretation to be given to a contract or other document or by-law, an agreed statement of facts may be used to place the document before the court and to describe the context in which the dispute arose. Technically, any such agreed statement of facts ought to be placed before the court and in evidence by an affidavit.

E. UNCONTESTED APPLICATIONS AND MOTIONS

1. General

Occasionally an application and more frequently a motion will be dealt with on a consent or an uncontested basis. For this section, the term "uncontested" will refer to the situation where the parties consent to the relief sought by the application or motion, or to some other agreed relief. It will also refer to circumstances where the opposing party or parties take no position on the motion, or where there is no opposing party. The rules attempt to ensure that uncontested applications and motions can be dealt with swiftly.

> Even if an application or motion is understood to be uncontested from the outset, or, having been contested, it becomes uncontested, that does not usually remove the need for evidence in support of the requested relief. The court will not normally grant relief, particularly final relief sought by application, without satisfying itself that the relief sought is within its jurisdiction to grant and that it is an appropriate case to grant the relief.

The nature of evidence required in an uncontested matter varies. For example, in a procedural motion where the relief to which the parties consent relates to an agreed deadline for the delivery of responses to undertakings given on an examination for discovery, very little, if any, evidence over and above the consent of the opposite party will be required. On the other hand, on a motion for approval of an infant settlement, substantial evidence will be required even though all interested parties consent.

Accordingly, even on matters that are to be dealt with on an uncontested basis from the outset, counsel should be careful to ensure that, where necessary, the evidence is presented to the court to support the request for relief.

2. Scheduling a Hearing Date

Where an application is uncontested, Rule 38.04(2) requires that the notice of application include as the hearing date, any date on which a judge sits to hear applications. In the Winnipeg Judicial Centre, a judge is assigned to hear applications and motions which are uncontested or urgent every weekday except holidays and the summer and winter recesses. This is known as the uncontested judges' motions list. During the summer and winter recesses, a judge is normally assigned one or two days a week to deal with uncontested or urgent applications or motions.

A motion to be heard before a judge, or an associate judge, is scheduled in the same manner as an application (Rule 37.05(2)), usually by scheduling it on the uncontested judges' or associate judges' motions list.

In the Winnipeg Judicial Centre, an uncontested motions list is heard by the associate judge every weekday morning commencing at 9:30 a.m. subject to the availability of an associate judge, including during the summer and winter recesses. At present, appearances on the associate judges' uncontested list in Winnipeg are occurring by teleconference (calling 1-855-342-6455; ID #: 5589296), although you should continue to follow the court's practice directions as this may change in the future.

Where an application or motion is initially contested and subsequently becomes uncontested, it can be scheduled for an uncontested hearing in the same way as if it had initially been uncontested, by requisition.

3. The Appearance

Good organization can make the difference between an uncontested application or motion being granted, delayed or dismissed.

In advance of the hearing date, counsel should ensure that all material that was intended to be filed has been filed. This includes the notice of application or notice of motion itself, the affidavit evidence, an application or motions brief if required, affidavits of service if necessary, and any consents.

At the hearing itself, counsel for the applicant or moving party should normally introduce the matter to the court by offering the following introductory information:

- counsel's name, title and pronouns;
- the matter, as it appears on the court list;
- the party's name for whom counsel appears, and their title and pronouns;
- the name or names of all other counsel appearing, together with the identification of the party for whom they respectively appear and their names, titles and pronouns;
- the names and interests of any other persons appearing on the motion (i.e., an unrepresented party) and their titles and pronouns; and
- identification of the motion and the nature of the relief sought.

See the June 17, 2021 *Practice Direction* on Forms of Address.

In an uncontested matter, if the material is proper in form and content and has been filed and served in accordance with the rules, it is not normally necessary to make a detailed submission to the associate judge or judge. On the contrary, counsel should provide the court with a brief statement of the most fundamental facts, and offer the reasons why the court should make an order. On an uncontested matter, those reasons would typically include that the other party or parties consent to the making of the order, or at least are not opposed.

Submissions should include the position or agreement of the parties on the issue of costs.

Just as some matters that are initially contested become uncontested, it happens that some uncontested matters become contested. This can occur in applications and motions. Where an application or a motion that is required to be heard by a judge is initially thought to be uncontested but becomes contested after it is set down for hearing on the uncontested list, it will normally be ordered dealt with on a contested basis rather than on the uncontested list, unless it is urgent or otherwise "appropriate" according to Rules 37.08(2) and 38.07(2).

F. CONTESTED APPLICATIONS AND MOTIONS

1. General

Contested applications are governed by Rule 38.07 and contested motions before a judge or associate judge by Rule 37.08.

2. Scheduling a Hearing Date

Where an application or a motion which is to be heard by a judge is known from the outset to be contested, or where it becomes contested, the application or motion should first be placed on the uncontested list from where it should be adjourned to the contested list maintained by the court registry. From there a date for a contested hearing should be obtained from the judges' civil motions co-ordinator. Generally, a motion brief by the moving party must first be filed before a contested motion date will be provided by the co-ordinator (see Rule 37/08(3)).

A similar process exists for motions to an associate judge.

Where a motion properly within the jurisdiction of an associate judge is to be contested, it should first be placed on the associate judges' uncontested list and then adjourned to the contested list. Following the filing of the moving party's brief a contested hearing date can be obtained from the associate judges' motions co-ordinator.

Whether the hearing is to be before a judge or associate judge, counsel will be asked to estimate the time required for the hearing. It is important to provide a realistic estimate.

3. Applications and Motions Briefs

Rules 38.07(3) and 38.07(4) and 37.08(3) and 37.08(4) require that briefs be filed whenever an application or motion is to be contested. In the case of applications, Rule 38.07 requires the applicant to file a brief consisting of:

- a list of any documents to be relied upon;
- a list of cases and statutory provisions; and
- a list of the points to be argued.

Rule 37.08(3) imposes identical requirements for the moving party in the case of a motion.

Requirements for the filing and content of a respondent's brief are set out in Rule 38.07(4) in the case of an application and Rule 37.08(4) in the case of a motion.

Rules 37.08 (4.1) and 38.07(4.1), in effect since September 1, 2022, provide that if a party relies on a statutory provision that is required by law to be printed and published in English and French, their brief must contain a bilingual version of that provision.

Rule 37.08(3) provides that the moving party's brief is to be filed at the time of obtaining the hearing date.

Rule 37.08.1(1) introduces a new concept called a Scheduling Agreement and provides that within seven days after service of the moving party's brief, the parties may file a written agreement establishing timelines for completion of certain preliminary steps in a motion, being:

- filing and service of affidavits by the parties, including any additional affidavits in response to affidavits filed by the responding party;
- scheduling and completion of all cross-examinations on affidavits;
- filing and service of any additional brief by the moving party; and
- filing and service of the responding party's brief.

No agreement may permit the filing of materials less than seven days before the hearing of the motion (Rule 37.08.1(2)). If the parties cannot reach a scheduling agreement, the moving party must bring a motion to establish a schedule for completion of the preliminary steps (Rule 37.08.1(3)).

