The Law Society of Manitoba

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CIVIL PROCEDURE

Chapter 4

Alternate Dispute Resolution, Trial, Appeal and Federal Court

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A. ALTERNATIVE DISPUTE RESOLUTION

1. General

A very high percentage of civil cases are settled before trial. These cases generally involve disputes that can be quantified in monetary terms and/or property. As money and property are usually infinitely divisible, there is almost always some type of monetary settlement that can be found which reasonably reflects the risks both sides face in going to court. Litigation is very expensive, and trials represent the most expensive component of the litigation process. It is, therefore, generally agreed that there is an obligation on the part of counsel to try to encourage clients to negotiate and enter into reasonable settlements.

> Settlement allows the parties to exercise some degree of control over the outcome. The benefits of settlement are significant to the parties in both financial and emotional terms. There is also a public interest in the resolution of disputes as it serves to reduce the number of cases which proceed before the courts.

Settlement discussions can be conducted between counsel for the parties, or the parties themselves, but most counsel and litigants are availing themselves of independent private mediators and judges of the Court of King's Bench to assist with dispute resolution. These methods have proven to be highly effective in achieving settlements.

This section will deal with private mediation, judicially assisted dispute resolution (JADR) and neutral evaluations offered by the Court of King's Bench, as well as settlement discussions involving counsel only.

2. When to Initiate Settlement

Settlement discussions or assisted dispute resolution can be initiated at any time. However, the parties need to be in a position to know the issues, quantum of the loss, and basis on which the dispute can be appropriately resolved. Therefore settlement discussions will usually be considered after documentary disclosure, and often after examinations for discovery, when both counsel and the parties will have a better understanding of the evidence and amount at issue. In some cases it will also be important to have expert opinion on issues of liability and/or damages.

Ideally, if a case is to be settled, steps should be taken as early as possible to schedule a mediation or JADR, or commence discussions, to avoid incurring further costs in preparing for trial. It may take several months to obtain a date for a private mediation or JADR. As well, settlement discussions close to the trial dates can distract counsel from preparation for trial, and parties may have insufficient time to properly negotiate a settlement.

Having said that, there are some parties who are unwilling to moderate settlement demands until faced with the prospect of testifying in open court. If this is your client, you need to advise them of the additional expenses being incurred in preparing for trial, the uncertainty of reaching an acceptable settlement, and the risks of proceeding to trial. If the other party refuses to engage in proper settlement discussions in advance of trial, you should ensure that you convey to opposing counsel the weaknesses in their case and strength of your client's case, and that the amount at which your client will settle will reflect the increased costs of preparing for trial.

3. Mediation

Mediation is a consensual negotiation process which allows parties to reach agreements that are fair and practical and may or may not reflect what the outcome would be at trial. There are no formalized or mandatory mediation rules, so parties are free to fashion their own process.

The parties to a dispute (whether or not an action has been commenced) may agree to participate in a mediation with a private, independent mediator, selected by the parties. The parties will be responsible to pay the fees of the mediator, which are typically based on an hourly rate. As is discussed below, judges of the Court of King's Bench provide services for a JADR or neutral evaluation at no cost. Therefore, parties will usually only engage a private mediator where the mediator has particular expertise in a matter, such as a business valuation, and the amount at issue is sufficient to warrant the expense.

Once the mediator has been engaged, an initial conference will be arranged with counsel and the mediator to discuss and agree upon the procedure for the mediation, the materials required and timelines. Most independent mediators require that the parties enter into a mediation agreement. The mediation is usually conducted in the offices of counsel for one of the parties.

The timing and suitability of a dispute for mediation, the materials required for a mediation, the manner in which the mediation is conducted, and any settlement agreement reached, are the same as for Judicially Assisted Dispute Resolution and are set out in detail in the next sections.

4. Judicially Assisted Dispute Resolution

Judicially assisted dispute resolution is a form of alternative dispute resolution in which a Court of King's Bench judge, acting as a neutral third party, assists the litigants in reaching an agreement by facilitating negotiations.

The judge leads and manages discussions with the parties to facilitate a settlement, by way of an agreed upon process similar to that of a private mediator. JADR may be used to resolve almost any civil litigation proceeding, but it is not available for criminal proceedings.

The Court of King's Bench implemented JADR in 1994 and its use has grown steadily since that time. It has become so popular that private mediations are rare, particularly since the court provides the services of the judge at no charge.

a) Advantages of JADR

The advantages of JADR as a dispute resolution mechanism are many, including:

- ease of access (the only mandatory requirement is that an originating process must be filed in the Court of King's Bench);
- flexibility (there are no formal rules of procedure for JADR, so parties are free to fashion their own procedure with the judge);
- speed (apart from scheduling dates, there are no procedural delays);
- cost (generally significantly less expensive than going to trial);
- control (the parties tailor the process to the individual circumstances of the case);
- informality (communication is enhanced in the informal setting of JADR);
- private and confidential (JADR sessions are not open to the press or public as trials are);
- choice of judge (judges can be chosen for skill in facilitating settlement and expertise in the type of dispute);
- non-adversarial (the "win-lose" result of trial is avoided);
- low risk (if the parties are unable to reach an agreement, they are still free to proceed to trial. Unaccepted offers to settle made at JADR are not binding);
- without prejudice (information disclosed in JADR is confidential and cannot be used at trial);
- preserves or restores relationships (unlike trial, which can have a polarizing effect).

b) Suitability for JADR

The nature of some disputes or issues are better suited for judicially assisted dispute resolution than others. In most cases, JADR should occur after there has been full documentary disclosure, and often after examinations for discovery, when the issues and quantum at issue are known. Both parties must be genuinely interested in settling and have realistic expectations as to the outcome.

A prerequisite to initiating the JADR process is that all parties agree that they wish to have a judge mediate their case. Clients must be fully informed about the JADR process and the available settlement options before making this decision. They must understand that mediation is not an adversarial process and that the judge will not be making any decisions or guaranteeing results.

Clients must also understand their role in the JADR session and be aware that they will be required to participate, in good faith, in the discussions and caucus sessions. They must also have authority to give instructions and agree upon any settlement. If anyone other than a party will play a role in settlement (i.e., a spouse who must approve the agreement), that person should be at the negotiating table and must agree to sign a confidentiality agreement.

c) Selecting a Judge

A significant advantage of JADR is that the parties, with the help of their counsel, have input into who will conduct the JADR. The parties must agree to three judges who would be acceptable to conduct the JADR. In selecting the three judges to be submitted, counsel should consider whether the judge has legal experience in the area of law being considered, whether anything might affect the perception that the judge is impartial, and the personal style of the judge in mediation.

When all parties agree, counsel will initiate the process by sending a jointly prepared letter to the Chief Justice or Associate Chief Justice requesting JADR. A sample letter is included in the precedents. The letter should identify the parties and counsel, contain a brief description of the case and issues, and specify the names of three judges, in order of preference. It is also helpful to enclose a copy of the pleadings. The assignment of the JADR judge is in the discretion of the court, and will often depend on the availability of the judges.

d) Pre-JADR Meeting

Once a JADR judge has been assigned, a pre-JADR meeting with the judge and counsel will take place in chambers, or by telephone or video conference. The purpose of the meeting is to:

- provide the judge with a brief synopsis of the case and issues;
- work out agreements as to facts and issues, if necessary;

- set a date and location for the mediation (which is usually conducted in the offices of counsel for one of the parties);
- determine timelines for providing materials;
- discuss the content of mediation briefs and other materials to be provided;
- discuss the process for the mediation, including any joint sessions and the use of caucusing; and
- highlight any concerns about unrealistic positions, sensitive issues, impasse or authority to settle.

Some judges prefer that the parties sign a formal written mediation agreement setting out the agreed upon rules before starting the JADR session, but an oral agreement will suffice. A sample mediation agreement is included in the precedents.

e) The Mediation Brief

> Success or failure of JADR is strongly connected to the amount of work that goes into preparing the mediation brief.

There is no set format, but the brief will usually contain:

- a one page overview of the case;
- a description of the parties and their relationship to one another;
- a concise statement of the agreed facts;
- a statement of the factual and legal issues, including the quantum of damages or amount at issue, and the party's position on the issues;
- the relevant pleadings;
- transcript extracts, if appropriate;
- relevant documents, including experts' reports;
- persuasive case law.

The mediation brief should be directed to the other side in order to sell them on the merits of settlement, but it is also important to provide a persuasive submission for the judge to assist in negotiations. The brief should show the strength of the case, yet leave the door open for settlement. Inflammatory language should not be used.

Stamp all JADR documents to identify them as mediation material ("Private and Confidential-for mediation purposes only") so that they cannot be used by the other side outside the JADR session. Tab and highlight the important sections.

Mediation briefs should be exchanged with the other counsel and given to the JADR judge well in advance of the JADR date.

f) The JADR Session

The JADR session process will vary depending on the judge, the parties and the nature of the case, but it will likely include the following stages:

- **Introduction** – The JADR judge, counsel and the parties will introduce themselves.
- **Judge's opening remarks** – The judge will give a general explanation of the JADR process (discussing concepts such as neutrality and impartiality, its non-adversarial, confidential and without prejudice nature, and voluntary participation) and outline how the session will proceed, including expectations as to courteous behaviour and the consent required to share information disclosed in caucus with the other side.
- **Opening statements** – In some cases, each party (usually through counsel) may make a short opening statement outlining their position in a persuasive but non-confrontational way. Since the opening statement sets the tone of the JADR session, the submission should be accurate, reasonable, neutral and free of legal jargon and technical terms.

  There is an increasing trend not to have opening statements, as the background and positions will have been outlined in the written briefs. Oral opening statements can be received as adversarial and can inflame the passions of the parties, resulting in a negative start to the mediation. This is particularly problematic if there is already considerable animosity between the parties.
- **Information gathering** – Either in a joint session at the outset, or in separate caucusing sessions, the judge will have the parties discuss and expand upon the information provided in their briefs, or opening statements if applicable, to identify the true matters at issue. The judge will encourage the parties to bring forward all interests and priorities. Asking questions to clarify what the other side has said and listening carefully are critical at this stage.
- **Issue identification** – If necessary, the JADR judge will assist the parties to prepare a list of the issues to be discussed and the order of discussion.

- **Negotiation** – If there are multiple discrete issues, they may need to be addressed separately. It is common to negotiate the easier issues first and to move on to the next issue if a discussion stalls. If everything cannot be resolved, consider a partial agreement.

- **Caucusing sessions** – These are separate sessions where the parties meet privately to discuss their position or settlement options with counsel, and at times with the JADR judge. Here the judge will often ask pointed questions and the client may vent negative feelings, but the communications are confidential and will not be disclosed to the other side by the judge unless authorized by the party in caucus. Most judges will comment on the merits of a position or issue, and this is often very valuable in persuading parties and achieving a settlement. The parties may also agree in advance to have the judge provide views on the issues in a joint session.

  The JADR judge will be active in transmitting information to the other side, communicating settlement positions, narrowing the issues and proposing or encouraging alternatives and compromises to try to reach agreement on the terms of a settlement. However, in some cases, it may become apparent that an agreement is not possible, and any party may decide to terminate the mediation at any time.

- **Settlement agreement** – If the framework of a tentative agreement has been negotiated, the judge will work with the parties to finalize the deal. The JADR judge cannot make any order concerning costs or otherwise. Costs of the parties and their counsel for the JADR and the proceeding are subject to negotiation and agreement by the parties.

  After the parties meet privately to review and confirm the terms of settlement, counsel (not the judge) will prepare the formal agreement and the parties will sign it. Counsel are strongly advised to prepare typed or handwritten minutes at the JADR setting out the terms of the settlement and have all of the parties sign it at that time. This will avoid disputes afterwards about the agreed upon terms. If necessary, a more formal settlement agreement can be prepared after the mediation, along with releases and other documents to implement the settlement.

- **Closure** – If an agreement is reached, the JADR judge will confirm with the parties that they are agreeable to the deal reached and close the session. Otherwise, the judge will typically encourage the parties to continue to consider their positions and the possibility of settlement, and will invite the parties to contact them for assistance.

  Even if the matter does not settle at the JADR, the process is valuable in learning more about the other party's position, and it is quite common for settlement to occur afterwards, once the parties have given further consideration to the discussions and risks of proceeding.

The settlement agreement survives the mediation and is binding and enforceable on the parties.

If there is a dispute about the terms of the agreement the parties may ask to re-attend with the JADR judge to work out the points of contention. If an agreement is reached but is later disputed, the matter may have to be litigated. However, disagreement about the terms of a Release or other non-essential terms does not affect the binding nature of the settlement agreement. The settlement agreement itself cannot be subject to privilege, for to hold otherwise would render the mediation process which produces the settlement meaningless. The JADR judge cannot be called as a witness in a subsequent proceeding.

5. Neutral Evaluation

As of January 1, 2018, the Court of King's Bench began offering another form of informal dispute resolution in civil matters known as a neutral evaluation. This dispute resolution mechanism allows the parties to receive a non-binding and without prejudice opinion from a judge as to the strengths and weaknesses of each party's case.

To initiate this process, the parties to a proceeding must make a joint written request of the Chief Justice or the Associate Chief Justice to have a judge provide a neutral evaluation of the probable outcome of the matter following a presentation of each party's best case.

The request must identify, where applicable, the pre-trial judge in the action and the judge who heard a motion for summary judgment in the action. In addition, the request may include a list of at least three judges whom the parties have jointly agreed would be acceptable to conduct a neutral evaluation of the action.

If the Chief Justice or the Associate Chief Justice determines that a matter is appropriate for a neutral evaluation, they will notify the parties and advise which judge (whether from the proposed list of judges or otherwise) has been assigned to conduct the neutral evaluation. A preliminary meeting will then be scheduled by the parties with this judge for the purpose of determining the manner in which the neutral evaluation is to be conducted, including the manner in which the case is to be presented.

Where a neutral evaluation is scheduled with a judge who heard an unsuccessful summary judgment motion, the neutral evaluation may be based on the evidence and argument presented at the hearing of the motion for summary judgment.

Following the presentation of each party's case, the judge conducting the neutral evaluation may provide the parties with their non-binding and without prejudice opinion respecting the merits of each party's case.

The judge conducting the neutral evaluation must not preside at the trial of the action without the consent of all parties to the proceedings. Even then, the assignment of the trial judge will remain within the discretion of the Chief Justice or their designate.

6. Settlement Discussions between Counsel or Parties

Settlement discussions between counsel may be either verbal or in writing, and may occur at any time. For instance, counsel may have a verbal discussion after the examinations for discovery with respect to how a case might be resolved. The possibility of a JADR or mediation should be considered at an early date, and will be canvassed by the judge at a pre-trial conference.

Most often, settlement discussions occur between counsel, but there is nothing to prevent the parties from discussing settlement directly between them. However, clients should be cautioned to make any tentative agreement subject to approval by counsel.

> Settlement discussions and written offers are made "without prejudice", and they are not admissible in court. However, when discussing settlement or making a settlement offer in writing, it is prudent to stipulate that such discussions or offers are made without prejudice.

7. Reports and Opinions

> It is important to provide clients with written reports and opinions. This will assist both counsel and clients in determining a reasonable settlement position. Counsel and client should agree on a bottom-line before settlement negotiations start, as well as starting positions, and be prepared to compromise.

Good counsel will provide clients with a written report and opinion no later than after the completion of the examinations for discovery. Such an opinion should be based on a review of the documents, the evidence given at the examinations for discovery and the applicable law. Counsel should also provide an updated opinion prior to proceeding to trial. This opinion should set out the costs of the trial and detail the financial consequences of winning and losing at trial. It should also outline the strengths and weaknesses of the case, and the risks of proceeding to trial where there is no guarantee of the outcome.

Most clients are reasonably happy, or at least not unhappy, with counsel if they are successful at trial and somewhat unhappy to outright hostile in the event of a loss at trial. It is therefore important for counsel to take certain self-protective measures and record their views in writing, especially where a client is determined to take a weak case to trial. The client must be fully informed of the costs and risks in advance.

8. Liability of Counsel

There is a developing area of advocate's liability (increasingly seen in Ontario) for improper recommendation of a settlement. Although counsel may have different views in assessing a claim, such divergence in views will not necessarily lead to a finding of liability. Counsel may be liable if it can be shown that an ordinarily competent lawyer would not have made the same error or recommendation during the conduct of the action.

If certain steps are taken, it is unlikely that you will be exposed to liability even though another lawyer would have recommended settlement or conducted the trial in a matter differently. Those steps should include the following:

- In dealing with personal injuries, make sure that the medical condition of the plaintiff has stabilized and is properly documented by a qualified medical practitioner. The possible future ramifications of any medical condition should be assessed and documented;
- Ensure that you have researched the relevant authorities before making any recommendation to your client regarding liability and quantum. You should also have a good appreciation of what witnesses may be available and the nature of their evidence;
- The client must be fully and properly informed of the strengths and weaknesses of the case, and the relevant law, and the ultimate decision to settle should be left up to the client;
- The release signed by the plaintiff should be action-specific (i.e., it should relate only to the claim arising out of the particular incident);
- Ensure that any monies payable to experts, court reporters or process servers are paid before the balance of the settlement funds are sent to your client.

9. Making Offers to Settle

It is essential to understand Rule 49 pertaining to offers to settle and to make use of the rule in the appropriate circumstances.

Under Rule 49, any party may make an offer to settle all or part of a proceeding in writing pursuant to a prescribed form. The failure to use the prescribed form, however, does not necessarily mean that you cannot take advantage of Rule 49. In *Gaudry v. Dreger*, 1994 CanLII 16856 (MB KB), (1994), 93 Man. R. (2d) 235 the court held that Rule 49 does apply to a letter containing a settlement offer marked "with prejudice." Also Rule 49.13 provides that the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made, and the terms of the offer.

An offer to settle may be withdrawn at any time before it is accepted, by serving written notice of withdrawal of the offer. An offer may be accepted by serving an acceptance in the prescribed form. However, failure to use the prescribed form will not necessarily mean that a written acceptance is not effective.

It is important to carefully word the offer. It should specify everything that your client requires in order to settle the proceeding. The only exception to this may be costs, because Rule 49.07(5) stipulates that where an offer to settle does not provide for the disposition of costs and is accepted, the plaintiff is entitled to certain costs. Most counsel address costs in the offer.

The benefit of making a formal offer to settle is that if the party making the offer is as or more successful at trial or other proceeding, then they may be entitled to additional costs against the unsuccessful party.

For example, where a plaintiff makes an offer to settle which is not accepted, and the plaintiff later obtains a judgment as favourable or more favourable than the offer, the plaintiff is entitled to party and party costs to the date the offer to settle was served and double the party and party costs from that date, unless the court orders otherwise.

In the case of an offer made by the defendant that is not accepted, where the plaintiff obtains a result that is as favourable or less favourable than the terms of the offer, the plaintiff will be entitled to party and party costs to the date the offer was served and the defendant will be entitled to party and party costs after that date unless the court orders otherwise (Rule 49.10).

> In order to attract the cost consequences, the formal offer to settle must be made at least seven days before the beginning of the trial (or at least three days before a motion), and must be open for acceptance until the hearing commences. The earlier the offer is made in the proceedings, the more effective it will be in terms of the additional costs consequences.

No mention or reference to the offer to settle may be made in any pleading, at any hearing, or at the trial until all questions of liability and relief to be granted have been determined, other than costs (Rule 49.06). The appropriate practice is for counsel to simply indicate to the trial judge that they wish to have an opportunity to speak to costs after a decision has been made.

Counsel must explain to the client the cost consequences of refusing an offer to settle and of achieving a less successful result at trial than that which was proposed in the offer. It is advisable to reduce this advice to writing and counsel may consider sending a copy of Rule 49 as an attachment to the letter, for the client's review.

B. PRE-TRIAL AND CASE MANAGEMENT CONFERENCES

1. Overview of Pre-Trial Conferences

A pre-trial conference is a meeting between counsel and a judge of the Court of King's Bench. The judge presiding at the pre-trial will be the judge who ultimately hears the trial of the matter unless otherwise directed by the Chief Justice (see Rule 50.11).

The meeting is informal in that it usually takes place in the judge's office, or by way of telephone or video conference, and not in open court. Unrepresented litigants are not permitted in chambers; in such cases, pre-trials are held in a courtroom.

With the introduction of comprehensive amendments to the Court of King's Bench Rules on January 1, 2018, significant changes were made to the pre-trial conference regime. As well, the Chief Justice of the Court of King's Bench issued a Practice Direction effective January 1, 2018 concerning the Rule amendments, including directions and practices for pre-trial conferences and judicial involvement in managing cases, the scheduling of trials, the practice for case management conferences, motions, and the availability of JADR and Neutral Evaluations.