Rule 37.08.1(6) provides sanctions that the court may impose on a party who fails to comply with the agreed or court-ordered schedule. Sanctions include striking out the motion, adjourning the motion, costs, or requiring the motion to proceed without the offending party being allowed to file or rely on an affidavit, transcript or brief that was not filed or served in accordance with the schedule.

If a motion does not involve complex factual or legal issues, the associate judge may waive the requirement for briefs to be filed in keeping with the principle of proportionality.

In any contested application or motion, it is desirable, although not required by the rules, to provide copies of cases and statutory provisions relied upon in the brief (if a brief is required), so that reference can be made to them in the section dealing with points to be argued. This also assists the judge or associate judge in preparation for the hearing and will reduce the likelihood that the decision will have to be reserved.

4. The Appearance

Good organization and preparation can make the difference between success and failure in contested applications and motions.

While preparation for the hearing will have begun at the time that the motion or application and supporting materials were first prepared or received, specific preparation for the hearing should begin well in advance of the scheduled hearing date. Early preparation will facilitate the timely identification of any deficiencies in the evidence, or any required legal research.

Well in advance of the hearing date counsel should ensure that all material intended to be filed has been filed.

Preparation of argument involves matters of both substance and style.

> In general terms, the substance of the argument will consist of references to the evidence, with emphasis on important facts that are helpful to the position being advanced and reasons for preferring those facts over contrary facts asserted by another party or parties. Submissions on the law should be based upon thorough research and should contemplate the ethical issue of counsel's obligations to draw to the court's attention all relevant and applicable statutes and judicial authorities.

The style in which the argument is presented is largely a matter of personal preference. Commenting on the practice of one counsel (not in the Manitoba jurisdiction) to shed tears during his speech to the jury, a court concluded that on the issue of style, it is largely a matter for the advocate to choose what weapons to use, from "logic" down to "noise and gesticulation" (D. Pannick, *Advocates* (Oxford, New York: Oxford University Press, 1992) at 26.

Style does matter, as a well-organized, clear, thoughtful, and articulate presentation will greatly facilitate the court's task in identifying facts and applying the law to those facts, and so will enhance the chances of success.

Generally speaking, counsel for the applicant, in an application, or for the moving party in a motion, will address the court first. Counsel should provide the same introductory information as in the case of uncontested proceedings.

Following submissions by the applicant's or moving party's counsel, the respondent's counsel presents argument. Following the respondent's argument, the applicant is normally allowed the right to reply. Reply is to be confined to new matters raised by the respondent in argument.

Following argument, the court may give its decision immediately, with or without reasons, or may reserve its decision. Occasionally, the court will give its decision orally and indicate that written reasons will follow.

When a decision is reserved, the period of reserve may be anything from several hours to several months.

> It is important to take and maintain written notes at the hearing of all applications and motions.

The notes taken should include the following components:

- sufficient introductory information to identify that the notes relate to a particular client and file or matter;
- information identifying the nature of the hearing;
- the date and time of the hearing;
- the location of the hearing, including courtroom number;
- the name of the court clerk or monitor;
- the name of the associate judge or judge;
- the appearances;
- the substance of arguments advanced by other counsel or parties in argument and reply; and
- the details of the court's decision.

Taking detailed notes is very important as:

- in the case of the majority of motions heard by associate judges held in their chambers, there is typically no record other than notes take by counsel and the associate judge. Although arguments before judges were historically not typically monitored, they are now routinely monitored, and a record is available. A motion heard by an associate judge in a courtroom may be monitored in which case a record is available, but counsel should confirm at the commencement of the hearing whether the proceedings are being monitored or not;
- your notes will facilitate reporting to your client;
- your notes will be necessary to prepare the form of order or judgment (see the section on orders below); and
- your notes may be helpful for appeal purposes.

A *Practice Direction* Self-Represented Litigants on Civil Applications and Motions was issued on September 15, 2017 by the Chief Justice. The Practice Direction states:

> *To reflect the obligation of a judge to ensure that a self-represented litigant has the opportunity to meaningfully participate in the hearing and has a reasonable opportunity to present his or her case to the best of his or her ability, where a motion or application involving a self-represented litigant is to be contested before a judge, prior to the hearing of the contested motion or application, the parties must appear at a case management conference with a judge for the purpose of the judge ensuring that the contested matter is ready to proceed, to explain the process and to otherwise advise the self-represented litigant what may be expected. Generally, such a conference will be scheduled before a judge for a one hour period at 9:00 a.m.*

In practice, these conferences are often being conducted by the judge presiding at the judges' uncontested motions list. This procedure applies wherever a motion or application involves a self-represented litigant and it is to be contested before a judge. It applies specifically to civil applications and motions but extends to bankruptcy applications and motions as well, and includes appeals of motions heard at first instance by an associate judge or registrar in bankruptcy.

5. Trial of an Issue

Occasionally an application or motion involves contested facts that the court cannot reliably assess based upon affidavit evidence alone. This is especially so where the assessment of the contested facts depends in whole or in part on an assessment of credibility. The use of affidavit evidence, even tested by cross-examination, does not facilitate the assessment of a witness's credibility, which is best undertaken when direct and cross-examination evidence is elicited *viva voce* and the associate judge or judge is allowed the opportunity to observe and listen directly to the witness.

In such cases, the court may direct the trial of an issue or issues. Rule 38.09(b) and Rule 37.10(a) make provision for orders for the trial of an issue in the case of applications and motions respectively.

G. PROCEEDINGS WITHOUT NOTICE OR WITH SHORT NOTICE

1. General

Normally the rules require that notice of an application or motion must be given to affected parties. Notice is given by service of the notice of application or notice of motion as the case may be, together with all supporting materials.

In the case of an application, there is no rule specifically dealing with proceeding without notice. By their nature, applications, like statements of claim, are originating processes seeking final or permanent relief. These claims or applications will generally not be granted without notice.

The rules contain exceptions where the giving of notice of a motion could lead to serious harm and perhaps undermine the very purpose for which the motion is being sought. The harm could result from either the giving of notice or the delay that would result from giving notice.

Rule 37.06(3) contemplates motions for interim orders without notice where "...the delay necessary to effect service might entail serious consequences...". It is a fundamental concept of the rules of natural justice and the common law, incorporated into the rules and procedures of the court, that any person who may be affected by a proceeding be given notice of that proceeding and the opportunity to be heard. Accordingly, the court has a strong preference that notice be given. Only where there is an urgent case supported by clear and strong evidence will the court dispense with notice.

> Where an application or motion is brought without notice, the application or notice of motion, as the case may be, should specify that it is brought without notice, and the relief sought should include a request that it be heard and determined without notice. The evidence tendered in support of the motion without notice should address not only the substantive relief sought but also the request that the hearing is held without notice. It is not sufficient for counsel to state that the matter is urgent: there must be clear and convincing evidence of the urgency and the consequences of giving notice.

The evidence presented to the court on a motion without notice is subject to a very high standard of disclosure of material facts. The evidence submitted in support of an application or motion made without notice must make full and fair disclosure of all material facts. Failure to do so is in itself sufficient ground to set aside any resulting order. See *Griffin Steel Foundries Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers*, 1977 CanLII

1634 (MB CA); and *Pulse Microsystems Ltd. v. Safesoft Systems Inc.*, 1996 CanLII 18062 (MB CA) (Rule 39.01(6)).

The failure to make full and fair disclosure on a motion made without notice can even attract an order for payment of solicitor and client costs: *221 Corp. Ltd. v. C&N Enterprises Co. Ltd.*, 1999 CanLII 18800 (MB CA).

See also the *Code of Professional Conduct* Chapter 5.1-1 and Chapter 5.1-2 and specifically commentary 6 to *Code of Professional Conduct* Chapter 5.1-1 and Chapter 5.1-2(e).

Sometimes the urgency of a situation may be such that proceeding without notice is not justified, but is sufficiently severe to justify proceeding with less notice than the rules would normally allow. Asking the court to hear a matter when less than the amount of notice required by the rules has been given to another party or affected person is referred to as proceeding on "short leave." The court's power to shorten the time required for the service of an application or motion is reflected in Rule 3.02(1).

As is the case when a proceeding is undertaken without notice, a request that a matter is dealt with on short leave should be included in the relief sought in the application or motion itself, and evidence justifying that request for relief should be included in the affidavit material that is filed in support.

2. Without Notice Motions List

In Winnipeg Judicial Centre, motions without notice to be heard by the associate judge will be placed on the associate judges' uncontested list (see Scheduling a Hearing Date, above). Common without notice motions include requests for:

- appointing a litigation guardian;
- a pending litigation order;
- substitutional service;
- dispensing with service;
- validating service;
- pre-judgment garnishment;
- extending the time for service of a statement of claim (where a limitation period has not expired);
- a pre-judgment attaching order; and
- interim recovery of personal property.

Material for motions made without notice must be filed by at least 2:00 p.m. the day prior to the day of the hearing. As long as the material is filed as required and the notice of motion clearly indicates that the motion is returnable on the associate judges' uncontested list at 9:30 a.m. on a particular date, the registry officer will place it on that list, space permitting.

H. COSTS

1. General

The award of costs of an application or motion is within the discretion of the court. That discretion is exercised according to several judicially articulated principles.

> The first principle is that success will normally entitle a party to an award of costs. Various factors, however, may persuade the court not to award costs to the successful party and even, sometimes, to award costs against the successful party.

Counsel must ask for costs in the notice of application or notice of motion or they may be precluded from ultimately obtaining an order of costs. Also, at the conclusion of the hearing counsel must specifically address the court on the issue of costs. A failure to do so may result in the court refusing to make an order of costs.

The amount of costs awarded for or against the party or parties can vary. In general, the amount may be determined as follows:

- costs, including or excluding disbursements, in a fixed amount;
- costs on a party and party or tariff basis, being Tariff A and Tariff B included in the rules;
- solicitor/client or solicitor and own client costs, which refers to the actual legal costs incurred by the recipient party (see, for example, *Pulse Microsystems Ltd.*, above).

Rule 57 identifies some of the considerations that the court will take into account in determining the issue of costs. The court considered the issue of costs in *MacDonald Estate, Re*, 1993 CanLII 14980 (MB KB) varied on appeal *1994 CanLII 16721 (MB CA)*.

Aside from the question of the amount of the costs, the disposition of the issue of costs on a motion can take one of several forms including:

- costs may be awarded "in the cause" which means that costs of the particular motion will go to the party who ultimately obtains an award of costs in the main action or application;
- costs may be awarded to a specific party in the cause, meaning that if that particular party is successful in the main action or application, they will receive costs of the particular motion;

- costs may be awarded to a specific party "in any event of the cause" which means that the specific party is entitled to costs of the motion paid by the other party regardless of success or failure on the main action or application;
- costs may be ordered "payable forthwith" which means that the costs ordered must be paid immediately. Where the order does not specify that the costs are "payable forthwith" the costs only become payable at the conclusion of the main action or application;
- the issue of costs may be referred to the trial or application judge, which simply leaves the discretion of the costs on the motion to the judge making the final adjudication;
- there may be no award of costs.

Rule 57.07 governs the award of costs against a lawyer personally.

I. JUDGMENTS AND ORDERS

1. General

A judgment refers both to the final determination by the court of an application and the written document reflecting that final determination (Form 59B).

An order refers both to the determination by the court of a motion and the formal document reflecting that determination (Form 59A).

Although forms 59A and 59B are supplied as generic forms of orders and judgments, specific rules sometimes provide for a particular form of order (i.e., under Rule 42 for a pending litigation order, Rule 43 for an interpleader order, Rule 46 for an order for garnishment before judgment or an attaching order, Rule 70 for an order in a family proceeding and Rule 74 for an order in a surrogate proceeding, among others).

Rule 59 deals with how written forms of orders are prepared, and for the rules in general, the word "order" is defined to include judgment.

It is not necessary to prepare a written form of order in every case. Except where otherwise provided, an order is effective from the date and time it is pronounced by the associate judge or judge. Accordingly, an order of the court is effective even though a formal written order has not been prepared and signed. In some situations where there is no concern regarding enforcement or appeal of an order, it may not be necessary to prepare a formal written order. By contrast, it is often necessary to have a written order for enforcement or appeal reasons. In matters where the assistance of police or the sheriff is required, a written order is a practical necessity.

Although Rule 59.03(1) provides that any party affected by an order may prepare a draft of the formal order, in practice counsel for the successful party will agree to prepare and circulate a draft.

Counsel will normally prepare a draft form of order or judgment by referring to counsel's own notes from the hearing, and to the form prescribed by Rule 59.

Rule 59.02 requires that a disposition sheet be prepared immediately and signed by the judge or officer making the order. Where written reasons are delivered, they are to be filed in court and referenced on the disposition sheet. Notwithstanding this rule, the disposition sheets are not always a satisfactory or accurate record of the order that was in fact pronounced.

Make detailed notes of the order or judgment pronounced by the associate judge or judge at the time of pronouncement. Seek clarification of any aspect of the order or judgment at that time. By doing so, you may save the time and cost that would result from a later appointment to settle the terms of the order or judgment, and you guard against the effect of an inaccurate or incomplete disposition sheet.

A draft order prepared by counsel must be submitted for approval as to form to other counsel or self-represented parties who appeared in court, except where the motion or application was dismissed, or unless the judge or associate judge specifically waives the requirement to obtain such approval.

Where a self-represented party is present it is a good idea to raise this issue at the conclusion of the hearing for consideration by the judge or associate judge because self-represented parties often fail to endorse orders as required. Such a failure will require arranging an additional, and usually otherwise unnecessary, appointment to settle the terms of the order.

Orders are generally signed by the registrar according to Rule 59.04 unless the judge or associate judge who made the order directed that they sign it themselves.

If the registrar is not satisfied that the order is in proper form, they will not sign it and may return it to the parties or refer it to the judge or the associate judge who made the order.

If counsel who drafted the formal order cannot obtain the approval of opposing counsel or parties within a reasonable time, whether because of disagreement over the wording of the order or otherwise, counsel may obtain an appointment with the court to have the terms of the order settled, under Rule 59.04(6). Notice to the other parties is required.