The Chief Justice issued a further Practice Direction/Notice, advising that effective September 3, 2019, the Court of King's Bench was introducing a "one judge model" for civil actions. Under the new model, once the action proceeds to a pre-trial or case management conference, the same judge will:

- handle all procedural steps;
- hear any motions, including summary judgment motions;
- hear any appeals from masters' decisions; and
- preside over the trial.

The one judge model builds on the previous comprehensive amendments to the Rules, with some additional Rule amendments. Through the one judge model, there is increased judicial involvement in managing cases, which is intended to further ensure that the identified objectives associated with more timely and affordable access to justice and the principle of proportionality are consistently and meaningfully achieved. The Practice Direction sets out the basic operating principles for the one judge model, the new regime for summary judgment motions and scheduling trials, and implications for settlement.

Rule 50, which was significantly revised, governs pre-trial management. It is intended to facilitate the just, most expeditious and least expensive determination or disposition of an action by having a judge manage the pre-trial conduct of an action.

Under Rule 50, a party may opt into the pre-trial conference process at any time after the close of pleadings, and trial dates are to be set at the first pre-trial conference. The Practice Directions state that the trial date is to be scheduled no later than 18 months after the first pre-trial conference, with the exact date depending on availability of the court and status of the action. More complex actions may require a longer time to be ready for trial, and where a party intends to proceed with a summary judgment or other dispositive motion, the court will aim to set trial dates within 20 months of the first pre-trial conference or following the decision of an unsuccessful dispositive motion. Apart from these cases, it is expected that the majority of cases will be set for trial between 9 and 15 months after the first pre-trial.

The one judge model has implications for settlement discussions, as the pre-trial judge will be the trial judge and will preside over summary judgment and other motions. The trial judge should not be influenced or privy to confidential negotiations or compromises that may be made in settlement discussions. While the pre-trial judge may comment on the strengths and weaknesses of the case, where the focus turns to financial negotiations, another judge may be made available to undertake a settlement conference or JADR.

Settlement discussions and any settlement offers are without prejudice and should not be referred to in a pre-trial brief or at a pre-trial conference, except possibly to indicate whether or not settlement discussions have occurred and whether the parties are open to a JADR. They cannot be disclosed on any motion or at trial.

2. Scheduling Pre-Trial Conferences

A pre-trial conference may be scheduled at any time after the pleadings in an action are closed. However, it is imperative that the party who opts into the pre-trial conference ensures that they have taken sufficient steps in the action such that the matter will be ready for trial at an early date.

A party seeking a pre-trial conference must first file a pre-trial brief with the court that includes a copy of all pleadings in the action, a concise statement of the factual and legal issues in the action, an indication of whether a motion for summary judgment or any other dispositive motion is being sought and the estimated duration of the trial. It is also customary to include sections setting out the status of the action and steps remaining to be completed, and the witnesses to be called, including expert witnesses.

After serving the pre-trial brief on all parties, the party seeking a pre-trial conference will contact the trial co-ordinator for available dates, and then seek the availability and consent from the other parties to a date, followed by a letter to the trial co-ordinator confirming the date. If the other parties to an action refuse or are unable to reach agreement on a date for a pre-trial conference, a party may bring a motion to a judge to schedule a date.

Every other party to the action must file a responding pre-trial brief with the court and serve it on all other parties at least seven days before the pre-trial conference. The responding pre-trial brief must include the party's position regarding any summary judgment motion or other dispositive motion sought. It is also to include the party's position on the factual and legal issues in the action.

The content of the pre-trial brief will vary depending on the nature of the case and the preferences of counsel. The pre-trial brief should adequately inform the judge of the relevant factual and legal issues, and the party's position thereon. In general, the brief should be concise and usually should not exceed about ten to fifteen pages.

In some cases, copies of key documents or important legal authorities may be attached to the brief, although this is usually not required and care should be taken not to inundate the pre-trial judge with material. Key evidence from discoveries may be referenced in the brief, but the transcripts of any examinations for discovery should not be filed. The pre-judge should not be given or read all of the discovery evidence of the opposing party, as it will include evidence that may not be favourable and/or relied upon at trial. A decision will need to be made before trial as to whether or what portion of a discovery transcript counsel may want to read in as part of their evidence at trial.

Rule 53.03(1) provides that a party who intends to call an expert witness at trial must file with the pre-trial judge a copy of a report signed by the expert and setting out the expert's name, address and qualifications, and the substance of the proposed testimony.

It is not a requirement to include expert reports with the first pre-trial brief particularly since pre-trial conferences may be scheduled before expert reports have been obtained. In that event, the pre-trial judge will set timelines for expert reports to be provided. However, if an expert report has been obtained by the time of the first pre-trial, then it should be included with the pre-trial brief, assuming the party intends to rely on the report and/or call the expert as a witness at trial. If a copy of the expert's report is not provided to the pre-trial judge, leave will be required from the trial judge to call the expert as a witness at trial (Rule 53.03(3)).

The pre-trial judge can also require the parties to an action to provide written material or documents on any matter that may assist in the conduct of the pre-trial conference.

As indicated above, counsel should not refer to settlement discussions or offers to settle in the pre-trial brief, as the pre-trial judge will be the trial judge and will preside over any summary judgment or other dispositive motions. If any reference is made to settlement, it should only be to indicate that there have or have not been discussions, and whether the party is prepared to participate in a JADR.

3. Conduct of the Pre-Trial Conference

As noted above, the purpose of pre-trial conferences is to facilitate the just, most expeditious and least expensive determination or disposition of an action. This is done by having a judge manage the pre-trial conduct of an action by:

- setting early trial dates and establishing timelines for the completion of steps in the litigation process;
- identifying and simplifying the issues to be tried in the action;
- avoiding wasteful or unnecessary pretrial activities; and
- ensuring that the action is ready for trial by making orders and giving directions respecting substantive and procedural issues in the action.

Before proceeding with the first pre-trial conference, the presiding judge will review the nature of the action, the issues in dispute and the status of the litigation with the parties. Following this review, if the judge determines that it is not appropriate to hold a pre-trial conference at that time, they may make a direction that the pre-trial conference not proceed. In addition, the judge may direct that the parties not schedule a pre-trial conference until after a specified date or a specified step in the litigation has been completed (Rule 54.04).

> At the first pre-trial conference, the pre-trial judge must set a hearing for any summary judgment or dispositive motion and/or set trial dates. Once set, the trial dates can only be adjourned by the Chief Justice or their designate on the request of a party or the pre-trial judge, and adjournments will only be granted in exceptional circumstances.

Unless otherwise directed by the Chief Justice or their designate, the pre-trial judge is seized of the action, and must preside at all subsequent pre-trial conferences and hear all motions arising in the action, including a motion for summary judgment or other dispositive motion.

The pre-trial judge has broad powers, and can make any order or give any direction that they consider necessary or advisable to facilitate the just, most expeditious and least expensive determination or disposition of an action. A non-exhaustive list of the types of orders and directions that a pre-trial judge can make is provided in Rule 50.05(4). Such orders and directions can be made on motion by any party or on the pre-trial judge's own motion, without materials being filed.

Each lawyer representing a party to the action and each party not represented by a lawyer must attend the pre-trial conference. Unless authorized by the pre-trial judge, the lawyer attending a pre-trial conference must be the lawyer principally responsible for the conduct of the action. This lawyer must have the authority to set dates respecting the conduct of the litigation and engage in settlement discussions. Parties to an action must attend a pre-trial conference if requested by the pre-trial judge.

Counsel will be canvassed as to whether the pleadings require amendment, whether all documents have been disclosed, whether examinations for discovery have been completed, whether all undertakings arising out of the examinations for discovery have been answered and whether all expert reports have been attached to the briefs and filed. Timelines will be set for the completion of outstanding matters. The pre-trial judge will also make inquiries with regard to the witnesses each party proposes to call. In this way a fairly precise calculation can be made as to the amount of time required for trial.

As trial dates will be usually set at the first pre-conference, it is good practice to speak to your client and contact witnesses before the conference and inquire as to their availability for future trial dates. At that point, one would only have a general estimate of when a trial might be set, but should be able to determine if there is any block of time the witness may not be available.

> In addition to the above, at the first pre-trial conference, the pre-trial judge must also determine whether any party intends to bring a motion for summary judgment or other dispositive motion. If a party intends to bring such a motion, they must satisfy the pre-trial judge that their motion can achieve a fair and just adjudication of the issues in the action as set out in Rule 50.04(5.2).

They must establish that summary judgment would be 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.

If the pre-trial judge is satisfied that these factors have been met, they must allow the motion to proceed. In that case, the pre-trial judge will make an order or give directions that they deem necessary or appropriate regarding the conduct of the motion, including an order or directions regarding evidence (including oral evidence - Rule 50.04(5.4)) and/or timelines.

4. After the First Pre-trial Conference

Following the first and subsequent pre-trial conferences, Rule 60.08(1) provides that the pre-trial judge must issue a memorandum that sets out the results of the conference, including:

- any orders made or directions given;
- the issues that have been resolved and the matters that have been agreed to by the parties;
- the issues requiring a trial or a hearing; and
- if a decision was made to schedule a further pre-trial conference, its date.

Additional pre-trial conferences can be scheduled by the pre-trial judge or by any party to the action on request to the pre-trial co-ordinator.

> The pre-trial memorandum, which must be filed and sent to the parties or their lawyers, is binding on the parties to the action, unless a party notifies the pre-trial judge of any inaccuracy within 14 days (Rule 50.08(4), (5)). Any facts identified by the pre-trial judge in the pre-trial memorandum as not being in dispute or evidence ordered to be adduced by affidavit are admissible for the purpose of the trial, unless the trial judge orders otherwise (Rule 50.08(6)).

The pre-trial judge is required to impose sanctions on a party who, without reasonable excuse:

- fails to comply with a provision of Rule 50;
- fails to comply with an order or direction given by the pre-trial judge; or
- is substantially unprepared to participate at a pre-trial conference or does not participate in good faith.

Such sanctions can include an order for costs, an order staying an action, or an order striking out all or part of a pleading, among other things (Rule 50.09(1)).

The pre-trial should be used as a starting point for trial preparation. If the action is at an appropriate stage by that time, counsel should plan to prepare, file and serve subpoenas on witnesses, and to prepare and serve notices to admit facts or documents.

After the pre-trial is also a good time to update and consolidate legal research, and analyse the relevant law. Scrambling to pull the law together shortly before the trial, while trying to meet with and prepare witnesses, will only add to the significant stress of conducting a trial. In short, beginning to prepare for trial immediately after the pre-trial conference and well in advance of the trial is the most prudent course of action to follow.

5. Rule 20A Conference – Expedited Actions

> The procedure set out in 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.

As of January 1, 2018, the pre-trial conference regime set out in Rule 50 applies to all Rule 20A expedited actions.

Although Rule 20A actions are subject to the same pre-trial and case management rules and practices as non-Rule 20A actions, Rule 20A sets out procedural rules and limitations governing Rule 20A actions. That is, Rule 20A continues to govern discovery and other trial issues for actions not exceeding $100,000. Please be mindful of the timelines for document and witness disclosure, and the limits placed on discovery and the use of expert witnesses in expedited actions.

Unless the pre-trial conference judge directs otherwise, no more than three pre-trial conferences may be held for an expedited action under Rule 20A.

6. Case Management Conferences

A new Rule 50.1 was enacted on January 1, 2018 to provide for case management by a judge. The Rule applies to "proceedings" and is therefore available for both actions and applications. A *Practice Direction* concerning the new Rule was also issued by the Chief Justice on November 7, 2017.

The Rule provides that the Chief Justice or their designate may, on their own, or on the request of a judge or a party to a proceeding, order the parties to attend one or more case management conferences (Rule 50.1(1)).

Where a party or their counsel wants to make a request for case management, the request is to be made in writing to the Chief Justice or Associate Chief Justice. The request must include the background of the proceeding and address each of the issues identified as considerations in Rule 50.1(2) and any other relevant factors. Generally, such requests by a party ought to be made prior to any pre-trial conference.

Rule 50.1(2) provides that an order for case management may be made if the judge determines that the active management of a judge is required to ensure that the proceeding moves forward in an expeditious manner. The judge may consider any relevant factors, including whether the proceeding:

a) involves a number of complex factual, legal or procedural issues;

b) has multiple parties;

c) has one or more self-represented parties;

d) will likely involve a number of interim motions or other proceedings;

e) will likely require a number of pre-trial evidentiary rulings.

The judge presiding at a case management conference may, on motion by a party or on their own motion, make any order or give any direction considered necessary or advisable to facilitate the just, most expeditious and least expensive determination or disposition of the proceeding (Rule 50.1(3)).

The case management judge may exercise all of the powers of a pre-trial judge under Rule 50, and, with the exception of setting trial and motions dates at the first conference, the provisions of Rule 50 respecting pre-trial management apply with necessary changes to case management.

The Practice Direction with respect to setting trial dates does not apply to proceedings in case management. For example, where an action justifies the appointment of a case management judge based on the considerations set out in Rule 50.1(2), the 18-month outer limit for setting trial dates is generally unworkable.

C. PREPARING FOR TRIAL

1. Organization

There is no one uniformly accepted method of organizing for trial. The earlier you do it the better. Generally, you should have a tabbed binder ("the pleadings binder") containing the pleadings, the affidavits of documents, the transcripts of the examinations for discovery and the answers to the undertakings.

You should also have a binder ("the trial binder") containing notes for the opening statement, outlines of direct examinations, outlines or notes for cross-examinations and a closing argument. Witness statements and other documents that have to be introduced as exhibits through a particular witness should be put in the appropriate place in the trial binder.

> Most counsel will be able to agree that some or all documents can be included in an agreed book of documents and submitted jointly. Counsel for the plaintiff will then prepare a book of documents with a list and the documents tabbed numerically. The agreed book of documents will state that the documents are agreed to be authentic within the meaning of Rule 51.01, but the inclusion in the book of documents is not an admission of the truth of any statement in the document, unless the parties specifically agree otherwise.

It is very helpful to the judge and the parties to have an agreed book of documents, with the documents in chronological order, or organized in a manner that they can be easily found. The agreed book of documents will have an introductory section stating the agreed purpose for which the documents may be used. This should be followed by a list describing each document with tab numbers. Many counsel will indicate in the list which party produced the document and include the production number from the party's affidavit of documents. A sample index to an agreed book of documents is included in the Appendices.

The agreed book of documents will be delivered to the trial judge and counsel at least two weeks before the trial, or as directed by the pre-trial judge. The documents can then be marked, sequentially, as exhibits at the opening of the trial. This is more time-efficient than entering documents as exhibits individually through witnesses. Any disputed documents will have to be put to a witness in the usual way, followed by argument and a ruling by the trial judge as to admissibility.

Each counsel will also prepare and file a book of authorities containing relevant statute and case law. The book of authorities should be filed at least two weeks before the trial or as stipulated by the pre-trial judge. Counsel should highlight the relevant statutory provisions and passages in the cases.

2. Proving Facts

Many facts can be proven by way of formal admission thereby obviating the need to call or have a witness to prove the fact. Some facts may have been admitted in the pleadings, in an affidavit, examination for discovery or other examination under oath. Counsel may also agree on a statement of facts and submit a written statement of agreed facts at the opening of the trial.

In most cases, there will be some uncontentious facts that can be agreed upon, but not all cases lend themselves to the preparation of a detailed statement of agreed facts and frequently much time is taken up in drafting and negotiating the content of the document with little to show in the way of results. However, preparing or attempting to prepare an agreed statement of facts is helpful in determining the facts and issues that are really in dispute. If an opposing party refuses to agree to certain facts, you should realize that you are going to have to prove these facts. This sounds basic, however, if you failed to appreciate a fact was in dispute, you may not prove it properly, or at all.

Facts can also be proven by serving a formal request to admit the truth of a fact pursuant to Rule 51.02. A request to admit in Form 51A must be served at least 20 days prior to the trial, and a response is required within 20 days after service (Rule 51.03(1)). If the party does not provide a response within 20 days, then it is deemed to have admitted the facts set out in the request (Rule 51.03(2)). Given these timelines, the request to admit should be served well in advance of trial so that you have the response in sufficient time to properly plan for witnesses and the facts that must be proven.

If the party responds and denies the facts, and the facts are subsequently proven at the hearing, the court may take the refusal to admit the facts into account in exercising its discretion concerning costs (Rule 51.04).

Admissions of fact may also be contained within the transcript of the examination for discovery or other examination under oath, or in a prior affidavit. The evidence contained in the transcript from your examination of the opposing party can be read in at trial as part of your case. The admissions of fact will only be binding against the person who was examined.

Finally, Rule 53.02(1) allows the court, on motion before or at the trial, to make an order allowing evidence of a witness or proof of fact or document to be given other than by personal attendance, in such manner as the judge specifies. The intent is to permit evidence to be given by affidavit, or by other means such as telephone or video-conference on such conditions as the trial judge finds appropriate.

3. Proving Documents

Certain classes of documents are admissible at trial without calling the maker of the document as a witness so long as notice is given. For example, medical records or reports are admissible at trial as long as the required notice is given under section 50 of *The Evidence Act,* subject only to the right of the opposite party to request that the physician be produced for cross-examination.

"Business records", as defined, are also admissible in evidence without calling the maker of the record as long as the notice required by section 49 of *The Evidence Act* is given. The same is true of banking records. *The Evidence Act* also provides for the admissibility of certain documentary evidence in sections 58 and 59, including where the maker of the document is dead or cannot be located.

As indicated earlier, in many cases counsel will agree to submit some or all of the relevant documents by way of an agreed book of documents. Even if the document is included in the agreed book, this will not usually be an admission of the truth of any fact in a document, or that a party does not require a medical practitioner to be called as a witness for cross-examination. The required notices should therefore be given under *The Evidence Act*.

Failure to give the necessary notices or to reach an agreement with opposing counsel will result in last-minute scrambling to try to identify and locate the author of a particular document and/or to arrange for their attendance at trial so that they can be called as a witness to prove the document, or attend for cross-examination in the case of a medical report.

It may also be possible to reach agreement with counsel or obtain an order of the trial judge to prove a summary of documents, such as a list, or compilation, rather than volumes of source documents, thereby avoiding the task of a laborious review of volumes of documents.

> For information on the process for proving a summary of documents; see Thomas Mauet, Fundamentals of Trial Techniques, 2nd Cdn Edition, p. 162; "Summary Charts". This is an important tool for dealing with large volumes of documents, and distilling them into a useable format for the court.

Rule 51 also provides that a request to admit the authenticity of documents can be served at least 20 days prior to the hearing. The request seeks to have the other party admit, for the purposes of the proceeding only, the authenticity of a document.

Authenticity is something different than the truth of the contents of the document. Authenticity simply means that the document is what it appears to be, namely, a letter written on a certain date, by a certain person, directed to another person. If one wishes to prove the truth of the facts contained in the letter, it would be necessary to call a witness.

4. Preparing Witnesses

Counsel should develop a preliminary witness list and update that list as the case proceeds. Well in advance of the trial, all witnesses (except those counsel is sure will appear at the trial, such as parties or paid experts) should be served with subpoenas and the required attendance money.

> If a witness resides outside Manitoba, counsel will have to obtain an interprovincial subpoena from the Manitoba court pursuant to *The Interprovincial Subpoena Act*. Arrangements will have to be made for the courts of the province in which the witness resides to adopt the subpoena and issue the necessary process.

Good counsel will serve the witness with an explanatory letter together with the subpoena. The letter will generally explain why the witness is required. It will also indicate that the witness will be contacted closer to the trial and advised as to the precise day on which they will have to appear.

The importance of serving a subpoena and the necessary attendance money lies in the consequences of the witness failing to appear. If a witness who has been served with a subpoena fails to appear, there is a procedure whereby a sheriff's officer may bring the witness to court. The trial judge will generally permit an adjournment for the Sheriff's Officer to locate the witness and bring them to court. If the witness has not been served with a subpoena, then the assistance of the sheriff's officer will not be available. It is unlikely that the trial judge will grant an adjournment to permit the service of a subpoena at that point.

Counsel should prepare each and every witness counsel intends to call. This would, at minimum, involve discussing the witness's evidence. Counsel should also do a practice run of the direct examination with the witness on at least two occasions and conduct some practice cross-examinations. This is particularly important for your own client and other key witnesses. Many witnesses who appear to know what they are talking about when being interviewed will freeze up when they are called to testify. Running through the direct examination prior to the trial may give the witness the extra confidence needed to avoid such an event.