Counsel drafting an order, or reviewing a draft order to give their approval as to form, should give careful consideration to the contents of the draft order. Counsel should ensure that the draft:

- is detailed and clear;
- recites all of the relief ordered by the court including conditions, if any;
- clearly identifies the obligations and rights of the parties;
- recites the disposition of the court on the issue of costs.

You should note that if an order simply dismisses a motion with or without costs, Rule 59.03(2) provides that approval of the form of order by the other parties is not required.

Pursuant to the *Practice Direction* Counsel's Approval of Form of Order dated June 21, 2024 where a party is represented by counsel, unless directed otherwise by the court, counsel's approval of the form of the draft order may be indicated by any of the following:

- Original copy, or digital signature of counsel indicating their consent to the form of order; or
- A written representation by counsel who prepared the draft of the formal order certifying that all counsel consent to the form of order.

2. Reopening Before Signature and Filing

Even after argument has been completed, the court has the discretion to reopen the hearing of an application or motion for further evidence and argument. In practice, the court is extremely reluctant to do so.

3. Correction of Errors

> Rule 59.06(1) facilitates the correction of errors arising from accidental slips or omissions by permitting the court to amend an order or judgment in that regard. Amendment of an order or judgment under that rule should be sought by way of motion.

This rule does not allow a challenge to an order on the merits. That must be undertaken by appeal.

Except as allowed by Rule 59.06(1) concerning accidental slips or omissions, the court has limited power to vary or set aside its order or judgment after it is made. Rule 59.06(2)(a) provides that a party may seek to have an order set aside or varied on the ground of fraud or of facts arising or discovered after the order was made. A party may also seek to have an order suspended or carried into operation by Rule 59.06(2)(b) and (c) respectively.

J. URGENT MATTERS AND EMERGENCIES

As reviewed above, the court will accommodate, and the rules contemplate, proceedings without notice or with short notice in some cases.

In urgent matters, the arrangements that should be requested depend in part on the degree of urgency. In most cases, some notice should be given to affected parties.

Rule 38.05(3) requires service of a notice of application at least 14 days before the date on which the application is to be heard unless the court abridges the time for service. On an urgent matter, counsel would need to persuade the court, based on evidence, that the time should be abridged.

In other than emergency situations, urgent matters are often scheduled for a date on the uncontested list before the assigned motions court judge who is then asked to determine whether the case is urgent enough to warrant the assignment of an early contested date. This can also be done for motions heard by associate judges, by placing the motion on the associate judges' uncontested list.

Hearings in the context of emergency situations involving danger to persons or property will be accommodated by the court. Where an emergency situation arises during regular hours, counsel should assess the situation, including the relief to be sought and the evidence available to support that relief, and determine the length of time that will be required to prepare the required documentation, which would normally include an originating document, a notice of motion, and supporting affidavit evidence. Counsel should immediately contact the designated court staff at the registrar's office to give notice of and to facilitate the intended emergency hearing. It may be necessary to deal directly with the judge's staff or the judge.

> The Court of King's Bench has established a system for dealing with emergencies that arise outside of normal court hours. The system includes a designated court officer who may be reached by telephone at a number established specifically for that purpose. It is that officer's job to receive information concerning the emergency situation and to make contact with a judge to deal with it. The telephone number for calls after 4:30 p.m. in Winnipeg is 204-981-9030. It is only available to counsel and law enforcement officers.

In extreme cases, the court will sit outside of regular hours and outside of the courthouse to deal with emergency matters. The court will also dispense with the requirement of written material, including affidavit evidence. In that event, the written material will have to be filed as soon as possible afterwards.

If a written order is expected or required in an emergency situation, counsel should have a draft in hand and should be prepared to change the draft to accommodate the court's specific order.

That a situation is an emergency does not necessarily mean that proceeding without notice will be justified. Accordingly, counsel must assess as to whether notice is required, or whether there are facts to justify asking the court to proceed without notice.

Although the court will be very accommodating in urgent matters and true emergencies, it is important not to abuse the system. Counsel should not seek urgent or emergency hearings where they are not strictly required to protect or preserve a party's position or safety.

K. APPEALS

1. General

As applications are originating processes giving rise to judgments for final relief, appeals from a judgment on an application may be made only to the Court of Appeal and under the provisions of *The Court of Appeal Act* and Rules.

Appeals from motions that are decided by a judge may also only be made to the Court of Appeal under *The Court of Appeal Act* and Rules. Note that the time limit applicable for filing an appeal from an order of a lower court judge to the Court of Appeal is different from that applicable for filing an appeal from an order of an associate judge to a judge of the King's Bench.

Appeals from an order, decision, or certificate of an associate judge, registrar or assessment officer may be made by way of notice of appeal to a judge under Rule 62.

2. Appeals to a Judge

> Rule 62.01(1) provides that any person affected by an order of an associate judge may appeal to a judge. The appeal is as of right.

While called an appeal, the hearing before a judge is a fresh hearing in that the parties are not limited to the arguments made before the associate judge. Also, the judge hearing the appeal can substitute their own discretion for the discretion exercised by the associate judge. However, under Rule 62.01(13*)* leave of the judge is required to adduce further evidence in an appeal of an associate judge's decision. This restriction does not apply to an appeal from an order, decision or certificate of a registrar or assessment officer.

3. Procedure

An appeal of an associate judge's decision is commenced by filing and serving a notice of appeal in Form 62A on all parties whose interests may be affected by the appeal.

The notice of appeal must be filed within 14 days after the signing of the order or the certificate appealed. This appeal period is different from the period that applies to appeals of orders of judges of the Court of King's Bench.

Rule 62.01(7) requires that the appellant file and serve an appeal brief within 60 days of filing the notice of appeal. The appellant may not obtain a date for the contested hearing of the appeal until the appeal brief is filed and served (Rule 62.01(9)). Within 30 days of filing and serving the appeal brief, the appellant must obtain a contested hearing date from the

registrar and file a notice of hearing date in Form 62B (Rule 62.01(9)). Within a further 7 days, the appellant must serve the notice of hearing date (Rule 62.01(10)).

An appeal brief is not the same as a motions or applications brief. According to Rule 62.01(8), it must consist of the following:

- a copy of the notice of appeal;
- a copy of the order, decision or certificate appealed from, as signed, together with the reasons, if any;
- the evidence and all other material that was before the associate judge as is necessary for the hearing of the appeal;
- any further evidence adduced under subrule 62.01(13);
- a list of any cases and statutory provisions to be relied upon; and
- a list of the points to be argued.

Rule 62.01(11) requires the respondent to file an appeal brief as well, at least 14 days before the hearing. The contents of the respondent's brief are outlined in Rule 62.01(12*)*.

As in the case of contested applications and motions, copies of the case and statutory authorities should be supplied.

Rule 62.02 allows for an appeal to be voluntarily abandoned by way of a notice of abandonment of appeal (Form 62C). An appeal is deemed to be abandoned where the appeal brief is not filed and served within the time prescribed by the rule or the contested hearing date is not obtained and the notice of hearing date is not filed within the time prescribed by the rule. Costs will apply (Rule 62.02(4)).