Counsel are free to, and should, speak with all potential witnesses other than the opposing party. If a witness is prepared to sign a written statement, then a written statement should be taken, preferably by someone other than counsel at trial. Alternatively, if the witness will not sign a written statement, a memorandum should be prepared and mailed to that witness. In order to ensure accuracy, a request should be made of that witness to review the memorandum and make any necessary changes. However, the written statement and memorandum are not admissible at trial.

Many witnesses are reluctant to become involved. Consequently, counsel may have to utilize some persuasive techniques. Dealing with witnesses can be tricky. You should consider the *Code of Professional Conduct* with respect to dealing with and approaching witnesses. You never want to appear to be, in any way, harassing or interfering with a witness.

In determining which witnesses to speak to and/or call at trial, it is important to know that there is no "property" in a witness, including an expert witness. Just because a witness may be called by the opposing party or may be considered adverse in interest, there is nothing to prevent counsel from attempting to speak to the witness, although there is no obligation on the part of the witness to speak to you.

In the case of an expert, counsel should ensure that when an expert is retained, it is a condition of the retainer that the expert will not communicate with opposing counsel or an opposing party. If counsel is aware that the opposing party obtained an expert opinion but they are not calling the expert to testify at trial, it may mean that the expert's evidence would not be favourable to them, and you may therefore want to attempt to speak to that expert.

Rule 53.07 permits the calling of the opposite party as a witness as part of your case. Counsel must give at least ten days' notice prior to the commencement of trial of the intention to call such a party as a witness. This should only be done in rare cases where there is no other way of adducing essential evidence to prove a fact. Extreme caution must be exercised before calling the opposing party as a witness, because the evidence they give will form part of your case.

5. Preparing Opening Statements, Direct Examinations, Cross-Examinations and Closing Arguments

It is often said that trial work is ninety-nine percent preparation and one percent inspiration. A lawyer who is unprepared or less well prepared than their opponent, starts with a significant disadvantage. Trials are intense and stressful, and good preparation well in advance will reduce stress levels and ensure that you present the best case possible.

It is a matter of personal preference as to whether counsel makes notes or a detailed outline of opening and closing statements and examinations. Counsel should have some kind of written outline so that points can be checked off as the trial moves along. This will ensure that all of the intended questions are asked and all of the important areas are covered.

Preparing direct examinations is particularly important because counsel cannot ask leading questions, except for background information or on non-contentious points. Consideration has to be given as to how the required evidence can be elicited from the witness effectively. Further, since direct examination usually requires the witness to provide a narrative of events, several run-throughs may be required with the witness before they learn to provide the necessary evidence.

It will be possible to prepare at least an outline of the cross-examinations of some witnesses called by the opposite side. Further, counsel should be able to prepare an effective cross-examination of the opposite party as their evidence has been recorded in the discovery transcript together with the documents that have been disclosed. However, the opposing party may give evidence that was not covered on a discovery, or that varies or is inconsistent with that evidence, and counsel must be flexible and able to address such matters on cross-examination.

At the pre-trial stage, the judge will ask counsel to advise of the witnesses they intend to call, and in preparing for trial and the timing of witnesses, it will usually be known which witnesses will be called. However, it is possible for a party to call a witness that has not been previously disclosed, particularly if necessary to address unanticipated evidence given by others at trial. There is a risk that if some advance notice has not been given to the opposing counsel, the trial judge may allow an adjournment if requested to prepare for a cross-examination. Otherwise, counsel will have to cross-examine the witness without having been able to prepare in advance.

The closing argument should also be prepared prior to the trial. It may have to be amended if the evidence does not come forward as anticipated. Some trial judges will require closing arguments to be made orally immediately upon the conclusion of the evidence. Counsel should not count on having an extra time to prepare.

If possible, counsel should prepare a typewritten version of the opening statement and the closing argument, even in point form, that can be provided to the trial judge to follow during the oral submissions at trial and then have to look at when preparing the decision.

D. THE TRIAL

King's Bench Rule 52 relates to trial procedure, including the order of presentation, marking and numbering exhibits, excluding witnesses until they are called to give evidence, and other matters. Rule 53 relates to evidence at trial, including the general rule that oral evidence is required, when leading questions may be asked on the direct examination of a witness, expert reports and witnesses, compelling attendance at trial, and other matters.

1. Opening Statements

An opening statement is very important and helpful for the trial judge.

> An effective opening statement should give an overview of the case and issues, and set out the facts expected to be proven. It should not contain any argument or comments as to inferences to be drawn from anticipated evidence or the credibility of witnesses. Facts should not be overstated, and they should be confined to facts that are reasonably certain to be proven. The opening statement should develop the theory of the case. The judge should be given a logical, coherent and integrated overview of the expected evidence, the issues in the case, and possibly a limited review of important legal principles.

The Rules and practice in Manitoba is that counsel for the defendant has the choice of giving an opening statement immediately after the plaintiff's opening statement, or at the close of the plaintiff's case and the opening of the defendant's case. In the case of defendant's counsel, the decision as to when the opening statement is given is a judgment call, but most often it will be advisable to give the opening statement immediately after plaintiff's counsel so that the judge is aware at the outset of the contrary evidence and defences being raised. In complex cases, counsel may prepare a lengthy written opening statement that is presented orally and given to the judge and opposing counsel to follow.

2. Direct Examinations

A direct examination should elicit the facts from the witness in a clear and logical progression. The witness should be the centre of attention. The background, content of the evidence, and demeanour of the witness are most important.

Counsel should strive to focus on the essential and important evidence, and avoid spending too much time on unimportant matters. Counsel should also use short and simple but carefully chosen questions and language. Jargon or overly complex vocabulary should not be used. This will only serve to confuse the witness.

The direct examination should be organized logically. This would normally involve a chronological presentation; however, counsel may choose to deal with the most important part of the evidence at the outset, notwithstanding that this piece of evidence occurs later in the chronology. Counsel should have a good degree of control over the witness. The best direct examination involves regular interplay between counsel and the witness, taking the witness through the events one step at a time. A witness should not be asked broad and open-ended questions or given the opportunity to give a long narrative in response to one question. There is considerable risk in allowing this. It is also important to ensure that the witness testifies as to first hand knowledge, and does not give objectionable hearsay evidence.

> The basic rule in direct examinations is that, although counsel may lead a witness with respect to preliminary matters and matters not in dispute, witnesses are not to be led through material matters. It is, therefore, perfectly permissible to lead a witness through background information and non-contentious matters.

A leading question is one which unduly directs the mind of the witness to the answer. A leading question may therefore:

- directly suggest the answer (i.e., "The car was speeding, correct?");
- invite the witness to agree with another witness or document (i.e., "The court has heard from Mr. Smith that the car was speeding. Is that your memory as well?");
- assume the fact in dispute ("How fast would you estimate the car was going?").

The direct examination of an expert witness involves additional issues. An expert is called to give an independent opinion to the court on subject matter which is beyond the knowledge of the ordinary person. The opinion is permitted because it aids the trial judge in reaching a proper decision.

The first step in calling an expert is to qualify the person as an expert in the area in which they will give evidence. This is done by having the expert testify that they possess sufficient skill, knowledge, experience and/or training relating to the opinion being elicited, such that they will appreciably assist the court. Counsel will generally do this by reviewing the expert's education, certifications and professional experience, and then asking the trial judge to qualify the person as an expert. Counsel for the opposing party may stipulate that the expert is qualified, and while it would then not be necessary to review the expert's background, it is generally advisable to do this in order to demonstrate for the trial judge that the expert is well qualified and the expert's evidence should be accepted.

The Mauet text, referred to above, provides a helpful checklist on qualifying an expert.

Experts may give opinions based on their own investigations of certain events. For example, a fire commissioner may be called to give an opinion as to the cause of a fire that they investigated. On the other hand, experts may also give opinions as to causation by relying on third party investigations and observations.

The traditional technique is to put a hypothetical question to the expert containing all of the facts expected to be proven and then ask the expert for an opinion based on those facts. If this model of examination is used, care must be taken to ensure that the facts are accurately put to the expert and that they are subsequently proven; otherwise, the expert's opinion will lose much of its value. Typically this is done in advance and an expert report is prepared that is put to the expert and marked as an exhibit at trial.

A witness who performed well during trial preparation may freeze during the trial and forget a crucial part of their evidence. Counsel will often have a pre-arranged code phrase for the witness such as the obvious "Do you remember anything else?"

It is permissible to refresh the memory of a witness who fails to respond by showing them a statement, report, deposition or other document. A certain series of questions must be asked to establish the foundation for refreshing the memory of a witness. If the document you were going to use to refresh the witness's memory is a document that you had previously claimed privilege over, it will now have to be disclosed to your opponent.

In order to be permitted to refresh the witness's memory, you must establish that the witness knows the fact but has had a memory lapse and that there is a document that will refresh their memory. The witness can then be given the relevant document and may confirm that their memory has been refreshed. The witness may then be permitted to testify without further aid from the document.

Rule 53.01(2) also provides that a where a witness appears unwilling or unable to give responsive answers, the trial judge may permit the party calling the witness to examine the witness by means of leading questions.

Occasionally one may call a witness who becomes adverse or hostile. Counsel may wish to cross-examine that witness using a prior inconsistent statement. The procedure to be followed is set out in sections 19 through 22 of *The Manitoba Evidence Act*.

Counsel has a limited right to re-examine their own witness after cross-examination. The right is restricted to new matters raised during cross-examination. Counsel will often,

however, conduct re-examinations which simply repeat the evidence given in the direct examination, which is not permitted. Cross-examining counsel must be alert and prepared to object in situations where the re-examination is being used to simply reinforce or rehabilitate the evidence given on direct.

Cross-examining counsel will have to consider whether any of the questions being asked on direct are objectionable. To object too much is to risk alienating the trial judge. To object too little is to risk evidence being admitted that may be relied upon to decide the case against your client. It is usually better not to object unless you are sure the answer will hurt you. Make an objection only if you are reasonably certain you will be successful.

State the word "objection" and then briefly state the legal basis for the objection. Common objections include the following:

- lack of relevance;
- privilege;
- hearsay;
- leading;
- calling for a conclusion;
- repetitive;
- assuming facts not in evidence; and
- misstating evidence and/or argumentative.

3. Reading In

Each party has the right to read in from the transcript of the examination for discovery of the opposite party.

> Reading in may be essential to proving part of the plaintiff's case or the defence, however, great care must be taken in selecting those portions of the transcript to be read in.
>
> The effect of reading in is that the evidence read in becomes part of your case.

It is therefore potentially a fatal error, in a case concerning a verbal agreement, to read in the opposite party's evidence as to the terms of the verbal agreement. The law in Manitoba is that a party is not absolutely bound by those portions of the transcript that are read in, and that counsel may lead other evidence to contradict or explain the portions read in. The evidence read in does, nevertheless, become evidence in the case. If this evidence is helpful to one party, it is generally harmful to the other.

The potential for counsel finding himself or herself in an embarrassing situation is real. See, for example, *O'Sullivan v. Turk,* 1947 CanLII 480 (MB CA), [1947] 2 W.W.R. 672 (Man. K.B.); *Silverman Jewellers v. Traders General Insurance* (1977), 3 C.P.C. 129 (Man. Q.B.); *Vita Credit Union v. Stotski* (1980), 17 Man.R. (2d) 48 (Q.B.); and *Carter v. Rungay,* 1984 CanLII 3836 (MB CA), (1984), 31 Man.R. (2d) 29 (C.A.). See also the decision of Madam Justice Beard in *Lebedynski v. Westfair Foods Ltd.*, 2000 MBQB 144 (CanLII), which contains a detailed and comprehensive analysis, as well as a helpful summary, of the legal principle involved.

Counsel reading in should also be aware that opposing counsel may ask that answers given before or after the answer being read in, or found elsewhere in the transcript that clarify or modify the answer also be read into the record. Care must therefore be taken in selecting the read-ins.

4. Cross-examinations

> Counsel must always consider whether to cross-examine a particular witness. One must ask whether the witness has given damaging evidence, whether the witness is important, whether the testimony of the witness was credible, whether on direct examination the witness forgot or was not asked about an important fact, and whether the witness made a prior inconsistent statement. These are all relevant factors in deciding whether to cross-examine.

These factors are also relevant in deciding how extensive the cross-examination should be once the initial decision to cross-examine has been made. For example, if a witness who is alleged to have committed arson fails to explain their whereabouts on the evening of the fire during direct examination, counsel should not re-visit that topic in cross-examination. This would only give the witness an opportunity to explain. The failure of the witness to explain where they were when the fire was being set can be used fruitfully in argument.

> Counsel must cross-examine a witness if they intend to impeach the credibility of a witness by calling contradictory evidence. Failure to cross-examine on a particular point does not imply a deemed acceptance of the evidence, but will mean that counsel is not entitled to call evidence to contradict the witness on that particular point and from making a closing argument that the witness' evidence should not be believed or is inaccurate.

The rule laid down in the 1893 decision of the House of Lords in *Browne v. Dunn*, continues to apply today. If counsel intends to impeach the credibility of a witness by calling independent evidence, the witness must be confronted with the contradictory evidence in

cross-examination, and given the opportunity to explain their position. The rule also applies to closing argument. Counsel cannot argue afterwards that a witness' evidence on a particular matter should not be believed or is inaccurate, unless the witness has been cross-examined and given notice that the examiner intends to impeach the evidence.

There are two basic approaches to cross-examination. The first is to elicit favourable testimony which supports your theory of the case. The second is to conduct a destructive cross-examination and attempt to discredit the witness and their testimony. If you intend to do both, begin by trying to elicit the favourable testimony before conducting the destructive part of the cross-examination. Not all cross-examinations are destructive cross-examinations. If counsel has been successful in eliciting favourable testimony from a witness, then a tactical decision may be made not to try to discredit the witness.

Cross-examination should establish as few basic points as possible. Counsel should make their strongest points at the beginning and end of the cross-examination. One should try to avoid a chronological approach so as to keep the witness off balance. The direct examination should not be repeated. This would simply give the witness a second opportunity to fill in any gaps in evidence.

It is often said that counsel should never ask a question in cross-examination to which the answer is not already known. This is not always true. Generally speaking, one should play it safe during cross-examination and ask only questions where it is known that the witness will answer in a certain way. There may be cases, however, particularly where the trial is going badly, when some chances will have to be taken.

Listen to the answers of the witness carefully. Observe the demeanour of the witness in answering the questions. Counsel should not argue with witnesses and most importantly, should not use open-ended questions on cross-examinations. All questions on cross-examination should be leading and if possible designed to elicit a "yes" or "no" answer. Witnesses should be controlled on cross-examination and questions should be confined to facts.

The Mauet text referred to earlier has a very helpful section on cross-examination.

5. Non-Suit

At the conclusion of the plaintiff's case, the defendant may move to dismiss the action on the ground that no case has been made out. This is called a motion for non-suit.

Where the motion is based on a legal argument (for example, some essential ingredient of the plaintiff's cause of action is missing) the defendant may make the motion and, if successful, still call evidence. In general, however, the trial judge will refuse to make a ruling on the motion unless the defendant elects to call no evidence should the motion be dismissed. Only courageous counsel elect not to call evidence and to have the judge decide the case on a motion for non-suit.

Motions for non-suit are frequently confusing to counsel and to the court. See the judgment of Mr. Justice Hamilton in *Jehle v. Petaski*, 1976 CanLII 1549 (MB QB), [1977] 1 W.W.R. 438 (K.B.) for a statement of the law in Manitoba in this area. Note also that the Manitoba Court of Appeal in *Lou Petit Trucking Ltd. v. Petit*,1990 CanLII 7982 (MB CA), (1990), 64 Man. R. (2d) 139 (Man. C.A.) questioned the correctness of one of the statements made by Justice Hamilton in *Petaski*. Both of these authorities should be studied before initiating a motion for non-suit.

For a discussion of the distinction between motions for non-suit based on no evidence and motions for non-suit based on insufficient evidence see *Laufer v. Bucklaschuk*, 1999 CanLII 5073 (MB CA), (1999), 145 Man. R. (2d) 1 (Man. C.A.) (para. 67). The Manitoba Court of Appeal explains that where a motion for non-suit is brought on the basis of no evidence, the judge is faced with a question of law and holds a discretion as to whether counsel must be put to an election.

Where a motion for non-suit is brought on the basis of insufficient evidence, this is a question of fact and counsel must always be put to an election. If it is unclear on what basis the motion for non-suit has been brought, the issue is to be resolved by putting counsel to an election.

It may be possible to avoid a non-suit by way of Rule 52.10. The Rule provides that where, through accident, mistake or other cause, a party fails to prove some fact or document material to the party's case, the judge may proceed with the trial subject to proof of the fact or document afterwards at such time and on such terms as the judge directs.

In rare cases, counsel may consider invoking their right to call the opposite party as part of the plaintiff's case in order to avoid a non-suit, but this should only be exercised as a last resort (Rule 53.07).

6. Rebuttal Evidence

Reply or rebuttal evidence is evidence called by the plaintiff after the defendant has called its evidence. The plaintiff's right to call rebuttal evidence is generally limited to evidence called for the purpose of contradicting substantial new affirmative evidence presented by the defendant that the plaintiff could not reasonably have anticipated and called as part of its own case. Counsel for the plaintiff should never withhold evidence in order to have something to call in rebuttal, as there is no right to call rebuttal evidence unless permitted by the court.

Counsel should call rebuttal evidence only when the evidence to be called is strong and decisive. Since rebuttal evidence is the last evidence the judge will hear, it is not a time to put forward weak evidence or evidence of marginal relevance.

7. Closing Statements/Argument

In civil cases, there are often many issues such as liability, contributory negligence and damages. It is helpful to the trial judge for counsel to identify the relevant issues at the beginning of argument.

Having done that, how counsel proceeds will depend greatly on the particular case and personal preferences. It is obviously helpful to identify which facts are uncontested and which facts are disputed. Counsel should make submissions to the trial judge on how and why disputed facts ought to be resolved in their favour. Such a submission will usually involve issues of credibility as between particular witnesses.

The facts will be determined on a balance of probabilities. Counsel will therefore look for consistencies that point to the probability of their own witnesses being believed, and inconsistencies which show that the opposition witnesses are not credible.

References to statute or case law should be woven into the submissions on individual issues. There is a great emphasis at law school on case analysis and many young lawyers see the argument as a chance to review case law in great detail. Most cases are determined on the evidence or the application of the law to the evidence, and case law is rarely determinative of a particular factual issue. However, case law is important in establishing general principles of law or legal elements that must be proven. There are also some cases that may turn on a point of law.

Counsel will have made an assessment of the strengths and weaknesses of their case and, obviously, emphasis will be placed on the strengths. The weaknesses should not be ignored and should be addressed up front, but should be downplayed and explained in favourable light. If the client is a sympathetic figure or the evidence is strong, counsel will emphasize the human aspects and the evidence. If, on the other hand, the evidence is weak but the law is on side, counsel will emphasize the law and *stare decisis*.

Counsel should be animated in approach. The mark of good counsel is how they deal with questions from the bench. If the judge asks a question, the question should be dealt with immediately and as competently as possible. Advance preparation and a thorough understanding of the case and the evidence is key to be able to answer questions. Once counsel is certain that the judge is satisfied with the response, the argument can be resumed. The temptation to stick to a script and defer questions until the end should always be avoided. As with cross-examination, argument should be commenced and concluded with strong points. Weak points should be buried in the middle of the argument if they need to be made at all.

As indicated previously, it is very helpful to provide a copy of your written argument to the judge and opposing counsel at the outset of the argument. This enables the judge to follow your argument, and the judge will have it when writing the decision. The written argument need not be perfect, and even point form will suffice.

References to the evidence should be absolutely accurate. Counsel may have a different recollection or interpretation of the evidence. A good set of notes taken during the trial will give one the edge in any argument about the evidence that was adduced. If counsel misstates the evidence during closing argument, it is inappropriate to rise and object. Counsel's misstatement of the evidence should then be dealt with in responding to the argument or, in the case of plaintiff's counsel, in reply. Incorrectly quoting the evidence given at trial is highly damaging to both the litigant's case and to counsel's reputation.

E. DECISION AND JUDGMENT

At the end of the trial, the judge will either give an oral decision or reserve. If the judge has reserved, counsel may be called back at a later time to receive an oral decision. If written reasons have been prepared by the judge, then counsel will simply be advised as to when the reasons are available to be picked up at the courthouse.

If the decision is delivered orally, counsel will have an opportunity to address the question of costs and any other technical issues concerning the form of the judgment.