L. RULE 20 – SUMMARY JUDGMENT

1. General

Rule 20 makes provision for the summary disposition of actions by motion to the court. The process allowed by the rules represents a consolidation of earlier practice in Manitoba with the practice of other provinces that have undertaken rules revision. Motions for summary judgment are common, and a substantial body of case law concerning summary judgment motions has developed.

2. Procedure

> A motion for summary judgment is brought in the usual form of notice of motion (Form 37A). All summary judgment motions must be heard by a judge.

Any party, whether plaintiff, defendant or other party, may move for summary judgment, and the right to bring a motion for summary judgment is not limited to any specific class of case.

Rule 20.01(2) provides that a motion for summary judgment can only be scheduled after a pre-trial conference has been held. There is a limited exception under Rule 50.04(2). Rule 50.04(2) addresses the screening function of the judge under the pre-trial management rules. The judge may determine before proceeding with the first pre-trial conference that it is premature to proceed with the conference at that time. However, the judge might determine that it would be appropriate to proceed with a summary judgment motion and direct that motion to be heard before the first pre-trial conference proceeds.

Rule 20.03(1) provides that the judge must grant summary judgment if the judge is satisfied that there is no genuine issue requiring a trial for a claim or defence.

Rule 20.03(2) provides that the judge must consider the evidence submitted by the parties and has the power to weigh the evidence, evaluate the credibility of a deponent and/or draw any reasonable inference from the evidence unless it is in the interests of justice that these powers only be exercised at trial.

If the judge is satisfied that the only genuine issue is the amount to which a party is entitled, the judge may order a trial of that issue or grant judgment with a reference to determine the amount. References are generally directed to the associate judges for hearing and the reference Rules 54 and 55 apply (Rule 20.03(3)).

If the judge is satisfied that the only issue is a question of law, they may determine the question and grant judgment accordingly (Rule 20.03(4)).

Rule 50.04 now governs the conduct of a summary judgment motion. Under Rule 50.04(5.1) the pre-trial judge has an obligation at the first pre-trial conference to determine whether any party intends to bring a summary judgment motion.

The judge must allow a proposed motion for summary judgment to proceed if the judge is satisfied that such a motion can achieve a fair and just adjudication of the issues in the action by providing a process that:

- allows the judge to make the necessary findings of fact;
- allows the judge to apply the law to the facts; and
- is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial (Rule 50.04(5.2)).

The judge may make any order or give any direction respecting the conduct of the motion including an order or direction respecting the evidence and timelines. The judge may also order that oral evidence be presented (Rule 50.04(5.3) and Rule 50.04(5.4)).

Given the significant differences in the summary judgment rules as compared to the former rule, many of the reported decisions will be less useful than previously and some time will be required to develop a solid base of judicial comment on the new provisions.

M. RULE 20A – EXPEDITED ACTIONS

1. Introduction

Rule 20A applies to all actions where the relief claimed is a liquidated or unliquidated amount not exceeding $100,000, exclusive of interest and costs, even if the plaintiff claims related relief in the action. The rule also applies to an action where a counterclaim, third party claim or, cross-claim, exceeding $100,000 is filed, unless the court orders otherwise. The rule does not apply to a family proceeding or a class proceeding.

The court may on motion, order that an action is not subject to Rule 20A, or may order that a claim be designated as a claim for less than $50,000, or as a claim for more than $50,000 Subrules 20A (17) and (18) set out discovery limits in such cases.

2. How Rule 20A Works

An action to which Rule 20A applies is commenced by way of a statement of claim which has the following heading:

The King's Bench

_____Centre

(Expedited Action – Rule 20A)

Rule 20A(6) provides that every document in an action to which the Rule applies must have this heading.

The pre-trial management scheme (Rule 50, addressed in Chapter 4) applies to all actions including Rule 20A actions. Under Rule 20A, until an action is in pre-trial management, all motions that can be heard by an associate judge according to Rule 37.02(2) shall be heard by an associate judge.

There are several special disclosure and discovery provisions specific to Rule 20A actions. Subrules 20A (7) to (15) address documentary disclosure and production.

Subrules 20A (16) to (19) address discovery and interrogatories and several limitations are placed on the availability and conduct of both discovery and interrogatories.

In actions where the relief claimed is less than $50,000, no discovery and no interrogatories are allowed without leave of the court. Leave for discovery is only to be given if the party seeking discovery can show exceptional circumstances that make discovery just, less expensive and more expeditious.

If allowed, an examination for discovery of a party is not to take more than 3 hours (subject to extension by the court).

In Rule 20A actions where the relief claimed exceeds $50,000, each party is limited to an examination for discovery not exceeding 3 hours (subject to extension by the court in certain circumstances), and no interrogatories may be delivered without leave.

Subrule 20A (19) places limits on undertakings. Subrules 20A (20) to (29) provide for the disclosure of witnesses, including expert witnesses, as well as the disclosure of persons not being called as witnesses who are reasonably believed to have relevant knowledge of matters at issue, together with a summary of material evidence of a party and the party's witnesses, all within 60 days after the close of pleadings or within 60 days after the completion of permitted discovery.

There are sanctions for failure to comply with the rules governing expedited actions. These include the restrictions on calling witnesses not identified according to subrule 20A (20) (see subrule 20A (24)) and more significantly, the requirement in subrule 20A (30) for the court to order costs against a party or to strike out a claim or defence of a party, where the party fails to comply with a time limit imposed by the rule or fails to comply with an order or direction made under the rule, without reasonable excuse.

N. CONCLUSION

Applications and motions are the daily stuff of a barrister's practice. The procedure for applications and motions is almost completely structured by the current rules which evolved from earlier rules and practice and are designed to facilitate, not hinder, the resolution of issues and disputes. As a result, counsel should be knowledgeable about the rules generally and should review specific rules as necessary before undertaking the prosecution or defence of an application or motion.

O. PRECEDENTS

1. Notice of Application

File No. CI 23-01-52292

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

applicant,

- and -

THE DISABILITY INSURANCE COMPANY OF CANADA,

respondent.

APPLICATION UNDER: *The King's Bench Rules*, Rule 14.05(2)(c)(iv)

NOTICE OF APPLICATION (CONTESTED)
HEARING DATE:
Thursday, October 20, 2___ , at 10:00 A.M.

DOWNING & ASSOCIATES
Barristers & Solicitors
500 Edmonton Street
Winnipeg, Manitoba
R3C 3R8

Telephone No. (204) 666-4949

DOREEN DOWNING

File No. CI 23-01-52292

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

applicant,

- and -

THE DISABILITY INSURANCE COMPANY OF CANADA,

respondent.

APPLICATION UNDER: *The King's Bench Rules*, Rule 14.05(2)(c)(iv)

NOTICE OF APPLICATION

TO THE RESPONDENT: THE DISABILITY INSURANCE COMPANY OF CANADA

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing before a judge, on Thursday, the 20th day of October, 2___, at 10:00 o'clock in the forenoon, at the Law Courts, 408 York Avenue, Winnipeg, Manitoba.

IF YOU WISH TO OPPOSE THIS APPLICATION, you or a Manitoba lawyer acting for you must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2:00 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

August 15th, 2___ Issued by _____
Deputy Registrar

TO: THE DISABILITY INSURANCE COMPANY OF CANADA
1 Portage Avenue
Winnipeg, Manitoba
R3K 0Z9

APPLICATION

1. The applicant makes application for:

   (a) a determination of the applicant's entitlement to benefits under a certain policy of disability insurance no. A6029 issued by the respondent to Winnipeg Dental Inc. on March 7th, 2___ (hereinafter “the insurance policy”);

   (b) a declaration that the applicant is entitled to benefits under and pursuant to the insurance policy;

   (c) costs.

2. The grounds for the application are:

   (a) that the applicant was insured under the insurance policy against loss from disability from carrying on her employment duties due to accident or other cause occurring or arising from January 1st through December 31st, 2___;

   (b) that on April 16, 2___, the applicant became disabled from her employment duties due to accident;

   (c) that the respondent has refused to pay to the applicant disability benefits due and owing under and pursuant to the insurance policy;

   (d) Court of King’s Bench Rule 14.05(2)(c)(iv).

3. The following documentary evidence will be used at the hearing of the application:

   (a) the Affidavit of Ann Andrews to be sworn;

   (b) the Affidavit of Dr. H. D. West, sworn July 13th, 2___;

(c) such further and other evidence as counsel may advise and this Honourable Court may permit.

August 15, 2___.

DOWNING & ASSOCIATES
Barristers & Solicitors
500 Edmonton Street
Winnipeg MB R3C 3R8
DOREEN DOWNING
Lawyers for the Plaintiff

TO: THE DISABILITY INSURANCE COMPANY OF CANADA
1 Portage Avenue
Winnipeg MB R3K 0Z9
The respondent herein

NOTE: This precedent is provided for the purposes of illustrating drafting and format. In this particular fact situation, a Notice of Application [under Rule 14.05(2)(c)(iv)] may or may not be the appropriate procedure, depending upon whether facts and/or the credibility of the Plaintiff are in dispute.

2. Affidavit in Support of Notice of Application

File No. CI 23-01-52292

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

applicant,

- and -

THE DISABILITY INSURANCE COMPANY OF CANADA,

respondent.

APPLICATION UNDER: *The King's Bench Rules*, Rule 14.05(2)(c)(iv)

AFFIDAVIT OF ANN ANDREWS
SWORN THE 30TH DAY OF AUGUST, 2___

DOWNING & ASSOCIATES
Barristers & Solicitors
500 Edmonton Street
Winnipeg, Manitoba
R3C 3R8

Telephone No. (204) 666-4949

DOREEN DOWNING

File No. CI 23-01-52292

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

applicant,

- and -

THE DISABILITY INSURANCE COMPANY OF CANADA,

respondent.

AFFIDAVIT OF ANN ANDREWS
SWORN THE 30TH DAY OF AUGUST, 2___

I, ANN ANDREWS, of the City of Winnipeg, in the Province of Manitoba, Dental Assistant,

MAKE OATH AND SAY THAT:

1. I am the applicant herein and as such have personal knowledge of the facts and matters hereinafter deposed to by me except where same are expressed to be based upon information and belief in which case I do verily believe them to be true.

2. I am 45 years of age, having been born January 26th, 19__.

3. Since September, 2___, I have been continuously employed as a dental assistant at Winnipeg Dental Inc. As a result of my employment, I am a beneficiary of certain disability insurance coverage provided to me and other employees by the respondent pursuant to a policy of disability insurance originally entered into on March 7th, 2___, and renewed from time to time. A true copy of the policy of disability insurance issued by the respondent under which I am a beneficiary is attached hereto and marked as exhibit "A" to this my affidavit.

4. On April 16, 2___, at approximately 11:00 o'clock in the morning, I was shopping at a retail store operated by Brown & Sons Groceries Limited at 123 Taylor Circle, in the City of Winnipeg, in Manitoba. While shopping I slipped and fell, causing personal injury which included injury to my left wrist and left hip, requiring physiotherapy, medication, and other treatment.

5. My work as a dental assistant involves a great deal of standing, and virtually constant use of my left and right arms, including my left wrist.

6. As a result of the accident, I have been and remain, since the date of the accident, unable to carry out my employment duties as dental assistant. In particular, although I am able to stand and move around to some extent, the injury to my left hip has meant that I must be seated for as much as one-half hour of every hour that I am awake, which is incompatible with my dental assistant duties. In addition, the pain and discomfort that I feel whenever I flex or move my left wrist prevents me from undertaking my dental assistant work.

7. I am under the care and treatment of Dr. H. D. West who has informed me and my employer that I am unable to carry out my employment duties due to my injuries.

8. By letter dated April 18th, 2___, I informed the respondent herein of the accident and of my injuries, and on April 20th, 2__, I completed and

filed with the respondent an application for benefits form in the form supplied by the respondent.

9. By letter dated April 30th, 2___, the respondent informed me that my claim for benefits was denied because I am not disabled from all possible job functions. Attached hereto and marked as exhibit "B" to this my affidavit is a true copy of that letter.

10. To date the respondent has refused to pay any benefits to me pursuant to the insurance policy.

11. I make this affidavit bona fide.

SWORN BEFORE ME at the City of Winnipeg, in the Province of Manitoba, this 30th day of August, 2___.

_____

A Barrister and Solicitor entitled to Practise in and for the Province of Manitoba

_____

ANN ANDREWS

This is EXHIBIT "A" referred to in the Affidavit of Ann Andrews sworn before me at the City of Winnipeg, in the Province of Manitoba, this 30th day of August, 2___.

A Barrister and Solicitor entitled to Practise in and for the Province of Manitoba

THE DISABILITY INSURANCE COMPANY OF CANADA
GROUP DIVISION, WINNIPEG, CANADA
(herein called the Company)

HEREBY CONTRACTS WITH

WINNIPEG DENTAL INC.
OF
WINNIPEG, MANITOBA

herein called the Policyholder, and agrees to insure certain Employees of the Policyholder, in accordance with the terms of this policy, particulars of which are as follows:

This policy is issued in consideration of the Policyholder's application and the payment of premium due. A copy of the application is attached and forms part of this policy.

GROUP HEALTH POLICY NO. A 6029

EFFECTIVE DATE	The insurance under this policy shall be effective for one policy year from 12.01 a.m. Standard Time at the Policyholder's address on the 1st day of July, 2___ and unless otherwise terminated by the Company as provided herein may be renewed annually, in accordance with the provisions contained herein.
PREMIUMS	Calculated in accordance with the provisions of this policy, and are due and payable on the Effective Date and monthly thereafter.
POLICY YEARS	The first Policy Year shall be computed from July 1, 2___ to June 30, 2___ inclusive. The second Policy Year shall commence on July 1, 2___ and thereafter the Policy Anniversary shall be an anniversary of such date.

The provisions of the following pages hereof form a part of this policy.

Signed for the Company at Winnipeg, Canada on March 7, 2___ the date of issue.

"J. Jones" Secretary

"S. Smith" President

GH-1-85 GROUP HEALTH INSURANCE - NON-PARTICIPATING CORR. TO N.1.