If the decision is delivered in writing and costs have not been addressed, another attendance before the trial judge to deal with costs and any other matters may be necessary (depending on whether an agreement can be reached on these issues).

> Counsel should advise the client of the decision as soon as possible. Usually this means giving the good or bad news to the client over the telephone and sending the client the written decision.

After the decision is delivered, counsel for the successful party will prepare a form of judgment. The form of judgment will be submitted to opposing counsel to be consented to as to form. The judgment will then be filed with the court and, if it corresponds to the decision that was actually given, it will be signed.

Counsel should advise opposing counsel when the judgment has been filed and immediately advise once they become aware that the judgment has been signed and entered. This way opposing counsel will be aware that the appeal period has started to run.

Occasionally counsel may disagree over the form of the judgment. It will then be necessary to make an appointment with the trial judge to settle such issues pursuant to Rule 59.04(6). Such an appointment is arranged through the office of the trial coordinator.

In general, counsel should not communicate directly with the judge and any communication to the court should be in writing directed to the trial coordinator, with a copy to opposing counsel. Having said that, documents delivered to the office of the trial coordinator are not always immediately delivered to the office of the relevant judge. Where documents are being delivered close to a deadline, counsel may arrange to have them delivered directly to the judge through the judge's administrative assistant.

The decision of the trial judge will be final, subject to an appeal to the Manitoba Court of Appeal. The court does have the power to re-open a trial, but only before the judgment is signed and entered. This would happen only if additional evidence of a decisive character that might alter the decision was discovered. This would have to be evidence which could not, with reasonable diligence, have been discovered sooner.

F. COSTS

1. General Principles

The general rule is that the successful party at trial is entitled to party and party costs against the unsuccessful party. Party and party costs will cover most disbursements and will include a contribution to legal fees in accordance with Tariff "A" to the rules. A successful litigant is almost never entitled to be completely indemnified by the unsuccessful litigant for actual legal fees.

Costs are always in the ultimate discretion of the court pursuant to section 96(1) of *The Court of King's Bench Act*. Rule 57.01(1) provides that, in exercising its discretion under section 96, the court may consider, in addition to the result of the proceeding and any offer to settle, the following:

- the amount claimed and the amount recovered;
- the complexity of the proceeding;
- the importance of the issues;
- the conduct of any party which tended to shorten or lengthen the proceeding;
- the conduct of any party which unnecessarily complicated the proceeding;
- the failure of a party to meet a filing deadline;
- whether any step in the proceeding is improper, vexatious or unnecessary;
- a party's denial or refusal to admit anything which should have been admitted;
- the relative success of a party on one or more issues in a proceeding in relation to all matters put in issue by that party;
- whether it is appropriate to award any costs or more than one set of costs where there are several parties with identical interests who are unnecessarily represented by more than one counsel; and
- any other relevant matters.

In a recent Manitoba case, a plaintiff who was unsuccessful in an action against a lawyer was, nevertheless, awarded costs. The reasoning of the court was that the lawyer had breached their duty to the plaintiff but that since the breach of duty had not caused any loss, the plaintiff was not entitled to damages. Since the action resulted from the lawyer's breach of duty, the lawyer was, however, obliged to pay costs. The decision to award costs to an

unsuccessful party is unusual and highlights the wide discretion judges have in this area (Rule 57.01(2)).

> Be aware that Rule 57.07 provides that where a lawyer has caused unreasonable costs to be incurred or time to be wasted by undue delay or other default, the court may make an order requiring the lawyer, personally, to pay the costs of any party.

The court can make such an order on its own initiative or on the motion of any party, but the order can only be made after the lawyer has been given a reasonable opportunity to make representations to the court.

The Ontario courts have used this rule with some frequency. In Manitoba, Justice Yard considered when it is appropriate to award costs against counsel personally in *Eblie v. Yankoski*, 2007 MBQB 106 (CanLII). See also *Baryluk c.o.b. The Wyrd Sisters v. Warner Bros. Entertainment Inc*., 2010 MBQB 66 (CanLII) and *Nazmdeh v. Spraggs*, 2010 BCCA 131 (CanLII).

2. Party and Party/Solicitor and Client Costs

> Party and party costs are the costs that are usually awarded to the successful party. They are defined by Tariffs "A" and "B" to the rules.

In exceptional cases, the court may award costs as between solicitor and client. There is a difference between an award of party and party costs on a solicitor and client basis, and costs as between a solicitor and their own client. In the former case, the award means that costs are to be paid in an amount determined by the court that is greater than party and party costs. In the latter case, the intention is to have the unsuccessful party pay the actual amount that the successful party has paid to their lawyer.

> Solicitor and client costs are rare and generally only awarded where there has been reprehensible, scandalous or outrageous conduct on the part of a party in relation to the litigation (*Young v. Young*, [1993] 4 S.C.R. 3 at 134).

Where allegations of fraud or serious misconduct are made unsuccessfully and without some foundation, a court can exercise its discretion to award costs on a solicitor-client basis. Further, where a claim is made against a party that is wholly devoid of merit, or involves unproven allegations of misconduct against them from the outset without any foundation,

solicitor-client costs may be awarded, as was found by the Manitoba Court of Appeal in relation to the corporate defendants in *Bibeau et al. v. Chartier et al,* 2022 MBCA 2.

An unsuccessful attempt to prove fraud or dishonesty does not necessarily mean that solicitor-client costs should be awarded, because not all such allegations amount to reprehensive, scandalous or outrageous conduct. (*Hamilton v. Open Window Bakery Ltd,* 2004 SCC 9 at para 26; *Manitoba Keewatinowi Okimakanak Inc. v. McIvor,* 2007 MBCA 134; *Bibeau, supra,* 2022 MBCA 2).

Unproven allegations of fraud or misconduct that do not rise to the level of reprehensible conduct may still lead to an award of elevated costs (*Cerasani v. Kupfer et al,* 2009 MBQB 202; *Tregobov v. Paradis et al.,* 2017 MBCA 60 at paras 22, 26; *Bibeau, supra*, at 92).

While there is no rigid rule, solicitor-client costs are not generally awarded for conduct arising prior to the litigation, but rather they are intended to censure behavior related to the litigation alone. Pre-litigation conduct may be compensated by an award of damages or to punish the other party by punitive damages, and an award of solicitor-client costs for conduct occurring before the litigation may therefor amount to double compensation. Courts are to be careful not to punish by way of costs, pre-litigation conduct that could be the subject of other relief (*Provincial Judges' Association of Manitoba v. Manitoba*, 2013 MBCA 74).

However, there are circumstances where solicitor-client costs may be awarded for conduct occurring during and also before the litigation, such as cases involving breach of trust, shareholder oppression and breach of fiduciary duty. There are also other limited circumstances where solicitor-client costs may be awarded for pre-litigation conduct, such as issues of public interest, where the fruits of the litigation do not provide any appropriate compensation for the reprehensible conduct, and where the principle of indemnification for the wrongdoing (and not just disapproval) justifies an order (*Provincial Judges' Assn. of Manitoba, supra; Bibeau, supra*).

An example in an older case involving conduct occurring during the litigation that was deserving of censure was *Colquhoun v. Colquhoun*, 1988 CanLII 7450 (MB KB), (1988), 52 Man.R. (2d) 193 (Q.B.), Mr. Justice Carr awarded solicitor and client costs against a party because of her failure to lead evidence or cross-examine on the allegations of sexual abuse which she was advancing and because of her intentional withholding of important evidence from experts. Solicitor and client costs were also awarded over a specific period when Mr. Justice Carr concluded that her conduct of the litigation was unreasonable.

The practice in Manitoba is to specifically include a claim for costs as between solicitor and client in the pleading. However, since costs are in the discretion of the court, the failure of counsel to ask for them would not necessarily mean that they could not be awarded.

3. Common Directions

"Costs in the cause" means that the liability to pay the costs of the particular interlocutory proceeding will be determined by the trial judge. It does not necessarily mean that the costs of the proceeding will be awarded to the party who is ultimately successful.

"Costs in any event of the cause" means that the party to whom the costs of a particular interlocutory proceeding have been awarded is entitled to those costs regardless of the final result in the action. Where the judgment is silent as to costs, there is some Ontario authority which indicates that neither party is entitled to costs against the other. "All proper costs and expenses" means that the party entitled to costs is entitled to party and party costs.

4. Calculation of Costs and Disbursements

Costs are calculated pursuant to Tariff "A" to the rules. The first step is to calculate the amount in issue in the lawsuit, which will determine the class into which the lawsuit falls. Each class of action carries with it a different tariff amount for each step in the proceeding.

The next step is then to review Tariff "A" and identify the steps in the proceeding, making a note of the monetary amount allowed for each step given the class of the proceeding. Total party and party costs to which a client is entitled can be calculated once the tariff has been reviewed. Note that some of the tariff items give discretion to the trial judge or an assessment officer. For example, with respect to a trial, the trial judge has the discretion to allow a fee to the second counsel not to exceed two thirds of the fee allowed to the first counsel.

Disbursements are calculated by reviewing the items in Tariff "B". In general, a party will be entitled to disbursements for filing and serving pleadings, the cost of transcripts of examinations for discovery, the costs of filing and serving subpoenas together with attendance money, and other costs as set out in Tariff B.

Controversy may arise where counsel submits a bill of costs containing excessive amounts for deliveries, fax usage or photocopies. In order to minimize disputes over these items, the court has, from time to time, issued practice directions stipulating litigants are only permitted to recover a certain amount for photocopies.

Fees paid to an expert may also be recoverable disbursements. Expert's fees are, however, subject to the requirement that they be "reasonable charges of an expert who has conducted investigations and inquiries for the purposes of either giving evidence or assisting in the conduct of the proceeding."

In *Western Finance Co. v. Tasker Enterprises Ltd.*, 1979 CanLII 2524 (MB CA), (1979), 1 Man.R. (2d) 338 (C.A.), for example, the trial judge exercised their discretion and allowed only part of the fees paid to an expert who testified on behalf of the successful party. In the same case, a claim for expert fees was made on behalf of a lawyer who was called as a witness. The court found that the lawyer was not called as an expert to give opinion evidence and that he was merely an ordinary witness whose attendance could be secured by a subpoena and payment of the necessary attendance money.

5. Common Cases

Where several plaintiffs, represented by one counsel, sue a defendant and only one plaintiff is successful, only the successful plaintiff will usually be entitled to costs from the defendant. The defendant will generally also be entitled to costs from the unsuccessful plaintiffs.

Where there is a representative proceeding or class action involving a very large number of plaintiffs who retain one lawyer, the group of plaintiffs will normally only be entitled to one set of costs. Similarly, an unsuccessful representative group or class action will normally only be liable for the costs of the defendants according to normal party and party assessment principles.

Where a plaintiff is only partially successful, such as where an award of damages is reduced by a finding of contributory negligence, the court may, in exercising its discretion, award full costs. Alternatively, the court may apportion the costs either on the same basis or a different basis than the apportionment of liability.

A Bullock order is an order that may be granted where it was reasonable for a plaintiff to have sued several defendants but, ultimately they have been successful against only one defendant. A Bullock order permits the plaintiff to add to any costs recovered from the unsuccessful defendant the amount of any costs which the plaintiff is obliged to pay to the successful defendants.

Bullock orders are common where a plaintiff is in understandable doubt as to which of two persons bears responsibility for an act that caused the damage and where factual findings were required to be made on that issue. Such an order would not be appropriate where there are separate and distinct causes of action alleged against two different defendants.

A Sanderson order attempts to achieve the same result as a Bullock order, but requires the unsuccessful defendant to directly pay the costs of the successful co-defendant. The Bullock order places the risk of collecting the costs on the plaintiff, while the Sanderson order places the risk of recovering the costs on the successful defendant.

A plaintiff whose action has been dismissed may be ordered to pay the costs of a third party. However, the usual rule is that an unsuccessful plaintiff will not be charged with the costs of a third party since the plaintiff did not sue the third party and was not responsible for adding it to the action.

There are instances, however, where fairness may require that an unsuccessful plaintiff pay the costs of a third party, such as where the main issue litigated was actually between the

plaintiff and the third party, where the third party was brought in by reason of an action or omission of the plaintiff, or where the third party proceedings followed inevitably upon the institution of the plaintiff's claim.

Where the plaintiff succeeds in a main action and the defendant succeeds in a counterclaim resulting in a balance owing to one of them, the court may make such order for costs as it feels is just.

Where the defendant pleads a defence of set off, and proves a set off in an amount equal to the plaintiff's claim, the defendant may be entitled to have the action dismissed with costs because the defence has been entirely successful.

6. Security for Costs

Rule 56.01 provides that a defendant may move for an order requiring the plaintiff to post security for costs. The court has discretion as to when to make such an order.

The rule indicates that such an order may be made in the following circumstances:

- where the plaintiff is ordinarily resident outside Manitoba;
- where the plaintiff has another proceeding for the same relief pending;
- where the plaintiff has failed to pay costs as ordered in the same or another proceeding;
- where the plaintiff is a corporation or a nominal plaintiff and there is good reason to believe that insufficient assets are available in Manitoba to pay costs; or
- where statute requires that security for costs be posted.

The fact that a person is outside Manitoba looking for work does not necessarily mean that the person is ordinarily resident outside Manitoba. See *Lacasse v. LeClaire*, 1987 CanLII 7032 (MBKB), (1987), 50 Man.R. (2d) 232 (K.B.). Where a plaintiff was a Manitoba resident when he commenced the action, but subsequently left the province to look for work while retaining substantial connections in Manitoba, it was found that such a plaintiff was not required to post security for costs.

The amount of security that the plaintiff will be required to post is discretionary. It is good practice to set out in the affidavit in support of the motion, a bill of costs outlining the steps believed to be required in the litigation and the costs and disbursements associated with those steps. Accordingly, there will be some evidence as to an appropriate amount.

The court may require the plaintiff to post security for costs for the entire proceeding. Alternatively, it may require the plaintiff to post security for only the initial steps in the

litigation, with the defendant having leave to move again for additional security in the event that the action proceeds further.

> If an order for security for costs is granted, the plaintiff may not take any steps in the proceeding until the security has been given. The order usually requires payment of money into counsel's firm trust account or into court. Other forms of security, such a bond, may also be acceptable to the court if a bonding company is prepared to provide a bond.

If the plaintiff fails to provide the security required, the defendant's remedy is a motion for an order dismissing the action.

7. Offers to Settle

The costs consequences of making and refusing offers to settle have already been discussed in this chapter.

The clear intention of Rule 49 is to encourage settlements whenever they are feasible and thus avoid unnecessary trials. Rule 49 is applicable to actions, applications, counterclaims, cross-claims and third party claims. It also applies to motions within an action.

Where an accepted offer does not provide for a disposition as to costs, Rule 49.07(5) indicates the costs to which the plaintiff is entitled.

The use of offers to settle is not a guarantee of additional "costs consequences." Ultimately, the awarding of costs remains within the discretion of the court.

It is always open to counsel to attend before the trial judge and make submissions on the issue of costs, even where offers to settle have been exchanged and Rule 49 seems to dictate certain costs consequences. For example, an offer to settle for an amount greater than the face amount of the claim but less than the total amount of the judgment triggered cost consequences in *Feniuk v. Chivers*, 1991 CanLII 12018 (MB KB), (1991), 79 Man. R. (2d) 4 (Man. K.B.).

On the other hand, an offer to settle for 100% of the amount of the claim was not considered to be a *bona fide* attempt to settle and therefore did not trigger cost consequences in *Data General (Canada) Limited v. Molnar Systems Group* (1989), 32 C.P.C. (2d) 33 (Ont. H.C.). See also the *Court of Appeal decision* at 1991 CanLII 7326 (ON CA).

G. CIVIL APPEALS TO THE COURT OF APPEAL

1. Introduction

This section of the materials will deal with appeals to the Court of Appeal of Manitoba from an order or judgment of a judge of the Court of King's Bench in civil matters.

In 2022, *The Court of Appeal Act*, CCSM, c. C240 (the "Act") was amended to provide that leave to appeal is required to appeal an interlocutory order of a judge of the Court of King's Bench, except in limited circumstances (s. 25.2(1)). A motion for leave to appeal must be made to a judge of the Court of Appeal in accordance with the Court of Appeal Rules. A specific test applies to determine whether leave should be granted. The leave requirements and test to be applied are set out in section 13 below dealing with motions.

Sections 2 to 12 deal with appeals to the Court of Appeal from a final judgment, or after leave to appeal is granted. While a specific test applies to a motion for leave to appeal, the test includes a consideration of the standard of review to be applied by the Court of Appeal which is set out below.

2. Should You Appeal?

Upon receiving an adverse judgment of the Court of King's Bench, you will need to give your client advice as to whether the judgment can be successfully appealed to the Court of Appeal. Appeals are costly and the advice should only be given after a careful consideration of the reasons for the decision and a determination as to whether they contain errors that are reviewable by the Court of Appeal and that affected the result. Critical to this determination is the nature of the error or errors and the standard of review that will be applied by the Court of Appeal.

It is important to recognize that an appeal is taken from the judgment, not the reasons for the judgment. An appellate court will review the reasons to determine whether they contain errors that may warrant reversal of the judgment, but it is the correctness of the judgment that is at issue. However, the reasons are of utmost importance, because they will be the focus of the appeal and the foundation on which the appellate court will determine whether the judgment was based on a reviewable error.

In the following sections, reference is made to a "trial judge" and appeals from a trial judgment, however the same rules apply to appeals from a final judgment or order given on an application, and the standards of review apply to all appeals.

a) Powers and Role of the Court of Appeal; Standard of Review

An appeal is not a retrial of a case. An analogy used by a judge of the Court of Appeal of Ontario is that an appeal is not a "rematch". You must assume that the matter has been fully played below. What you are doing is looking over the videotape to find out whether the referee made a mistake and, if so, whether the result was affected.

The role of an appellate court is not to reweigh the evidence or retry the case, or substitute its view as to what the evidence establishes or the conclusions of the trial judge, unless there was a clear error that caused the trial judge to reach the wrong result.

The Court of Appeal Act, R.S.M. 1987, c. C240, confers broad powers on the Court of Appeal, which are set out in sections 25 to 29. The court has all of the jurisdiction and power of the Court of King's Bench, as well as the power to:

- give any judgment which ought to have been pronounced;
- make any further or other order as is deemed just;
- draw inferences of fact not inconsistent with any finding of fact that is not set aside;
- receive further evidence on questions of fact;
- order a new trial on all, or one or more questions.

The Court of Appeal may exercise these powers even where the appeal is of only part of the judgment, or is in favour of parties who have not appealed.

However, *The Court of Appeal Act* does not address the manner in which the court's powers are to be exercised or the standard for determining whether or not a judgment should be set aside. (*(L.(H.) v. Canada (Attorney General),* 2005 SCC 25 (CanLII), [2005] 1 S.C.R. 401). Those principles have been established by the Supreme Court of Canada in numerous cases. The leading authority is *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 SCR 235.

It is essential to understand the standard of review that an appellate court will apply to each of the various issues which may arise on an appeal, as this will have a significant impact on the likely success of the appeal.

There are different standards of review that will apply to:

1) questions of law;
2) questions of fact, including findings of fact based on the credibility of witnesses and findings based on established facts;
3) inferences of fact; and
4) questions of mixed fact and law.

There are also specific rules for reviewing decisions based on the exercise of discretion, and for the review of the trial judge's assessment of damages.

b) Questions of Law

> On a pure question of law, the standard of review is correctness, and the appellate court is free to replace the opinion of the trial judge with its own. Appellate courts have a broad scope of review on matters of law.

There are two main reasons for applying a correctness standard. One is the principle of universality, which requires appellate courts to ensure that the same legal rules are applied to similar cases. The second reason is the recognized law-making role of appellate courts.

The primary role of trial courts is to resolve individual disputes based on the facts before them and settled law; the primary role of appellate courts is to delineate and refine the legal rules and ensure their universal application. (*Housen, supra*, paras. 8 – 9).

c) Findings of Fact

Findings of fact are given a high degree of deference by appellate courts. They are not to be reversed unless the trial judge made a "palpable and overriding error". (*Stein et al v. 'Kathy K' et al,* 1975 CanLII 146 (SCC), [1976] 2 SCR 802; *Housen, supra*; *Albo v. The Winnipeg Free Press et al.,* 2020 MBCA 50, para 19).

> "**Palpable**" means an error that is "plainly seen" or can be plainly identified in the judge's reasons.