This is EXHIBIT "B" referred to in the Affidavit of Ann Andrews sworn before me at the City of Winnipeg, in the Province of Manitoba, this 30th day of August, 2___.

_____

A Barrister and Solicitor entitled to Practise in and for the Province of Manitoba

The Disability Insurance Company of Canada
1 Portage Avenue
Winnipeg, Manitoba
R3K 0Z9

April 30, 2___

Ms. Ann Andrews
500 Patience Road
Winnipeg, Manitoba
R3C 4G9

Dear Ms Andrews:

Re: Your Disability Claim
Group Health Policy No. A6029

We acknowledge receipt of and thank you for your letter of April 18th, 2___, and your application for benefits dated April 20th, 2___.

We regret to inform you that you are not entitled for benefits because you are not disabled from all possible job functions.

Please do not hesitate to contact us should you have any questions.

Yours truly,

THE DISABILITY INSURANCE COMPANY OF CANADA

Per:

A.N. Adjuster

ANA/dw

3. Judgment

File No. CI 23-01-52292

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

applicant,

- and -

THE DISABILITY INSURANCE COMPANY OF CANADA,

respondent.

JUDGMENT

DOWNING & ASSOCIATES
Barristers & Solicitors
500 Edmonton Street
Winnipeg, Manitoba
R3C 3R8

Telephone No. (204) 666-4949

DOREEN DOWNING

File No. CI 23-01-52292

THE KING'S BENCH
Winnipeg Centre

THE HONOURABLE)
) The 20th day of October, 2___
MR. JUSTICE DAMOCLES)

BETWEEN:

ANN ANDREWS,

applicant,

- and -

THE DISABILITY INSURANCE COMPANY OF CANADA,

respondent.

JUDGMENT

THIS APPLICATION was heard on the 20th day of October, 2___, in the presence of counsel for all parties.

ON READING THE NOTICE OF APPLICATION AND THE EVIDENCE FILED BY THE PARTIES, and on hearing the submissions of counsel for the parties:

1. THIS COURT DECLARES that from April 16th, 2___ to October 20th, 2___, the applicant was disabled within the meaning of a certain policy of insurance issued by the respondent to Winnipeg Dental Inc., dated March 7th, 2___;

2. THIS COURT ORDERS that costs of this application be paid by the respondent to the applicant.

October , 2___

_____
Deputy Registrar

APPROVED AS TO FORM:

SMITH AND JONES

Per: _____
Lawyers for the Respondent

4. Notice of Motion

File No. CI 23-01-54454

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

NOTICE OF MOTION
ASSOCIATE JUDGES' UNCONTESTED LIST
HEARING DATE: September 19, 2___, at 9:30 a.m.

DOWNING & ASSOCIATES
Barristers & Solicitors
500 Edmonton Street
Winnipeg, Manitoba
R3C 3R8

Telephone No. (204) 666-4949

DOREEN DOWNING

File No. CI 23-01-54454

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

NOTICE OF MOTION

THE plaintiff will make a motion before the Presiding Associate Judge on Tuesday, the 19th day of September, 2___, at 9:30 in the morning, or as soon after that time as the motion can be heard, at the Law Courts, 408 York Avenue, Winnipeg, Manitoba.

THE MOTION IS FOR an Order:

1. That the defendant produce for inspection the following documents identified in Schedule "B" of the affidavit of documents of the defendant:
   (a) written statement of Mr. John Singe, dated April 18th, 2___;
   (b) report of Harry Owen to Loss Adjustment Limited, dated June 30th, 2___;

2. For costs of this motion.

THE GROUNDS FOR THE MOTION ARE:

1. Court of King's Bench Rule 30.02, 30.03 and 30.06;

2. That the documents are relevant to the matters at issue and that the claim of privilege has been improperly made.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The pleadings herein;

2. The affidavit of Ann Andrews, sworn August 20th, 2___;

3. Such further and other material as counsel may advise and this honourable court may permit.

August 20th, 2___

DOWNING & ASSOCIATES
Barristers & Solicitors
500 Edmonton Street
Winnipeg, Manitoba
R3C 3R8
Telephone No. 204-666-4949
DOREEN DOWNING
Lawyers for the Plaintiff

TO: GREEN & COMPANY
Barristers & Solicitors
600 Howe Street
Winnipeg, Manitoba
R3C 3R6
Telephone No. 204-532-2898
GREGORY GREEN
Lawyers for the Defendant

5. Affidavit in Support of Notice of Motion

File No. CI 23-01-54454

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

AFFIDAVIT OF ANN ANDREWS
SWORN THE 20TH DAY OF AUGUST, 2___

DOWNING & ASSOCIATES
Barristers & Solicitors
500 Edmonton Street
Winnipeg, Manitoba
R3C 3R8
Telephone No. (204) 666-4949
DOREEN DOWNING

File No. CI 23-01-54454

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

AFFIDAVIT OF ANN ANDREWS
SWORN THE 20TH DAY OF AUGUST, 2___

I, ANN ANDREWS, of the City of Winnipeg, in the Province of Manitoba, Dental Assistant,

MAKE OATH AND SAY THAT:

1. I am the plaintiff herein and as such have personal knowledge of the facts and matters hereinafter deposed to by me except where same are expressed to be based upon information and belief in which case I do verily believe them to be true.

2. On April 16th, 2___, I suffered physical injuries when I slipped and fell on a pool of clear liquid located on the floor of the defendant's store, as alleged in the statement of claim.

3. I am informed by my solicitors, and do verily believe, that on July 17th, 2___, they filed a statement of claim herein on my behalf, and in accordance with my instructions.

4. I am informed by my solicitors, and do verily believe, that on or about August 12th, 2___, they were served on my behalf with the affidavit of documents of the defendant. Schedule "B" to the affidavit of documents of the defendants discloses certain documents over which the defendant has claimed privilege. A true copy of Schedule "B" is attached hereto and marked as exhibit "A" to this my affidavit.

5. Although the defendant has produced copies of all of the documents listed in Schedule "A" to the defendant's affidavit of documents, the defendant has refused to produce copies of, or to produce for inspection, those documents listed in Schedule "B" of its affidavit of documents. I am informed by my solicitors, and do verily believe, that they have written to request production of the documents in Schedule "B" but to date the defendant has refused to produce those documents or copies of them, for inspection. Attached hereto and marked as exhibit "B" to this my affidavit is a true copy of correspondence dated August 14th, 2___, from my lawyers to the lawyers for the defendants. Attached hereto as exhibit "C" to this my affidavit is a true copy of correspondence dated August 16th, 2___, from the lawyers for the defendant to my lawyers.

6. I make this affidavit in good faith.

SWORN BEFORE ME at the City of Winnipeg, in the Province of Manitoba, this 20th day of August, 2__.

_____

A Barrister and Solicitor entitled to Practise in and for the Province of Manitoba

_____

ANN ANDREWS

This is EXHIBIT "A" referred to in the Affidavit of Ann Andrews sworn before me at the City of Winnipeg, in the Province of Manitoba, this 20th day of August, 2__.

_____

A Barrister and Solicitor entitled to Practise in and for the Province of Manitoba

SCHEDULE B

Documents that are or were in the corporation's possession, control or power that it objects to producing on the grounds of privilege.

Documents which are privileged, being memoranda, letters and other confidential communication which came into existence after this litigation was under contemplation and/or in anticipation of such litigation for the purpose of obtaining information for the use of the defendant's solicitors to enable them to conduct the defence in this action and/or advise the defendant thereon, including:

1. Solicitor/client communications and solicitor's memoranda to file;

2. Customer inquiry or Property Damage Report by Ann Andrews dated April 16, 2___;

3. Written statement of Mr. John Singe, assistant manager of Brown & Sons Groceries Limited, dated April 18, 2___;

4. Report of Harry Owen, general manager of Brown & Sons Groceries Limited, to Loss Adjustment Limited, dated June 30, 2___;

5. Reports by Brenda Haywood of Underwriters Adjustment Bureau Ltd. dated:

    (a) November 18, 2___;

    (b) February 4, 2___;

    (c) August 12, 2___; and

    (d) January 15, 2___.

6. Photograph of Brown & Sons Groceries Limited taken on April 16, 2___;

7. Private Investigator's report dated January 12, 2___;

8. Without prejudice correspondence between counsel for the parties.

This is EXHIBIT "B" referred to in the Affidavit of Ann Andrews sworn before me at the City of Winnipeg, in the Province of Manitoba, this 20th day of August, 2___.

_____

A Barrister and Solicitor entitled to Practise in and for the Province of Manitoba

DOWNING & ASSOCIATES
Barristers & Solicitors
500 Edmonton Street
Winnipeg, Manitoba
R3C 3R8

August 14, 2___

Green & Company
Barristers & Solicitors
600 Howe Street
Winnipeg MB R3C 3R6

Attention: Mr. Gregory Green

Dear Mr. Green:

Re: Andrews v. Brown & Sons Groceries Limited

Thank you for your recent letter with which you served the defendant's affidavit of documents.

We have reviewed the defendant's affidavit of documents with our client who is of the view that the documents listed in Schedule "B" are relevant and are not privileged and therefore should be produced. We therefore request that your client produce the documents listed in Schedule "B".

Yours truly,

DOWNING & ASSOCIATES
Per:

DOREEN DOWNING
DD/dw

This is EXHIBIT "C" referred to in the Affidavit of Ann Andrews sworn before me at the City of Winnipeg, in the Province of Manitoba, this 20th day of August, 2___.

_____

A Barrister and Solicitor entitled to Practise in and for the Province of Manitoba

Green & Company
Barristers & Solicitors
600 Howe Street
Winnipeg, Manitoba
R3C 3R6

August 16, 2___

Downing & Associates
Barristers & Solicitors
500 Edmonton Street
Winnipeg, Manitoba
R3C 3R8

Attention: Ms. Doreen Downing

Dear Ms. Downing:

Re: Andrews v. Brown and Sons Groceries Limited

Thank you for your letter of August 14th, 2___. Our client maintains its position that the documents listed in Schedule "B" are properly the subject of a claim for privilege and therefore declines to produce them.

Yours truly,

GREEN AND COMPANY
Per:

GREGORY GREEN

GG/dw

6. Affidavit Opposing Notice of Motion

File No. CI 23-01-54454

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

AFFIDAVIT OF HARRY OWEN
SWORN THE 8TH DAY OF SEPTEMBER, 2___

GREEN & COMPANY
Barristers & Solicitors
600 Howe Street
Winnipeg, Manitoba
R3C 3R8
Telephone No. (204) 532-2898
GREGORY GREEN

File No. CI 23-01-54454

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN AND SONS GROCERIES LIMITED,

defendant.

AFFIDAVIT OF HARRY OWEN
SWORN THE 8TH DAY OF SEPTEMBER, 2___

I, HARRY OWEN, of the City of Winnipeg, in the Province of Manitoba, General Manager,

MAKE OATH AND SAY THAT:

1. I am employed as the general manager of the defendant Brown & Sons Groceries Limited and as such have personal knowledge of the facts and matters hereinafter deposed to by me except where same are expressed to be based upon information and belief in which case I do verily believe them to be true.

2. I have been employed by the defendant continuously since January, 2___.

3. Although I was employed as the manager of the defendant on April 16th, 2___, I was away from the defendant's place of business and from the City of Winnipeg on vacation on the date in question and, as a result, was not present at the defendant's place of business on the date or at the time of the plaintiff's alleged accident.

4. Immediately upon my return to work with the defendant on April 18th, 2___, I was informed by my assistant manager, Mr. John Singe, of an incident that occurred on April 16th, 2___, involving the plaintiff herein. I immediately asked Mr. Singe to provide me with a full written report concerning the incident in order to familiarize myself with the incident. I was anxious to determine what had happened in order to ensure, if possible, that incidents of that nature would be prevented in the future. Mr. Singe provided me with a written report dated April 18, 2___ .

5. In addition to the foregoing, based upon the information provided by Mr. Singe, I was worried that the incident might result in litigation involving the defendant. I therefore wanted to be able to provide information to the defendant's lawyers if that ever became necessary.

6. Sometime prior to June, 2___, on a date that I cannot recall, legal counsel was appointed to assist the defendant with this matter. At the request of the defendant's legal counsel I met with a representative of Loss Adjustment Limited on June 30th, 2___, and provided a report. I intended that report to be delivered to legal counsel for the defendant.

7. I make this affidavit bona fide.

SWORN BEFORE ME at the City of Winnipeg, in the Province of Manitoba, this 8th day of September, 2___.

_____

A Barrister and Solicitor entitled to Practise in and for the Province of Manitoba

_____

HARRY OWEN

7. Order of the Associate Judge

File No. CI 23-01-54454

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

O R D E R

DOWNING & ASSOCIATES, Barristers & Solicitors
500 Edmonton Street
Winnipeg, Manitoba, R3C 3R8
Telephone No. (204) 666-4949

DOREEN DOWNING

File No. CI 23-01-54454

THE KING'S BENCH
Winnipeg Centre

ASSOCIATE JUDGE JONES	)	Tuesday, the 19th day of September, 2___

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN AND SONS GROCERIES LIMITED,

defendant,

ORDER

THIS MOTION, made by the plaintiff, was heard this day, at the Law Courts, in the City of Winnipeg, in the Province of Manitoba.

ON READING the pleadings herein, the Notice of Motion dated August 18th, 2___, the Affidavit of Ann Andrews sworn August 20th, 2___, the Affidavit of Harry Owen sworn September 8th, 2___, and on hearing the submissions of counsel for the plaintiff and counsel for the defendant:

1. THIS COURT ORDERS that the defendant produce for inspection the original statement of John Singe, assistant manager of Brown & Sons Groceries Limited, dated April 18th, 2___, described in Schedule "B" to the affidavit of documents of the defendant;

2. THIS COURT ORDERS that the plaintiff's motion for an order that the defendant produce the statement of Harry Owen dated June 30th, 2___, be and is hereby dismissed;

3. THIS COURT ORDERS that costs of this motion shall be in the cause.

September , 2___

_____
ASSOCIATE JUDGE JONES

APPROVED AS TO FORM:

GREEN & COMPANY

Per: _____
Lawyers for the Defendant