Examples of "palpable" factual errors include: "findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence, and findings of fact drawn from primary facts that are the result of speculation rather than inference". (*Barcode Systems Inc. v. Symbol Technologies Canada Inc.*, 2008 MBCA 47 (CanLII), para. 2; *Knock v. Dumontier*, 2006 MBCA 99 (CanLII), paras. 22-24; *Waxman v. Waxman*, 2004 CanLII 39040 (ON CA), (2004) 186 O.A.C. 201 (Ont. C.A.), para. 296).

> "**Overriding**" means an error that that would affect or is determinative of the outcome of the case.

A palpable and overriding error is "an obvious error that can be plainly identified in a judge's reasons that is determinative of the outcome of the case" (*Albo, supra*, at para 19). It is not sufficient to find that the judge made an error; the finding must be clearly wrong and must affect the result. (see also *L.(H.) v. Canada (Attorney General),* 2005 SCC 25 (S.C.C.), at paras 55-57; *Benhaim v. St-Germain*, 2016 SCC 48 (S.C.C.), at paras 38-39; *Salomon v. Matte-Thompson*, 2019 SCC 14 (S.C.C.), at para 33).

There are various policy reasons for giving a high level of deference to findings of fact made by the trial judge. The major role of trial judges is to determine the facts. Trial judges are exposed to all of the evidence, they are in a privileged position to hear the testimony and assess the credibility of witnesses, and they have the expertise to weigh the evidence and make factual findings.

Deference also serves to limit the number and length of appeals, and promote the autonomy and integrity of the proceedings in the lower court.

i. Findings of Fact based on Credibility

Appellate courts have a very limited jurisdiction to interfere with credibility findings, as the trial judge has the advantage of seeing and hearing the witnesses, and assessing their demeanor. Appellate courts are reluctant to interfere with credibility findings and may only overturn findings of fact based on credibility if there has been a palpable and overriding error which affected the trial judge's assessment of the evidence.

This principle of high deference can only be respected if the reasons of the trial judge reflect a proper analysis and weighing of the evidence, and state a rational basis for the conclusion reached. The trial judge must assess the overall credibility of the witness to determine whether the witness' evidence is consistent with the reasonable probabilities raised by all of the evidence.

An appellate court must be satisfied that the trial judge's finding of credibility is based on all the elements by which it can be tested, and not one to the exclusion of others. There must be more than a bald recitation of the evidence followed by a conclusion that the trial judge believes the witness, or prefers one witness over another. The reasons must be sufficiently clear for the court of appeal to assess their worth from a legal point of view, and if they are not clear or not valid, the court must intervene and form its own opinion on the evidence.

(*Permaform Plastics Ltd. v. London & Midland General Insurance Co*., 1996 CanLII 17951 (MB CA), (1996), 110 Man.R. (2d) 260 (Man. C.A.); *Hebert v. Comstock Canada & Lundrigans Ltd*., 1997 CanLII 22749 (MB CA), (1997), 113 Man.R. (2d) 308 (Man. C.A.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.)).

ii. Inferences of Fact

Findings of fact based on inferences from established facts are also reviewed on the standard of palpable and overriding error, but the role of the appellate court is not to determine whether the inference can reasonably be supported by the findings of fact or to second-guess the weight assigned to the evidence. Rather, the appellate court is to determine whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts.

An appellate court will only interfere where there is a palpable and overriding error with respect to the underlying facts on which the inference is based, or where the inference drawing process itself is palpably in error. (*Housen, supra*).

d) Mixed Fact and Law

Questions of mixed fact and law involve applying a legal standard to a set of facts. Factual findings involve making a conclusion of fact based on a set of facts. Both may involve drawing inferences, but the difference is whether the inference is legal or factual. Where the question is of mixed fact and law, the appropriate standard of review must be determined, which is often difficult.

The standard of palpable and overriding error applies to questions of mixed fact and law only where they are inextricably intertwined. If the question of law can be "extricated" from the factual matters, then it can be treated as a question of law and evaluated on the standard of correctness.

An error of law may relate to a principle of law, mischaracterization of a legal standard or the legal test to be applied. For example, if the trial judge finds that the correct legal test requires the consideration of four factors, but only three are considered, then the trial judge has in effect applied the wrong legal test and made an error of law. In a negligence case where the trial judge must apply a legal standard to a set of facts, if an error can be attributed to a failure to apply the correct standard or consider a required element of the legal test, then such an error will be reviewed on a standard of correctness.

Where the trial judge has considered all the evidence the law requires and comes to the wrong conclusion, or if the question of law cannot be separated because the factual determinations and law are inextricably intertwined, then the question is one of mixed fact and law and is reviewed on the standard of palpable and overriding error.

For example, contractual interpretation is generally a question of mixed fact and law reviewable on the deferential standard of palpable and overriding error. Two recognized exceptions to this are (1) where there is a readily extricable question of law, and (2) the interpretation of a standard form contract where there is no factual matrix specific to the parties.

(*Housen, supra; King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80 (Man. C.A.); *Matic v. Waldner,* 2016 MBCA 60 (Man. C.A.); *Albo v. The Winnipeg Free Press* et al., 2020 MBCA 50 (Man. C.A.)).

e) Discretionary Decisions

> The standard of review of discretionary decisions is very high. Appellate courts are very reluctant to interfere with the exercise of a trial judge's discretion, as the trial judge is in the best position to weigh the equities of the case.

Appellate courts will not intervene merely because they think the judge reached a wrong result, as discretionary matters rarely involve a right or wrong answer. If the trial judge proceeds on proper principles and makes a decision judicially in the exercise of their discretion, the decision will be upheld. For example, if the trial judge makes a judgment that a burden of proof has been met based on all the relevant facts and applicable law, an appellate court will not interfere.

However, there are cases where justice demands that the exercise of discretion be reviewed. If the trial judge misdirected themselves, took into consideration irrelevant factors or failed to consider the relevant factors, or if the decision is so clearly wrong as to amount an injustice or a truly unjust result, an appellate court will be justified in intervening.

(*Elsom v. Elsom*, 1989 CanLII 100 (SCC), [1989] 1 SCR 1367; *Towers Ltd. v. Quinton's Cleaners Ltd.,* 2009 MBCA 81 (Man. C.A.); *Homestead Properties (Canada) Ltd. v. Sekhri*, 2007 MBCA 61 (Man. C.A.)).

f) Damages

> The assessment of damages is a matter within the special expertise and competence of the trial judge. An appellate court is not to substitute its own view of the evidence simply because it would have reached a different conclusion.

An appellate court will intervene where there is no evidence upon which the trial judge could have reached the conclusion, if the trial judge proceeded on a mistaken or wrong principle, took into account an irrelevant factor or failed to consider the relevant factors, or if the amount awarded is so inordinately low or high that it must be considered an erroneous estimate of the damages (*Woelk v. Halvorson*, 1980 CanLII 17 (SCC), [1980] 2 SCR 430; *Lumsden v. Manitoba*, 2009 MBCA 18 (Man. C.A.), para. 72).

3. Review of Reasons

In light of the principles of appellate review set out above, the reasons for judgment must be reviewed with a critical eye to determine whether there are reviewable errors that affected the result. The decision to appeal must be an informed one based upon the evidence and the law, and the likelihood of success, not an immediate reaction to an unfavourable decision.

When reviewing the reasons for judgment, you should consider the following:

- Did the trial judge make an error of law and did that error affect the result? If the error of law is part of a question of mixed fact and law, can the legal error be separated from the factual issues? As the Court of Appeal will review errors of law on a correctness standard, a clear error of law will have the best chance of a successful appeal.

  For example, did the trial judge incorrectly interpret a statutory provision that was central to the case? Did the trial judge identify the correct legal test or principles, or the correct legal standard to be applied to the facts? Did the trial judge actually consider and apply all of the elements of the legal test or standard?

- What are the central factual findings on which the decision is based? Is there evidence to support the findings? Did the trial judge consider all of the relevant evidence, or did they ignore or misconstrue material evidence bearing on the issue?

- Are material findings of fact based on the credibility of witnesses? Did the trial judge articulate a proper analysis and rational basis for the credibility findings, based on the overall credibility of the witness and all of the evidence?

- Did the trial judge properly draw inferences from established facts? Did the trial judge misconstrue or fail to consider relevant underlying facts on which the inference is based? Is the inference one that can reasonably be made from the underlying facts?

- Is the decision based on the exercise of the trial judge's discretion? Did the trial judge consider all of the relevant facts and applicable law on which the exercise of discretion must be based? Is the decision so clearly wrong that it amounts to a truly unjust result?

- Is the trial judge's assessment of damages based on the proper legal principles and all of the relevant evidence, or did the trial judge proceed on a mistaken principle, or base the decision on irrelevant factors or by failing to consider the relevant factors? Is the award of damages inordinately low or high?

- Did the trial judge fail to address any issues raised at trial?

- Did any errors of law or fact individually or cumulatively affect the result? In some cases, a series of errors may be found to have had a material affect on the conclusions reached by the trial judge.

Even if you determine that the reasons give rise to good grounds of appeal, before making a final decision, you should consider the negative factors of an appeal, including:

- Legal fees beyond the tariff costs that would be awarded to your client if successful on the appeal, and the costs your client would be required to pay to the respondent if not successful.
- The possibility of a cross-appeal on a favourable determination.
- The implications and cost of delay to your client from the appeal.

Finally, depending on the nature of the case and issues on the appeal, you may want to consider whether a negotiated settlement may be possible, as the respondent has the risk that the judgment may be set aside and will be required to incur significant legal fees.

4. Time for Commencement of the Appeal

a) General Rule

Assuming that your opinion to your client is that there are good grounds for an appeal, you must bear in mind the following rules with respect to the time within which you must commence your appeal.

Rule 11(1)(a) of the Court of Appeal Rules provides that the time for filing and serving a notice of appeal is within thirty days after filing the judgment appealed from, where filing of the judgment is required. Rule 11(1)(c) provides that in any other case, the time for filing and serving a notice of appeal is within thirty days after the pronouncement of the judgment being appealed.

Where an appeal or a right to an appeal comes under any other Act, it shall be commenced within the time prescribed by that Act (Rule 11(2)).

Where leave to appeal is required and has been granted, the notice of appeal shall be filed and served within 30 days of pronouncement of the order granting leave to appeal (Rule 11 (2.1)).

The notice of appeal must be filed with the registrar of the Court of Appeal and served on all parties within the time prescribed (Rules 10, 11(1)).

You should be aware that Rule 14 provides that a respondent to the appeal may file a notice of cross-appeal within 15 days after being served with the appellant's notice of appeal. Rule 13 provides for appeals where the defendant has filed a third-party claim.

b) Extensions of Time to File a Notice of Appeal

Rule 42 deals with extensions of time and provides that the court or a judge may, where an application is made, extend or abridge the time prescribed by the rules for doing any act or taking any proceeding, whether the application is made before or after the expiration of the time prescribed.

The criteria to be applied to determine whether to extend the time to file a notice of appeal are whether:

1) there was a continuous intention to appeal within the time period when the appeal should have been commenced;
2) there is a reasonable explanation for the delay;
3) there are arguable grounds of appeal;
4) any prejudice suffered by the other party can be addressed; and
5) it is right and just in all of the circumstances that the time for commencing the appeal be extended.

(*Samborski Environmental Ltd. v. The Government of Manitoba* et al., 2020 MBCA 63, para. 36 (Man. C.A.); see also: *Hunter v. Hunter,* 2000 MBCA 134 (Man. C.A.) [In Chambers], paras. 6-7; *Boryskiewich v. Stuart*, 2014 MBCA 77 (Man. C.A.), paras. 6-9; *Singh v. Pierpont*, 2015 MBCA 18 (Man. C.A.), paras. 37, 40-41; *Winnipeg Condominium Corporation 479 v. 520 Portage Avenue Ltd. et al.,* 2019 MBCA 83 (Man. C.A.)).

In determining whether there are arguable grounds of appeal, the court will give some preliminary consideration to the grounds and standard of review to determine whether the appeal could succeed and change the result, but the full merits of the case should not be considered. An arguable ground is one that, if established, appears to have sufficient substance to be able to convince a panel of the court to allow the appeal (*Samborski Environmental Ltd., supra*; *C.(S.) v. C. (A.S.),* 2011 MBCA 70 (Man. C.A.) [In Chambers], para. 8).

In considering any prejudice, the relevant time period is from the date the appeal period expired to the date of the application. Any issues of prejudice must relate to that delay.

As to whether it is right and just in all of the circumstances to extend the time for filing an appeal, in *Delichte v. Rogers*, 2018 MBCA 79 (Man.C.A.), Mainella, J.A. stated that:

> *The factors are not intended to be a rigid straightjacket as to the exercise of judicial discretion. Regardless of whether or not all four criteria are met, the Court may still grant or refuse the extension of time if it is right and just in all of the circumstances to do so (see Hunter at paras 6, 11; C. (S.) v. C. (A.S.), 2011 MBCA 70 (Man. C.A. (In Chambers)) at paras 4-5; and Boryskiewich v. Stuart, 2014 MBCA 77 (Man. C.A.) at para 6). I agree with the comments of MacPherson JA in Monteith*

v. Monteith, 2010 ONCA 78 (Ont. C.A. [In Chambers]), that this last consideration is an "umbrella" (at para 20); the Court must look broadly at the relevant circumstances and do what justice requires.

c) Procedure to seek Extension

An application for extension of time to file a notice of appeal is brought by a notice of motion returnable before a single judge of the Court of Appeal in chambers. In support of the notice of motion an affidavit must be filed which sets out the basis upon which an extension is requested. The affidavit should be from the client/party and should explain the delay and confirm that the client formed the intention to appeal before the appeal period expired.

To establish that there is an arguable case, a concise written brief should be filed setting out the grounds for the appeal and the merits of the appeal.

5. Notice of Appeal

a) Form

Court of Appeal Rules 2 to 8 relate to the form and content of notices of appeal.

The style of cause is the same as in the Court of King's Bench but "plaintiff" and "defendant" (or applicant or respondent) are shown in brackets and beside that "appellant" or "respondent" is added. For example, "(plaintiff) appellant" (see Rule 7).

Rule 4 provides that a notice of appeal shall be in Form 1 of Schedule A, and lists the information that must be set out in the notice of appeal, including:

- the particulars of the judgment or order appealed from, including:
  - the name of the court appealed from,
  - the name of the judge of the court appealed from,
  - the date the judgment was pronounced and filed, and
  - the orders made,
- the grounds to be argued,
- the relief or disposition sought and whether that requires overturning or varying of all or part of the judgment or order.

The notice of appeal must also state whether or not oral evidence was adduced in the trial or other proceeding, and if a transcript of evidence is required, and if so, whether it has been ordered.

The notice of appeal must be dated and signed by counsel for the appellant.

Rule 112 requires that the notice of appeal must attach the notice of intention to exercise language rights in Form 1 of Schedule C.

The rules relating to a notice of appeal apply to a notice of cross-appeal with necessary modifications, except that the notice shall specify the date on which the notice of appeal was served on the respondent (Rule 14).

b) Parties

If the grounds of appeal include a constitutional issue, then you are required, pursuant to *The Constitutional Questions Act*, C.C.S.M. c. C180, to serve both the Attorney General of Canada and of Manitoba with notice under that Act. The notice under that Act has its own specific requirements (see *The Constitutional Questions Act*, s. 7).

Rule 10 requires that all parties directly affected by the appeal must be served with the notice of appeal, but the court may order service on any parties not served or any non-parties if their interests may be affected. The better practice is to serve the notice of appeal on all parties to the action or proceeding at the outset.

If your client is not a party to the appeal, but has an interest in the appeal, Rule 46.1 provides that a motion may be made to a judge for leave to intervene. Further, if your client's legal rights or commercial interests may be affected by an appeal, a motion may be made to be added as a party. (See *I. Peters Transport Ltd. v. Man. Motor Transport Board*, 1981 CanLII 2702 (MB CA), (1981), 17 Man. R. (2d) 359 (C.A.)).

c) Grounds

The rules require that the notice of appeal set out the grounds to be argued. As the notice of appeal must be filed and served within the time limit, and since it will be filed before you have the transcript of evidence, it is important to ensure that you have covered all of the potential grounds of appeal.

The notice of appeal is similar to a pleading and is typically framed in general language to be comprehensive. You can later decide to abandon a ground of appeal, but if you have not included an important ground, the respondent may challenge your ability to raise it later. Having said that, the court will liberally construe the grounds in the notice of appeal.

> While the main grounds of appeal should be included and cover the primary conclusions or orders being appealed, you should still carefully consider the grounds to raise and include only those that have merit and are proper grounds on which an appeal can be made.

You should also make every attempt to be as clear and concise as possible, and avoid duplication. You will typically want to start with the strongest grounds of appeal.

In most appeals, there will usually be a limited number of grounds of sufficient merit to warrant consideration by the court. In "Appellate Advocacy" in *Isaac Pitblado Lectures on Continuing Legal Education* (March, 1981), A. Kerr Twaddle, K.C. (prior to his appointment to the bench), made the following comments about the points to argue on an appeal, and while they relate more to the arguments to be raised in the factum and at the hearing, they have some application to the notice of appeal as well:

> *In any judgment you are liable to find ten or fifteen potential points to argue on appeal. But I suggest that you can rarely find more than one or two which have any substantial merit. If you are not going to convince the Court on the point which has some merit, you are not likely to convince the Court on all the subsidiary points. You are going to waste the Court's time. Worse than that, if you are raising points which do not appeal to the Court, you will annoy the judges. They are human. If they keep having to listen to points with little merit, they are going to get irritated, and if they do, is it likely that they will become convinced by the good argument you make? No. They will see it as being as frivolous as the other arguments they have discarded (at p. 36).*

As indicated above, you need to ensure that you have raised grounds in the notice of appeal covering all of the main findings of the trial judge that were material to the result and that you want to appeal. This will typically include more than one or two grounds, but raising ten grounds would be very excessive.

6. Material Before the Court

The material that is to be before the court for the appeal includes a transcript of the oral evidence given at the trial or proceeding under appeal, an appeal book containing the record from the King's Bench proceeding (pleadings, exhibits at trial or affidavit evidence, court judgment and reasons, and notice of appeal), as well as the factums and casebooks of the parties.

The Court of Appeal Rules set out the contents that are to be included in the appeal book and factums. The court has also issued Practice Guidelines and Notices that address authorities and casebooks, as well as requirements for materials prepared by counsel for the court.

a) General Requirements for Materials

The requirements for the preparation of materials are important, and the registrar will reject any materials that do not comply. The specific requirements for appeal books, factums and case books are set out below. The other general requirements include the following:

- All documents (notice of appeal, appeal book index, factum, etc.), must be typed in font size 14, printed on 8 ½" x 11" (21.6 cm x 27.9 cm) white paper, with margins no less than 1" (2.54 cm), using the right-hand side of the page only;
- All documents must be double spaced with a maximum of 26 lines per page. Quotations from authorities shall be indented and single-spaced, and thus may increase the allowable number of lines per page;
- Documents are to be colour-coded with backers as follows:
    - The appeal book - grey covers;
    - The appellant's factum - blue covers;
    - The respondents' factum - beige covers;
    - The joint book of authorities - green covers; and
    - Any other materials, including the casebook - white or off-white covers.

b) Transcript of Evidence

The appellant has the responsibility of ordering the transcript of the oral evidence given at trial for the hearing of the appeal. Rules 16 to 19 set out the procedure to be followed. Although the rules refer to a transcript of the oral evidence, the transcript is to include the entire proceeding, including the opening and closing arguments of counsel.

The appellant must provide, with the notice of appeal, satisfactory confirmation that a transcript of evidence has been ordered for the court, unless the registrar or a judge order otherwise. The court has issued a Notice designating the reporting service that must be used.

Where a paper transcript is ordered, three copies must be ordered for the court. Where an electronic transcript is ordered, you will still have to provide one paper copy for the court. You will also need one copy of the transcript for yourself and one for the respondent. The respondent will normally be sent a copy from the transcription service and will be billed directly. You are responsible for the balance of the costs.

Rule 17(1) provides that before transcripts are ordered the parties are to attempt to restrict the evidence to be transcribed to that which is relevant to the appeal. A party may also apply to a judge for an order (Rule 17(2)). In one case, the Court of Appeal directed that daily transcripts prepared during the trial could be used as the official transcript, over the objection of court reporters who argued they were entitled to the full fees of a new transcript. (See *Robertshaw v. Grimshaw*, 1988 CanLII 7216 (MB CA), (1988), 53 Man. R. (2d) 285 (C.A.)).

Despite Rule 17, in most cases the entire transcript of evidence will be required, particularly if all orders from the court below are being appealed. Unless a witness testifies only on one issue that is not relevant to the appeal, it is typically very difficult to isolate and separate the evidence into discrete issues, and it may detract from a proper assessment of the witness' evidence as a whole.

c) Appeal Books

The appellant also has the responsibility to prepare the appeal book. Rules 22 to 25 set out the time within which the appeal book must be filed and the contents of an appeal book.

Three copies of the appeal book must be filed within forty-five days after filing the transcript of evidence (Rule 22(1)), or where no transcript of evidence is required, within forty-five days after filing the notice of appeal (Rule 28(1)). The appeal book must be served on the other parties to the appeal within five days after filing.

The appeal book is a compilation of the record from the court below, the judgment and notice of appeal. The documents should be separated with tabs and consecutive page numbers are to be added in the top right-hand corner. Rule 23(1) provides that the appeal book must contain, in the following order:

(a) an index setting out and describing individually all documents and exhibits constituting the appeal book and including all exhibits to affidavits (also separately described), listing the tab and page numbers of the appeal book;

(b) all pleadings, affidavits or orders filed in the court appealed from and constituting the record in the proceeding under appeal;

(c) a list in numerical order of all exhibits filed in the proceedings under appeal;

(d) all exhibits included by the appellant, namely any exhibits or part of exhibits, arranged in numerical order, which in the appellant's opinion are relevant to the appeal;

(e) the formal judgment or order appealed from;

(f) the notice of appeal;

(g) any notice of cross-appeal;

(h) the reasons for judgment of the judge or other authority appealed from, whether or not they are included in the transcript of evidence.

Ensure that your index is complete and properly describes all documents, so that the judges can readily identify and locate the documents. As stipulated in Rule 23, the index must individually list the documents and exhibits constituting the appeal book, with the page numbers that are to be consecutively inserted on each page. Do not just list the affidavit of a party, but also list and describe each of the exhibits which are attached to it with the exhibit number.

In the appeal book, a separate tab should be included for each document, including each trial exhibit and exhibit to an affidavit, as this will make it much easier for the judges and for you to quickly locate the documents.

Rule 24 provides that the parties shall attempt to reduce the bulk of the appeal book by excluding material that is not relevant to the appeal, and if the parties disagree on the content, a judge may give directions.

You should include only the exhibits that are relevant to the appeal, although in many cases all or most of the exhibits will be necessary. It is important to note that you are responsible for providing the court with the complete record of all relevant documents, not just the ones that you want to rely upon. They must include all documents that are relevant to the issues on the appeal.

Where a number of affidavits are part of the record and many of them contain one or more of the same exhibits, you should avoid duplication and include the exhibits once, although in general this is advisable only when the exhibits are lengthy. You want to make it easy for the judges to review the affidavits and the exhibits, and avoid requiring them to search for the applicable document. Therefore, if you exclude a duplicate copy or copies of an exhibit from one or more affidavits, you should still list the exhibit in the index to the appeal book and indicate where it can be found, and also include a tab in the appeal book where the exhibit would appear with a sheet indicating where it can be located.

The respondent has the right to file a respondent's appeal book containing exhibits which in the respondent's opinion are relevant to the appeal but which have not been included in the appellant's appeal book. No time is set out, but this should be done shortly after receiving the appellant's appeal book and before the preparation of factums.

d) Factum

Rules 26 to 29 set out the time within which the factums must be filed and their content.

The appellant is required to file three copies of a factum within 45 days after depositing the transcript of evidence, and is to serve the factum on each other party within five days after filing (Rule 26). The respondent is to file three copies of its factum within thirty days after service of the appellant's factum, and serve the other parties within five days after filing (Rule 27).

If no transcript of evidence is required, Rule 28(1) provides that the appellant's factum and the appeal book are to be filed and served within 45 days after the filing of the notice of appeal, and the respondent's factum is to be filed and served within 30 days after service of the appellant's factum.

The time period to file a factum or appeal book, may be extended (a) by the registrar, but only if a written request to do so is made before the expiry of the applicable time

period and with the consent of all other parties; or (b) by a motion to a judge in chambers (Rule 28.1).

If the respondent has filed a cross-appeal, the factum filed on the main appeal may include the issues and argument raised on the cross-appeal, but these should be set out separately with the headings "Issues on the Cross-Appeal" and "Argument on the Cross-Appeal". The introduction should also refer separately to the fact that a cross-appeal has been filed and give an overview of it. Any additional facts required for the cross-appeal can be included in the statement of facts or set out separately. The appellant will file a separate factum responding to the cross-appeal.

The required contents of the factums of the appellant and the respondent are set out in Rule 29(1). They are to include:

Part 1 **Introduction** setting out a concise overview of explanation as to what is involved in the appeal.

Part 2 Statement setting out a concise **summary of the facts** material to the issues in the appeal.

Part 3 **List of issues**:

a) The appellant's factum is to set out a concise statement identifying the issues in the appeal and the appellant's position on each issue. The appellant must also state the applicable standard of review on each issue. The basis for the court's jurisdiction to determine the appeal must also be included.

b) A respondent's factum is to include a concise statement indicating agreement or disagreement with the issues identified by the appellant, the respondent's position on the issues in disagreement, and identifying alternative issues. The respondent must also state the applicable standard of review on each issue, and the basis for the court's jurisdiction.

Part 4 **Argument**. The factum must include a concise statement of the argument, with appropriate headings, setting out the law and facts to be discussed, with reference to the page and line number in the evidence or appeal book, and the tab number and page in the case book for the authorities relied upon.

Where a statute, regulation, rule, ordinance or by-law is cited or relied on in the argument, the portions that may be relevant to the decision of the appeal shall be included in the factum or case book. If a statute, regulation, rule, ordinance or by-law contained in a factum or case book is required by law to be printed and published in English and French, a bilingual version must be included in the factum or case book or deposited with the court.

Both the appellant and respondent are to give an estimate of the amount of the time required for argument.

The name of counsel who has prepared the factum shall be typed at the end, and the factum must be signed by counsel.

It is customary and helpful to include at the very end as Part 6, a list of the authorities referred to in the factum and included in the case book.

The Court of Appeal Practice Guidelines contain additional requirements for factums. The pages and paragraphs must be numbered sequentially. In the section summarizing the facts, reference should be made to the volume, page and line number of the transcript of evidence, and the tab and page number of exhibits and affidavits in the appeal book.

Factums should be no more than 30 pages. The court has the right to reject factums of excessive length and any factum exceeding 30 pages is subject to review and possible rejection. This is also set out in Rule 29(3), which provides that a judge, without a hearing, may reject a factum on grounds of excessive length and give directions on the maximum length, in which case the factum is to be redone and refiled within the next 10 days.

The court will usually only allow a factum to exceed 30 pages in complex appeals with numerous issues. In such cases, a letter should be sent to the registrar at the time of filing the factum explaining why it is not possible to comply with the page limit.

> The Court of Appeal also issued a *Notice* to the profession advising that effective April 1, 2007, factums will not be accepted for filing if they do not state the standard of review on each issue under appeal or the basis of the court's jurisdiction.

In most appeals from the Court of King's Bench, the court's jurisdiction to determine the appeal will be based on the provisions of section 89 of *The Court of King's Bench Act*, C.C.S.M. C280, and sections 25(1) and 26 of *The Court of Appeal Act*, C.C.S.M. C240. A statement with the applicable wording should be included at the end of the list of issues.

The preparation and drafting of the content of factums is discussed in section 7 below.

e) Extension of Time to File Appeal Book or Factums

Rule 28.1 provides that the time period within which to file an appeal book, appellant's factum or respondent's factum, may be extended (a) by the registrar, but only if a written request is made before the expiry of the applicable time period, and with the consent of all other parties; or (b) by a judge in chambers, on motion.

f) Casebooks

The parties are required to file three copies of a case book, which may be a joint case book (Rule 31(1)). The appellant and the respondent must each file a case book within 14 days after they file their factum, and serve a copy on the other party. If the parties intend to file a joint case book, it must be filed within 14 days after the respondent's factum is filed (Rule 31(1.1)).

The Practice Guidelines require that the case book include an index of the authorities included therein, and that each case be separated by a tab (numbered or lettered).

For some important authorities, you may want to include the entire case, however where a case is lengthy and/or only a portion of the case is relevant, only excerpts of the case should be included. The Practice Guidelines provide that a case book shall contain those passages of decided case that are relevant to the issues on the appeal, together with the headnote and such other portions of the case that put the passages relied on in the proper context. The specific passages relied on should be highlighted or the passage marked along the right margin of the text.

The respondent's case book should contain only those additional authorities or excerpts of authorities not contained in the appellant's case book.

The Court of Appeal issued a *Notice* on March 30, 2009 advising that each judge is supplied with a Judges' Book of Authorities containing authorities frequently relied upon. The list of authorities is attached to the Notice and may be updated from time to time. In preparing case books, counsel need not include authorities contained in the Judges' Book. However, extracts from those authorities which counsel intend to refer to the court should be included in the factum or case book.

7. Preparation and Content of the Factum

The preparation of the factum in civil appeals is probably the most important step in the appeal itself. It creates the first impression the judges will have of the case and of counsel.

The factum is the central document at every stage of the appeal:

- it is the primary source of the information about the appeal that will be reviewed by the judges before the oral argument;
- during the hearing it will be the roadmap for counsel's argument; and
- after the hearing the judges will have the factum for reference and it will remind them of, and supplement the points made in oral argument.

It is therefore very important to devote a considerable amount of time and thought in preparing the factum. You should not assume that you can make up for deficiencies in the factum in the oral argument, and by that time, the judges will already have formed an impression of the strength of your case.

a) Preparing to Write the Factum

Before writing the factum, there are a number of steps that should be taken.

i. Review Judgment and Draft Issues

First, you should review the trial judgment again carefully, identifying all of the legal and factual errors, and prepare a summary.

Next, you should draft the broad issues to be argued, and group the errors within those issues. The issues should be narrowed to only a few points with the strongest grounds of appeal. You should carefully draft the wording of each issue to be as precise as possible to convey what is intended.

The respondent will want to consider whether the appellant has properly framed the issues and may want to revise the wording of the issues and/or identify other issues.

ii. Identify and Summarize Relevant Evidence

You will need to identify the evidence that is relevant to the issues on the appeal. You should then prepare a summary of the evidence of the witnesses from the transcript or any affidavits, as well as exhibits, noting the page and line number of the transcript and the applicable tab and page number in the appeal book.

iii. Review and Select Authorities

You should review all of the legal authorities that are referred to in the judgment and that were relied upon by all parties. You may need to conduct further research depending on the findings made by the trial judge, and you will need to review the law relating to the applicable standard of review on the various issues.

Before you start writing, it is important to carefully select the authorities you want to rely upon, including statutory provisions and case law. You should refer to only the leading and latest cases from the highest authority available (i.e., Supreme Court of Canada or Court of Appeal), including any relevant decisions of the Manitoba Court of Appeal.

You should also consider including excerpts from textbooks or articles from notable authors, as these materials can be helpful to support the legal argument and they are often relied upon by appellate courts.

It is generally not necessary to include more than one or two cases for any proposition of law, and you should not include cases that only marginally or peripherally relevant.

The Court of Appeal issued a Notice on January 25, 2006 which provides that when referring to decisions in factums and motion briefs, counsel shall use the neutral citation, if available. The neutral citation contains the year, tribunal identification and ordinal number, for example, 2006 MBCA 102.

For Supreme Court of Canada decisions, the neutral citation shall be included with a parallel citation to the official Supreme Court Reports [S.C.R.] citation (i.e., *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 (CanLII), [2003] 1 SCR 6).

For other reported decisions, a parallel citation from a reported series is to be used with the neutral citation (i.e., *Wallace (Rural Municipality) v. Mead Petroleums & Farms Ltd.* (2005), 192 Man.R. (2d) 11, 2005 MBCA 3). For unreported decisions that have a neutral citation, the neutral citation shall be used.

It is preferable to list the statutory authorities relied upon first, followed by the cases. It is also helpful to group the cases as far as possible by topic or issue with headings.

iv. Prepare Outline of Factum

You should then prepare an outline of the factum, focusing first on the strongest points at issue and any important errors of law.

> Keep in mind that the factum cannot exceed 30 pages (in most cases) and that it must be typed in 14 point font. It is often challenging to meet the page limit and you will want to ensure that you have allowed sufficient space to adequately address the most important issues.

In drafting the factum, you should be clear, persuasive and concise, avoiding duplication or repetitive statements and arguments. You also need to carefully proofread the factum to ensure that all citations and evidentiary references are accurate, and that there are no typographical or grammatical errors.

b) Introduction

Rule 29(1) provides that Part 1 of the factum is to be an introduction setting out a concise overview or explanation as to what is involved in the appeal. As the introduction will be read first and will set the stage for the argument to follow, this is an opportunity to provide a persuasive statement of the strongest ground or grounds for the appeal and the reason the judgment is incorrect and should be set aside.

c) Statement of Facts

The statement of facts is to contain a concise summary of the facts that are material to the appeal. It is essential that you be meticulous in accurately and fairly setting out the facts. If the facts are misstated or misrepresented, this will not only affect the case, but will also harm your reputation as counsel. You must include all facts that are relevant, not just the ones that favour your case.

It is usually preferable to set out the facts in chronological order, starting with the facts relating to the case and then any relevant facts relating to the proceedings in the Court of King's Bench. After each paragraph you should include the specific reference in the materials for the fact, including the page and line number in the transcript, and the tab and page number in the appeal book.

Unless you are seeking to set aside a finding of fact, the statement of facts should be based on either facts that are not in dispute, or the findings of fact made by the trial judge, with reference to the supporting evidence. If evidence is disputed or you are challenging a finding of fact, you should provide both versions. However, keep in mind that the Court of Appeal will only interfere with factual findings if a palpable and overriding error was made, and you will therefore want to consider whether it is important to reference contrary evidence.

A small but important point is that you should refer to the parties as they were referred to in the court below, i.e., plaintiff and defendant, not appellant and respondent. You may wish to go further and refer to them by name or by a designation, i.e., the tenant or the landlord.

As Mr. Justice Huband recommended in the "Appellate Advocacy", Continuing Legal Education Seminar of November, 1991, except in those cases where there is absolutely no dispute as to facts, counsel for the respondent should also prepare a separate factual resume not only for their own benefit but also for that of the court.

In most cases, the respondent will want to frame the wording and/or refer to facts of importance to their position, but if the facts as set out by the appellant are entirely fair and accurate, then the respondent may simply state that no issue is taken with them.

d) List of Issues

The appellant's factum is to include a concise statement of the issues in the appeal, followed by the appellant's position on each issue, and then the applicable standard of review.

You will have already prepared the precise wording of the issues. The issues should be limited to only the strongest grounds, and generally they will relate to the main findings or conclusions reached by the trial judge. In some cases, there may be more than one ground or sub-issues on a material finding, which can be included in the list of issues or developed in the argument.

> Your position on each issue should be brief and succinct, usually only one or two sentences. Beneath your position you will include the standard of review, which can be shown as "Standard of Review: Correctness" or "Palpable and Overriding Error". For some issues, both standards may apply and they can both be stated, although it is generally preferable to show the error of law separately as this will be the stronger ground or have the greater chance of success on the appeal.

The respondent is to include a concise statement indicating agreement or disagreement with the issues identified by the appellant along with the respondent's position on the issues which are not agreed, and identifying alternative issues and the respondent's position thereon. The respondent must also state the applicable standard of review and the court's jurisdiction.

The court's jurisdiction to determine the appeal is to be set out after the issues. Where the appeal is from the Court of King's Bench, the paragraph will read "The Court's jurisdiction to determine the appeal is based on the provisions of section 89 of *The Court of King's Bench Act*, C.C.S.M. C280, and sections 25(1) and 26 of *The Court of Appeal Act*, C.C.S.M. C240."

e) Argument

The argument should be clear, concise, well organized and persuasive. A well written argument can be very influential and enable the court to assess the overall strength of the case.

All of the important grounds should be adequately but succinctly covered in the argument. You should not leave strong points for oral argument, as you want the judges to appreciate the merits of the appeal in advance, be able to follow the written argument during oral argument, and have the written argument available to reference after the oral hearing to remind them of the arguments and assist in preparing the decision.

If the same legal principles apply to all or most of the issues on the appeal, you should set out a concise review of the law as it relates to the case and facts at the outset, followed by the argument on the specific issues. Otherwise, the relevant law should be set out at the beginning of the argument under the specific issue. You should assume that the appellate judges will have some knowledge of the law, unless it is a novel or obscure issue. You should also briefly refer to the standard of review and applicable authority, but keep in mind that the authorities will typically be well known to the court so any references should be limited.

Avoid citing too many authorities for the same point, and focus on the latest and highest level of court. If a passage in a case cited is particularly important or on point, it should be quoted in the factum, although lengthy excerpts should generally be avoided. Be sure to include the tab number in the case book as well as the page and paragraph numbers of the case.

> Your argument should then set out how the law applies to the facts. The law and facts need to be interwoven to show how one supports the other. You need to ensure that you clearly set out how the trial judge erred, and the findings or conclusions that ought to have been made.

As a respondent, you need not specifically refer to all of the points raised by the appellant if you are able to adequately do so in a general way. However, you must ensure that you address the main questions raised by the appellant's argument to clearly set out why the trial judgment is correct and should be upheld.

While not provided for in the rules, it is useful for both the appellant and the respondent to add a Part 5 at the end of the factum called "Order Sought." In that part, set out briefly the specific orders or nature of the relief you are seeking.

f) List of Authorities

A list of the authorities that are included in the casebook should be attached at the end of the factum (Part 6) showing the applicable the tab number.

Although not required, it is sometimes helpful to also include a column to the right of the citations showing the paragraph and page number in the factum where the authority is referenced.

g) New Points of Argument

> As a general rule, an appellant may not raise an issue that was not pleaded or was not argued in the court below. The burden on the party seeking to raise a new issue on appeal is a heavy one. The rationale is that it is not fair to raise a new argument in the factum or at the hearing of the appeal where there may have been evidence led at trial if the other side had known the matter was at issue.

It will only be in cases where all of the relevant facts are before the appellate court that the court will consider allowing a new issue to be raised, and the court will generally not allow a party to raise an issue that they deliberately chose not to pursue at trial unless the issue arises from a contrary ruling by the trial judge. In most cases, the court will only allow a new question of law for which no evidence or further evidence is required.

At the hearing of the appeal, Rule 30 provides that counsel may, with leave of the court, use arguments and raise points of law that are not set out in the factum. However, you should be aware that the court expects a party to include all relevant arguments in the factum and will not allow attempts to ambush the opponent. If you are intending to raise another point which is not in the factum, you should give your opponent notice and provide all authorities upon which you will be relying.

8. Settlement Conferences

On January 21, 2023, the Act was amended to add section 37.1, which provides that at the request of all parties to an appeal, the Chief Justice of Manitoba may appoint a judge to meet with the parties and attempt to settle all or some of the issues on appeal before the hearing of the appeal.

The procedure governing settlement conferences is set out in Rule 32.1.

9. Preparing for the Hearing

Unless there are urgent circumstances, the court will contact counsel to schedule a hearing date after the appellant's factum is filed. You will be asked for the length of time required for the hearing, but generally it will be based on the estimate that you provided in your factum.

Before the hearing, it is essential that you review and be fully familiar with the facts and evidence, the law, the judgment and the factums. You should tab and highlight the passages of the evidence and authorities to which you will be referring, and you may want to prepare a list of the key documents so that you can access them quickly. You should be well versed on the case law, including the facts and legal principles.

You will have spent a lot of time and careful thought in preparing your factum, and it should be used as the blueprint for your oral argument. Proper planning should begin with the factum and should focus on the strongest grounds. You should write out the oral argument you want to present. While some experienced counsel are able to work from point form notes, many still write out the precise wording and arguments they want to present.

You should not plan to read your factum verbatim, but it is acceptable to read selected portions which contain the specific wording of the point or legal proposition you want to make. Your oral argument should follow and both reference and supplement the factum. The judges will want to know where the argument is contained in the factum, and they may make a note of it so that they can go back and review it after the oral argument. If you rely on notes, you should be prepared to inform the court where the argument is found in the factum.

You will need to carefully plan your oral argument based on the time allotted to you. Not only do you want to ensure that you cover all of the important arguments, but the court will not look favourably on you if you exceed the time limit and they may cut you off entirely before you finish. You also need to be able to present your argument at an appropriate pace, allowing time for the judges to ask questions, make notes, and find any references you want them to review in the appeal book, transcript of evidence or case book.

You do not want to speed up the pace of your delivery, as this will seriously detract from your argument and may result in the judges being unable to follow or fully appreciate the points being made. It is helpful to read your oral argument aloud to ensure it can be effectively presented in the time you will have.

The structure of your oral argument should include a short opening statement summarizing the essence of the appeal in a way that will interest the court. You should fairly present the importance of the issues without overstating them. Next you should very briefly indicate the points to be argued with a short preview of the argument. At this point you will want to inform the court if any issues have been abandoned, and if the argument is being divided between two counsel, you should advise who will be arguing which points.

You should briefly review the facts of the case, but a more detailed reference to the evidence or documents may be more appropriate when addressing specific issues and errors of the trial judge. If there is a particularly key document or passage from the evidence, you will want to take the judges to it.

Usually, you will next want to review the law. You will need to set out the legal principles that apply to the facts and connect the case logically to the facts. You should plan to take the judges to passages in the cases that are particularly important and persuasive. Many judges will underline or mark the passage for future reference. If you simply mention the case and tab number, you cannot be certain that the judges will go back and read the passage. However, you should avoid reading lengthy passages and instead direct the judges to the paragraph numbers that they should read.

In referring to case law, provide the tab number in the case book, state the name of the case and court, the legal principle relied upon, a brief summary of the facts if relevant, the decision reached with reference to helpful passages, and explain how the case supports the point and result you want to achieve.

Finally, you should conclude with a very brief summary as to why the trial judge erred in a way that affected the result, as well as the relief that is requested.

With proper preparation, you will be able to answer any questions that may arise, particularly if they are raised out of the sequence of your presentation. You should also try to anticipate the questions that may be asked and consider how you will respond to them.

10. The Hearing

In Manitoba, the Court of Appeal usually sits in panels of three judges. Larger panels (of five or, very rarely, seven judges) may be used to determine important issues or to overrule a previous decision of the court.

There are many styles of oral argument that are effective, and for the most part, you should adopt the manner of presentation that works best for you. While some lawyers have the gift of making eloquent arguments with little reference to notes, many do not and rely more on the persuasive arguments they have prepared and their thorough knowledge of the law.

You will have prepared your oral argument in advance, but you should make sure the court knows where in the factum the argument is found. While you will follow your factum and the written submission you have prepared, you should try to speak directly to the judges to engage them and to observe how your arguments are being received. Be aware and make sure to allow the judges time to make notes or find a case or evidentiary reference.

You should be respectful but at the same time present a confident and persuasive argument, as concisely as possible. You should address the weaknesses of your case early on, and be prepared to explain why they are not material to the outcome.

Sometimes questions will be asked that may appear to be against your point, but you should not assume this is the case. The judge may be seeking clarification, or may want to know how you would address the contrary arguments. Such questions should be taken as an opportunity to persuade and change an initial negative impression. However, if your argument is not being accepted, don't repeat or belabor the point.

Appellate judges will often focus quickly on areas of concern to them and ask questions to clarify or have you elaborate on those points. These questions may arise before you have reached the part of your argument that deals with them, but you should always answer the question immediately and completely. Even if you intend to address the issue later, you should not defer answering the question, but instead should answer it at least briefly and indicate that you will be addressing it in more detail.

11. Certificate of Decision

Following the hearing, the court will deliver an oral or written decision setting out whether the appeal is allowed or dismissed, and if allowed how the judgment appealed from is varied. The court may also direct a re-trial of one or more issues.

Rule 40 relates to Certificates of Decision. A form of Certificate of Decision in Form 2 of Schedule A is prepared by counsel (usually the successful party), which is to be agreed upon by opposing counsel, and filed for signing by the registrar.

In the top left of the certificate, the judges hearing the appeal are listed by order of seniority, next to which the date of the decision is set out.

After the style of cause, the first paragraph sets out the date of hearing, the matters considered by the court (i.e., evidence, factums and hearing of argument) and whether judgment was reserved. The decision of the Court of Appeal is then set out in separate numbered paragraphs.

The certificate should be circulated to opposing counsel for consent as to form. If there is any disagreement as to the contents or form, counsel may contact the registrar to make submissions to the senior judge of the panel or the panel itself to settle the terms of the certificate. By virtue of Rule 40(5), the certificate is dated as of the date of delivery of the judgment and takes effect from that date.

12. Discontinuance, Dismissal for Delay and Abandonment

Rule 37 provides that an appellant can discontinue an appeal by giving the respondent a notice of discontinuance, and where given, the respondent is entitled to costs of the appeal, unless otherwise agreed upon by the parties. The costs may be taxed by the court (Rule 47(6)).

Rule 39 provides that where an appellant unduly delays the prosecution of the appeal, the respondent may on notice move to the court for dismissal of the appeal. The motion must be brought before the court as a whole and not before a judge sitting in chambers, as only the full court has the jurisdiction to make such an order. (See *Law Society of Manitoba v. Eadie*, (May 27, 1988, unreported) (Man. C.A.)) and *Law Society of Manitoba v. Eadie*, 1988 CanLII 206 (MB CA).

> Under Rule 33(4), if the appellant's factum has not been filed within the time limits, the registrar may give notice requiring that the appeal be perfected within 30 days, failing which the appeal will be deemed to be abandoned.

Where an appeal is deemed to be abandoned, the registrar may, upon application of the respondent, tax the costs and issue a certificate of decision dismissing the appeal (Rule 35). An appeal from the registrar's decision to deem an appeal abandoned may be made to a judge in chambers within 30 days after the date of the deemed abandonment (Rule 35.1).

Pursuant to Rule 36.1, if an appeal has not been set down for hearing within one year after the notice of appeal has been filed, the registrar has the discretion to give notice that the appeal will be deemed abandoned and will be dismissed, unless, within 30 days of the notice, the appeal is set down for a hearing, or by a motion to a judge in chambers a party shows cause why the appeal should not be dismissed.

13. Motions

Rules 43.1 to 46 relate to motions before a judge or the court. A notice of motion must be filed and must normally be supported by an affidavit, particularly where it is necessary to substantiate a fact that is not a matter of record before the Court of Appeal.

If a transcript of evidence or the appeal book has already been deposited with the court, this may be relied upon, but there may be additional facts relevant to the motion that need to be set out in an affidavit. The form of notice of motion and affidavit are similar to those used in the Court of King's Bench.

In addition, a concise memorandum setting out the submissions in support of the motion may be filed in the discretion of counsel or when required by the court or a judge. In most cases, it will be helpful to your case to prepare and file a memorandum.

Unless a statute or the rules require that the motion be made to a panel of the Court of Appeal, the motion is to be made to a single judge in chambers. The judge or the registrar may refer any matter to the court, except where a statute specifically confers authority on a judge in chambers.

A person affected by an order made by a judge in chambers may appeal to a panel of the Court of Appeal, unless a statute grants exclusive authority to a judge in chambers and there is no right of appeal (Rule 46(1)). An appeal from a chambers order is by way of a notice of appeal, which must be filed and served within fifteen days after the pronouncement of the order. Thereafter, the appeal proceeds in the same way as any other appeal to the court under Rule 28.

There are various types of motions that can be brought, but there are four common ones that you should be aware of:

a) Motions for an extension of time;

b) Motions for leave to appeal;

c) Motions to stay a judgment or execution pending the appeal;

The notice of motion and supporting material must be filed and served four clear days prior to the hearing of the motion. The respondent may respond to the motion by

filing and serving on all other parties, within two days after service of the motion, a concise memorandum setting out response submissions. Motions are regularly held in chambers every Thursday at 10:00 a.m.

d) Motions for further evidence. Such motions are governed by Rule 21, discussed in detail below.

a) Motions for Extensions of Time

Motions for extensions of time have been discussed above in section H, 4(b) and (c).

b) Motions for Leave to Appeal

i. Interlocutory Appeal from an Order of a King's Bench Judge

In 2022, the Court of Appeal Act was amended to provide that an appeal must not be made to the court with respect to an interlocutory order of a judge of the Court of King's Bench unless leave to appeal is granted by a judge of the Court of Appeal or the Court of Appeal (s. 25.1(1)).

The Act provides for certain exceptions (s. 25.2) where leave to appeal an interlocutory order is not required:

(a) in a proceeding involving the liberty of a person or the custody of a minor;

(b) if the order grants or declines to grant a stay or an interlocutory injunction; or

(c) in other cases specified in the rules.

The test to be applied on an application for leave to appeal an interlocutory order was set out in the decision of *Knight v. Daraden Investments Ltd. et al.*, 2022 MBCA 69 (Man.C.A.) (see also *McIntyre et al. v. Potter et al,* 2023 MBCA 39 (Man. C.A.)). The applicant must satisfy two criteria:

1. the proposed ground of appeal must have arguable merit; and
2. the proposed ground of appeal must be of sufficient importance to warrant the attention of a full panel of the court.

In assessing the first criterion of arguable merit of the proposed ground of appeal, the court may consider any one or more of the following non-exhaustive list of factors:

- Is it prima facie frivolous or vexatious?
- Is it prima facie destined to fail, taking into account the standard of review that will likely be applied?
- Does it have a reasonable prospect of success?
- Can it be dismissed through a preliminary examination?

- Is it likely to be rendered moot due to the natural progression of the proceedings?
- Will it unduly or disproportionately delay or add to the cost of the proceedings?

Some of the questions listed above are different ways of approaching the same task of determining the arguability of the proposed ground of appeal.

The first criterion is to be addressed in light of the applicable standard of review. If the standard of review involves significant deference, an applicant will have a higher hurdle to overcome than if the standard of review is correctness. (*Knight, supra,* at para 20; *Manitoba Hydro-Electric Board v. Public Utilities Board (Man) et al.,* 2019 MBCA 54, at para. 12).

For the second criterion, whether the proposed ground of appeal is of sufficient importance, the court may consider any one or more of the following non-exhaustive list of factors:

- Does it raise a novel or unsettled point of law or of practice?
- Will resolution of the issue likely affect the determination of disputes between others (aside from the parties to the proceedings)?
- How significant is the order to the course or outcome of the proceedings?

In addition, the decision to grant leave to appeal is ultimately a matter of discretion. There may be circumstances where leave should be granted even though both criteria have not been met, if denying leave might result in an injustice (*Knight, supra,* at para 26; *Rolling River School Division v. Rolling River Teachers' Association of the Manitoba Teachers' Society et al*, 2009 MBCA 38, at para 13).

ii. Appeals pursuant to an Enactment

The Act provides that an appeal may be made to the Court of Appeal from a decision of any other court or tribunal if a right of appeal to the court is provided by an enactment (an Act of Manitoba or Canada, or regulation thereto), but if the enactment provides there is no right of appeal, or a limited right of appeal, or imposes conditions on the ability to appeal, the enactment prevails over the Act.

Some statutes governing decisions of arbitrators or administrative tribunals provide that leave to appeal must first be sought from a judge of the Court of Appeal.

The statute will set out the nature of the questions that may be appealed, which are often restricted to questions of law or jurisdiction. In general, three criteria must be satisfied before leave to appeal will be granted:

1. Leave to appeal may only be granted on a question of law or jurisdiction, unless the statute provides otherwise;
2. The question must be one of sufficient importance to warrant consideration by the Court of Appeal;
3. The case must have arguable merit, or in other words, the applicant must have a reasonable prospect of success.

Leave may also be granted if the denial of leave could result in an injustice.

(*Harder v. Manitoba Public Insurance Corp.,* 2012 MBCA 20 (Man. C.A. [In Chambers]); *Winnipeg Airports Authority Inc. v. EllisDon Corp.*, 2011 MBCA 51 (Man. C.A. [In Chambers]); *Pelchat v. Manitoba Public Insurance Corp.,* 2006 MBCA 90 (Man. C.A.); *4784881 Manitoba Ltd. v. Khidir*, 2008 MBCA 49 (Man. C.A. [In Chambers]); *Fredant Investments Ltd. v. Winnipeg (City) Assessor* 1997 CanLII 2506 (MB CA), (1997), 118 Man.R. (2d) 307 (Man. C.A. [In Chambers])).

The notice of motion must be filed within the time allowed by statute, returnable before a judge of the Court of Appeal in chambers, together with an affidavit where necessary. The notice of motion will set out the proposed grounds of appeal and the affidavit will include the decision or reasons for judgment to be appealed. If leave is granted, a notice of appeal is filed in accordance with the terms of the order. There is no appeal from a motion for leave to appeal (Rule 46(3)).

c) Motions for Stay

Under King's Bench Rule 63, an appeal of a King's Bench judgment does not act as a stay of that judgment. The successful party can proceed as if the order was valid and enforceable as of the date it was granted.

If an unsuccessful party wishes to delay the implementation pending an appeal, steps should be taken to secure a stay of the judgment. In many cases, the successful party will consent to a stay, and this should be sought before bringing a motion.

A motion to stay a judgment should be brought first to the judge who made the order, and only if the order is denied, should the party seek a stay from a judge in chambers in the Court of Appeal.

The Court of Appeal has repeatedly confirmed that this is the appropriate procedure and has been widely followed. It is to be adhered to unless there are special circumstances for doing otherwise. (*Labossiere v. Labossiere Estate*, 2011 MBCA 38 (Man. C.A. [In Chambers]), para. 9; *Yes Forex Ltd. v. Wildcat Exploration Ltd.*, 2008 MBCA 124 (Man. C.A.), para. 6).

It is only where the judge of the Court of King's Bench refuses to grant a stay that a motion can be made to a single judge in chambers of the Court of Appeal. If the King's Bench judge grants a stay, then an appeal must be made to a panel of the Court of Appeal. This is because a single judge in chambers has concurrent jurisdiction to grant such an order, but once an order is granted, the jurisdiction is spent. (*Laufer v. Bucklaschuk* 1998 CanLII 17751 (MB CA), (1998), 131 Man.R. (2d) 119 (Man. C.A. [In Chambers])).

Where a motion for a stay is denied by the King's Bench judge, a motion before a judge in chambers in the Court of Appeal proceeds by way of a new hearing, not an appeal. The party seeking a stay before a judge in chambers must first file a notice of appeal, and then a notice of motion for a stay, supported by affidavit material that satisfies all elements of the test that will be applied by the court on the motion.

An appeal lies to a panel of the Court of Appeal from a decision of a judge in chambers (*3997937 Manitoba Ltd. v. 704882 Alberta Ltd*., 2001 MBCA 124 (Man. C.A.); reversing *2001 MBCA 88* (Man. C.A. [In Chambers])).

The law governing the granting of a stay pending an appeal is clear and well established. The same test applies to an application for a stay in both the Court of King's Bench and before a judge in chambers of the Court of Appeal. On an appeal to the Court of Appeal, the ordinary principles applicable to appeals apply. (*Chartier v. Chartier Estate (Trustee of)*, 2012 MBQB 243 (Man. Q.B.), para 9; *Gateway Packers Ltd. v. Greyhound Canada Transportation*, 2004 MBCA 38 (Man. C.A. [In Chambers]), para. 5)

A stay is a matter of judicial discretion and there is a heavy onus on the applicant since there is a presumption in favour of the correctness of the decision. (*Kuny v. College of Registered Nurses of Manitoba*, 2016 MBCA 122 (Man. C.A.), para. 11; Gateway Packers Ltd., supra, para. 5).

The test to be applied is:

1) whether there is an arguable case that the order sought to be appealed from is wrong;

2) whether the applicant could, unless the stay is granted, suffer irreparable harm; namely, harm that is not susceptible of or is difficult to be compensated in damages; and

3) on the balance of convenience, which of the parties involved would suffer the greater harm from the grant or refusal to grant a stay pending the disposition of the appeal on its merits.

(*Gateway Packers Ltd., supra*; *Chicago Blower Corp. v. 141209 Canada Ltd*., 1990 CanLII 11287 (MB CA), (1990), 63 Man.R. (2d) 241 (Man. C.A.); *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 (S.C.C.)).

In considering whether there is an arguable case, or sometimes called a serious question, there are no specific requirements to be met to satisfy the test, and the threshold is a low one. The judge is to make a preliminary assessment of the merits of the case, but the court will consider the applicable standard of review on the appeal. (*Kuny, supra,* para. 12; *Hart v. Dubois*, 2011 MBCA 75 (Man. C.A. [In Chambers]), para. 6).

A stay can also be sought from a decision of the Court of Appeal pending an application for leave to appeal to the Supreme Court of Canada. The motion is made to a judge in chambers of the Court of Appeal. The same test applies, except that since it is a second appeal, the serious question element is to be considered in light of two additional factors.

The first is that the Supreme Court of Canada has strict requirements for leave to appeal to that court which require that the appellant demonstrate that the appeal raises a question of public or national importance, or a legal issue of importance. The second factor is that the decision has already been decided by an appellate court which will be afforded deference. (*Leis v. Leis*, 2011 MBCA 109 (Man. C.A. [In Chambers]), paras. 2-6).

If a stay is granted, the judge or court may also impose any terms or conditions that are deemed just and appropriate, including orders to ensure that the *status quo* or rights of the parties are preserved pending the appeal. For example, a party may be required to post security for a monetary judgment, or even be ordered to pay part of the judgment. (*Pauluik v. Paraiso* 1996 CanLII 18144 (MB CA), (1996), 110 Man. R. (2d) 1 (Man. C.A.), para. 1-2).

d) Motions for Further Evidence

By virtue of section 26(3) of *The Court of Appeal Act*, the court may receive further evidence upon questions of fact. Court of Appeal Rule 21 was amended effective January 1, 2023. It sets out the procedure to be followed. The admission of further evidence is an exceptional request and is rarely granted.

The test to admit new evidence is well established by a long line of cases. The same test applies in both civil and criminal cases, except that it is generally not applied with the same force in criminal cases. In *Palmer v. R.,* 1979 CanLII 8 (SCC), [1980] 1 SCR 759, the court set out the principles to be applied (at para. 21):

1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen,* 1964 CanLII 43 (SCC), [1964] SCR 484;

2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

3) The evidence must be credible in the sense that it is reasonably capable of belief; and

4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

(See also: *Public School Boards' Assn. (Alberta) v. Alberta (Attorney General),* 2000 SCC 2 (CanLII), [2000] 1 SCR 44, paras. 6-9).

In civil cases, appellate courts may apply the test less strictly where the assessment of damages is at issue. (See, for example, *Knutson v. Farr* 1984 CanLII 556 (BC CA), (1984), 12 D.L.R. (4th) 658 (B.C.C.A.), at p. 666, where evidence was admitted in relation to damages in a personal injury action; *Coulter (Guardian ad litem of) v. Ball*, 2004 BCCA 309 (B.C.C.A. [In Chambers]) where the court ordered documents to be produced to allow an appellant to bring a motion to admit new evidence on damages).

Rule 21 sets out the procedure to be followed to bring a motion for further evidence. The motion will be heard on the day scheduled for the hearing of the appeal.

A separate notice of motion is to be filed indicating the intention to introduce further evidence and the nature of the proposed further evidence. The motion must be accompanied by an affidavit setting out:

1) the general nature of the further evidence to be introduced;

2) the way in which the further evidence is likely to be determinative of the appeal; and

3) why the further evidence was not introduced at the proceeding from which the appeal lies.

The actual evidence is not to be specifically disclosed or attached to this affidavit.

A second affidavit is to be completed with the further evidence sought to be introduced attached or identified in specific terms. The second affidavit is to be placed in a sealed envelope and kept separate by the registrar until the motion is decided. If the motion is denied, the court will not look at the evidence.

The original and three copies of the motion and supporting affidavits are to be filed and served before the deadline for filing the moving party's factum. A respondent may respond to the motion by filing and serving their affidavit on or before the deadline for filing their factum. If the party seeking to file a responding affidavit is the appellant, they must file and serve their affidavit within 30 days of being served with the motion to file further evidence. A responding affidavit must be filed in a sealed envelope.

Any examination or cross-examination on the affidavits must take place prior to the hearing date. The original and three copies of the transcripts must be filed in sealed envelopes.

Each party's arguments on the motion to introduce further evidence must be set out in their factums. If the respondent is seeking to introduce further evidence, the appellant may file a supplementary factum in order to set out their position on the introduction of further evidence. The supplementary factum may not exceed 5 pages and must be filed within 30 days of being served with the respondent's factum.

The timelines in Rule 21 may be extended or abridged by the Registrar with the consent of all parties, or by a motion made before a judge or the court.

The affidavits, transcripts and portions of the factum that relate to the further evidence sought to be introduced are confidential and do not form part of the record that may be accessed by the public unless and until the court rules that the evidence may be introduced.

The court's December 14, 2022 Notice describing the changes to Rule 21 may be found *here*.

The court also issued a *Notice* on December 14, 2022 respecting allegations of ineffective assistance of counsel, which typically are raised by a motion for leave to file fresh evidence. The Notice provides:

> *Motions for leave to file fresh evidence are often filed where the appellant raises as a ground of appeal that their counsel was ineffective or otherwise contributed to a miscarriage of justice in first instance. The December 14, 2022 Practice Direction is effective January 1, 2023 and provides directions, case law, and commentary in relation to proceedings where there are allegations of ineffective assistance of counsel. This incudes duties on the appellant's counsel making such allegations, the reporting of the counsel in first instance to the Law Society's insurer, and the possibility of a motion by the counsel at first instance regarding the waiver of privilege.*
>
> *An allegation of ineffective assistance of counsel is an exceptional submission that should not be made absent a proper factual record reasonably supporting such a claim.*

H. FEDERAL COURTS PRACTICE AND PROCEDURE

1. Introduction

The Federal Courts are not places where you are likely to spend much time. Many counsel never get there at all. Because dabbling in Federal Courts litigation is difficult, it often leads to the questions: "How did I get here? What have I done?" So, if you find yourself stepping off the elevator on the fourth floor at 363 Broadway, emboldened by your experiences in the Manitoba Court of King's Bench and ready to file your first Federal Court action or application, there are a few things you should think about first.

This section focuses on three important issues for practitioners who rarely find themselves in the Federal Court:

1) When does the Federal Court have jurisdiction over a civil proceeding?

2) What is the Federal Court's jurisdiction over applications for judicial review of federal administrative decisions?

3) What are some of the most notable differences between the Manitoba King's Bench Rules of civil procedure (KB Rules) and the Federal Courts Rules? (*Federal Courts Rules*, 1998, SOR/98-106 (FC Rules)).

This short section cannot provide comprehensive answers to these sometimes tricky questions. However, it should help you recognize when to consider initiating proceedings in the Federal Court and some procedural issues that you might encounter. When you face these issues, more detailed research will be required.

a) Federal Court – Background Information

The Federal Court of Canada was created in 1971 under the authority of section 101 of the *Constitution Act, 1867* for the "better administration of the law of Canada." The Exchequer Court of Canada was established in 1875, with the Federal Court of Canada being its successor.

The Federal Court of Canada originally consisted of two divisions: the Appeal Division and the Trial Division. In 2003, these divisions became two separate courts: the Federal Court and the Federal Court of Appeal.

The Federal Court is Canada's national trial court. The Federal Court's authority derives primarily from the Federal Courts Act. (*Federal Courts Act,* RSC 1985, c F-7, as amended (the Act)).

The Federal Court hears and decides legal disputes arising in the federal domain, including claims against the Government of Canada, civil suits in federally-regulated areas and challenges to federal tribunal decisions. The Federal Court also determines which court retains jurisdiction if divorce proceedings between the same spouses were commenced on the same day in two courts that have jurisdiction, and neither was discontinued within 40 days after it was commenced. (See the *Divorce Act*, RSC 1985, c 3, s. 3(3)).

The Federal Court consists of a Chief Justice, an Associate Chief Justice and up to 39 other Judges. Presently, there are 34 full-time judges, 4 supernumerary judges and 9 prothonotaries. (Also known as associate judges, prothonotaries are judicial officers appointed under section 12 of the Act, whose functions are similar to those of masters in the Manitoba Court of King's Bench). The Federal Court of Appeal presently has 12 full-time judges, including the Chief Justice.

The Federal Court's principal office is in Ottawa at the Supreme Court of Canada Building. The Federal Court maintains offices and courtrooms in all major Canadian cities and the judges travel for hearings. A Federal Court judge sits in Winnipeg approximately one week every month. Hearings are also held by teleconference or video-conference, and special sittings can be arranged. The Federal Court of Appeal sits in Winnipeg twice a year and may hear cases on an emergency basis in Ottawa.

The Federal Court provides services in French and English. If a hearing is to be conducted in a language other than that used in the documents, the court requires advance notice to provide translation services.

2. Federal Court Jurisdiction in Civil Proceedings

There are many matters for which there is no option but to bring proceedings in the Federal Court. For example, judicial review of most federal administrative decisions, maritime proceedings and intellectual property matters are matters over which the Federal Court has exclusive jurisdiction. See the Federal Court's website for a more detailed review of the court's jurisdiction.

There are many civil proceedings, however, for which the plaintiff may choose to bring an action either in the Manitoba Court of King's Bench or in the Federal Court.

Federal Court jurisdiction is best understood by contrasting it to a provincial superior court's jurisdiction. Provincial superior courts have both "general and inherent" jurisdiction. This means that neither the federal nor the provincial government is required to expressly grant jurisdiction over a particular subject matter to provincial superior courts; their power is inherent. Further, provincial superior courts can decide any issues submitted to them; their power is general. Provincial superior court jurisdiction can only be limited by express statutory provisions and, even then, the Constitution Act, 1867 imposes limits on what powers can be taken away.

In contrast, the Federal Court is a statutory court without inherent jurisdiction. The Federal Court's jurisdiction encompasses a very narrow range of subject matter. The Federal Court only has jurisdiction where:

a) parliament provides for a statutory grant of jurisdiction;

b) there is an existing body of federal law that is essential to the disposition of the case and that nourishes the statutory grant of jurisdiction; and

c) the law on which the case is founded is a "law of Canada" (as defined in s. 101 of the *Constitution Act, 1867*).

(See *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 SCR 752, [1986] SCJ No 38 [*Miida* jurisdiction test]).)

Before initiating proceedings in the Federal Court, you should be sure that your case satisfies each of these three requirements.

a) Statutory Grant of Jurisdiction

For the first branch of the *Miida* jurisdiction test, a federal statute must confer jurisdiction over the matter to the Federal Court. Just because federal legislation deals with a matter does not mean that the Federal Court has jurisdiction (if this were the test, bankruptcies and actions involving banks would be in the Federal Court). If your proceeding arises from a federal statute, review the statute to see if the Federal Court is given jurisdiction either expressly or by necessary implication. You will not find this very often (See *Divorce Act* s. 3(3)).

Besides these specific statutory grants, sections 17 to 28 of the *Act* set out most of the Federal Courts' areas of jurisdiction.

For a good review of the types of proceedings and the legislation that grants jurisdiction to the Federal Court, see the Federal Court *website.*

Areas of jurisdiction include:

i. Claims Against the Federal Crown (s. 17)

Except as otherwise provided in the *Act* or another federal statute, the Federal Court has concurrent, original jurisdiction in all cases where relief is claimed against the Federal Crown. This means that in many cases, the Federal Court and a provincial superior court will have concurrent jurisdiction. However, the

Federal Court or the Federal Court of Appeal has exclusive jurisdiction over the following matters:

Federal Court

- questions referred to the court by agreement between the Federal Crown and any person (s. 17(3));
- applications for judicial review of decisions of federal boards, commissions or other tribunals except those listed in s. 28 of the *Act* (s. 18);
- cases involving patents, copyright, trademarks and industrial property (ss. 20(1)(a) and (b)); and
- appeals that may be taken to Federal Court under federal legislation.

Federal Court of Appeal

- appeals from Federal Court judgments (s. 27(1));
- appeals from Tax Court of Canada judgments decided under the general procedure in the *Tax Court of Canada Act* (s. 27(1.1));
- applications for judicial review of decisions of federal boards, commissions or other tribunals listed in s. 28(1); and
- appeals expressly granted by federal legislation.

ii. Actions by the Federal Crown and Actions Against Federal Crown Servants and Officers (s. 17(5))

If the Federal Crown or the Attorney General of Canada claims relief in a civil proceeding, the Federal Court has concurrent original jurisdiction. Similarly, where relief is sought against an officer, servant or agent of the Federal Crown for anything done or omitted in the performance of duties, the Federal Court has concurrent jurisdiction. This may require consideration of whether an individual is a servant, officer, or agent of the Crown.

iii. Judicial Review of Federal Administrative Decisions (ss. 18 and 28)

The Federal Court has exclusive jurisdiction over virtually all applications for judicial review of decisions of federal boards, commissions or tribunals. Division of powers and *Charter* issues may, however, be raised in either the Federal Court or a provincial superior court. Whether a particular application must be made in the Federal Court of Appeal or the Federal Court is discussed below.

iv. Intergovernmental Disputes (s. 19)

Disputes between the federal and provincial governments or between two or more provinces may be heard in the Federal Court if a provincial statute grants such jurisdiction. In Manitoba, *The Federal Courts Jurisdiction Act*, CCSM, c 270, section 1 confers such jurisdiction.

v. Intellectual Property (s. 20)

The Federal Court has exclusive jurisdiction over proceedings about applications for trademarks, patents, copyrights, industrial design and topography, and applications to impeach or annul claims to intellectual property. The Federal Court has concurrent jurisdiction in other cases involving intellectual property where the remedy is sought pursuant to a federal statute or in law or equity. The Federal Court does not have jurisdiction if the proceeding only incidentally raises an issue of intellectual property.

vi. Maritime Proceedings (s. 22)

The Federal Court has concurrent original jurisdiction over navigation, shipping, and other aspects of maritime law, except to the extent that the jurisdiction is otherwise assigned. The *Canada Shipping Act,* SC 2001, c 26 also confers jurisdiction on the Federal Court in certain maritime proceedings.

vii. Aeronautics (s. 23(b))

Jurisprudence on this head of jurisdiction is confusing. If your case involves airplanes or airports, carefully research the issue when considering whether to proceed in the Federal Court.

b) Existing Body of Federal Law

The second branch of the *Miida* jurisdiction test requires an existing body of federal law for the Federal Court to have jurisdiction. This can limit the scope of some statutory grants, for example, if the claim is simply founded on the common law of tort or contract, rather than on a particular body of federal law (i.e., maritime tort or maritime contract).

The subject matter under consideration in any case must be integrally connected to the existing body of federal law. For example, notwithstanding section 17(5)(b) of the Act, the Federal Court may not have jurisdiction to hear an action in negligence against a Federal Crown servant because the action may not be based on an existing federal statute.

However, that does not mean that a tort action can never be sufficiently supported by federal law to be heard in the Federal Court. (*Moxham v. Canada*, [1998] 3 FC 441, [1998] FCJ No 554). In *Stephens Estate v. R.,* (1982) 26 CPC 1, 82 DTC 6132, at 6138 (FCA) [Stephens]) the Federal Court of Appeal held that a plaintiff could sue the

Federal Crown in the Federal Court for vicarious liability for the torts of its servants, even though the federal servant could not be sued in Federal Court:

> *A Crown action in contract (or tort) may be held to be one sufficiently supported by federal law to give the Federal Court jurisdiction if the contractual or tortious liability can be said to be one that is provided for by federal law.*

In *Stephens*, the Federal Court of Appeal indicated that the *Crown Liability and Proceedings Act*, RSC 1985 c C-50 established the vicarious liability of the Crown. Similarly, a plaintiff can institute an action in the Federal Court against the Federal Crown for breach of contract. The Supreme Court of Canada has held that the Crown's liability in tort and contract is the result of federal legislation. (See *Canada v. Foundation Co. of Canada*, [1980] 1 SCR 695, [1979] SCJ No 124).

c) Law of Canada

To satisfy the third part of the *Miida* jurisdiction test, the law relied upon to support the court's jurisdiction must be within the constitutional competence of Parliament. This requirement is met if the subject matter falls within a federal head of jurisdiction found in section 91 of the *Constitution Act, 1867*.

3. Federal Court's Jurisdiction Over Applications for Judicial Review

An application for judicial review is a special, uniform remedy created by sections 18 to 18.5 of the Act. The grounds of review are set out in section 18.1(4). Sections 18 to 18.5 apply equally to the Federal Court and the Federal Court of Appeal (except s. 18.4(2)).

> The Federal Court of Appeal has exclusive jurisdiction to hear applications for judicial review from any of the tribunals listed in section 28 of the Act. Also, other federal statutes expressly confer judicial review jurisdiction to the Federal Court of Appeal. Always review a board's or a tribunal's enabling legislation for jurisdiction.

Before applying for judicial review of a certain decision, you must determine whether the decision to be reviewed was made by a "federal board, commission or other tribunal" as defined in section 2 of the Act. If not, the Federal Court will not have jurisdiction. Also, section 18.5 of the Act excludes judicial review if the decision or order can be appealed to a different court.

The Act does not specify whether interlocutory decisions of a tribunal may be subject to judicial review. Absent special circumstances, this is generally not possible. *(See MNR v. Schnurer Estate*, [1997] FCJ No 121, [1997] 2 FC 545 (FCA); *IPSCO Inc v. Sollac, Aciers d'Usinor*, [1999] FCJ No 910, 246 NR 197 (FCA)).

4. Some Important Aspects of the Federal Courts Rules and Notable Differences from the Manitoba Court of King's Bench Rules

a) General

The FC Rules are quite similar, though by no means identical, to the KB Rules. The basic purpose of the civil procedure rules in both jurisdictions is to promote "the just, most expeditious and least expensive determination of every proceeding on its merits." (Rule 3).

> All proceedings in the Federal Court are brought either as an action, application or appeal, and different procedures apply to each.

Actions are commenced by a statement of claim and are responded to by a statement of defence. After pleadings close, discovery begins. The same pre-trial evidence-gathering devices are available in the Federal Court as in the King's Bench (i.e., discovery of documents and examinations for discovery). Disputes about pre-trial procedures may be resolved by motion and trial dates are set after pre-trial conferences.

There are a few noteworthy differences between pleadings in the Federal Court and the King's Bench. For example, in the Federal Court, a defendant may commence a third party claim against a co-defendant or against a person who is not a party to the action, where a plaintiff claims that the third party is liable to the defendant for all or part of the claim.

In the King's Bench, a third party claim may only be brought against a non-party who may be liable to the defendant for all or part of the claim, or for an independent claim arising out of an occurrence which is related to the main action. A crossclaim should be filed in the King's Bench where a defendant brings a claim against a co-defendant in the main action.

There is another notable difference for statements of defence. In the King's Bench, all allegations of fact that a party does not deny in its statement of defence are deemed to be admitted unless the party pleads no knowledge of the fact. In the Federal Court, Rule 184 provides that all allegations of fact that are not admitted are deemed to be denied.

Federal Courts Rules 334.1 to 334.4 deal with class proceedings. Although they are similar, the Federal Court class action rules do not duplicate any particular provincial scheme.

Applications are commenced by a notice of application. The most common application in Federal Court is for judicial review of a federal administrative tribunal's decision. The respondent must file a notice of appearance to indicate an intention to oppose the application.

Applications are decided on the basis of affidavit and documentary evidence. Each party must file an application record. The applicant's record must contain the notice of application, the impugned tribunal order, supporting affidavits, transcripts and a memorandum of fact and law (Rule 309(2)).

The respondent's record must contain supporting affidavits, transcripts and a memorandum of fact and law (Rule 310(2)). Rule 70(1*)* sets out the requirements for the memorandum of fact and law (similar to those for a factum in the Manitoba Court of Appeal). In the King's Bench, the parties must file an application brief (similar to a motion brief in the Federal Court).

Appeals are commenced by a notice of appeal. The steps in a Federal Court appeal are similar to those used in the Manitoba Court of Appeal. In the Federal Court of Appeal, the factum is called a memorandum of fact and law instead.

Documents may be filed in the Federal Court in either English or French. Pursuant to Rules 70(2) and 348(3), any extracts of federal statutes and regulations in a memorandum of fact and law or in a book of authorities must be reproduced in both official languages.

b) Key Elements of the Federal Courts Rules

Below is a summary of some important provisions in the FC Rules:

i. Time Limits

One of the most significant features of the FC Rules, and one that can be a source of much frustration to counsel, is the severe restriction on the ability to extend time limits by consent. Under Rule 7, a consent extension of time cannot exceed half of the original time limit and a time limit may only be extended by consent once. Parties cannot consent to an extension of a period fixed by a court order; this can only be achieved by a further court order. The FC Rules do not prescribe a form for consent to an extension. The document used should evidence the period to be extended, the length of the extension, and the parties' consent.

If a further or longer extension is required, or if an extension of timelines fixed by a court order is desired, a party must file a motion (Rule 8). A party may file a motion for an extension of time before or after the expiry of the period to be extended.

A moving party may seek leave, by way of a letter to the court, to be relieved from the requirement to bring a formal motion where certain requirements are met.

(See the *Consolidated General Practice Guidelines* dated June 8, 2022 - *Informal Requests for Interlocutory Relief*.)

Nevertheless, where the requirements are not met, the court reserves the right to force the moving party to file a formal motion.

While the aim of the rule is clearly to speed up the pace of the litigation, it may also result in a substantial generation of paper and aggravation.

For example, even if opposing counsel consents to an extension of time for service of a document which is longer than that permitted by Rule 7, and there would be no prejudice to the opposing party, the Federal Court could still force the moving party to file a written motion. The onus to meet on such a motion is stringent. To be granted an extension of time, the applicant must satisfy the court that:

1. there was a continuing intention to pursue the matter;
2. the matter has some merit; and
3. a reasonable explanation exists for the delay. (See *Canada v. Hennelly*, [1999] FCJ No 846, 244 NR 399 (FCA).)

The court will not normally grant an extension of time simply because counsel's work load was too heavy to meet a deadline or because the deadline was inadvertently missed.

The consequence of this regime is that litigation often moves quickly, with little flexibility in the timelines. Where your instructions are to push an action to trial or settlement (and you can meet the tight timelines), the Federal Court is the appropriate place to file. Where you have doubt about your client's (or your) ability to keep the pace, it may be prudent to file in the King's Bench instead.

ii. Timelines, Status Reviews and Specially Managed Proceedings

In the King's Bench, it is counsel's responsibility to move the litigation forward. Although the KB Rules set out timelines for each step, opposing counsel can move a matter forward (or hold it in abeyance) as they see fit. Unless one of the parties brings a motion to compel the other side to comply, or a motion to dismiss for delay, the KB Rules allow litigation files to remain open indefinitely.

The FC Rules are specifically designed to avoid letting litigation stall. In an action, if 180 days have passed since the claim was filed and pleadings are not closed, or if 360 days have passed after the claim was filed but no pre-trial requisition has been filed, the court will issue a notice of status review (Rule 380(1)). In an application, the court may issue a notice of status review 180 days after the application was filed if no requisition for a hearing date has been filed (Rule 380(2)).

A notice of status review will indicate if the court requires the applicant to show cause as to why the proceeding should not be dismissed for delay or, alternatively, if it requires the respondent to show cause as to why default judgment should not be entered in favour of the applicant.

Status review is conducted on the basis of written representations but the FC Rules do not indicate how to respond to a notice of status review. The plaintiff's counsel should at least provide the court with a description of the nature of the action and the steps taken to advance the litigation. If there has been little or no activity, counsel should explain why and should consider requesting that the court specially manage the case, particularly if the defendant has caused the delay.

On status review, mere declarations of intent and desire by the plaintiff are not enough, nor is the argument that the defendant was lax in responding. (See *Baroud v. Canada*, [1998] FCJ No 1729, 160 FTR 91.) The plaintiff must demonstrate a good excuse for the delay and propose a plan to move the case forward. The court will consider the parties' representations and decide whether the action or application should proceed or be dismissed for delay.

If the court is satisfied that the proceeding should continue, it will order that the proceeding continue as a specially managed proceeding (Rules 383-385). In a specially managed proceeding, the court assigns to a file a case management judge or a prothonotary who has the ability to fix time limits for the completion of further steps in the litigation, to conduct dispute resolution or pre-trial conferences, to hear any motions or to give any directions necessary for a just, expeditious and inexpensive resolution of the case. Rule 384 allows the court to order, at any time (including at the parties' request), that a proceeding continue as a specially managed proceeding.

Not only does the Federal Court keep track of the pace of the litigation for the purpose of status review, it also controls the timing by refusing to allow documents to be filed outside the time frames imposed by the FC Rules. For example, if a statement of defence is to be filed, Rule 204 requires that it be served and then filed within 30 days of service of the statement of claim.

If you attend to the registry to file the defence on the 31st day, the registry will refuse to accept the pleading for filing. You will either need to obtain a Rule 7 consent from the plaintiff or you will need to file a motion for an extension of time to file the statement of defence.

iii. Dispute Resolution Services

> Federal Courts Rules 386 to 391 provide for court-assisted dispute resolution conferences that are conducted by a case management judge or a prothonotary. The court may order, on its own initiative, that a case be referred to a dispute resolution conference.

Dispute resolution in the Federal Court could take the form of mediation, an early neutral evaluation of the merits of the case, or a mini-trial with a non-binding opinion as to the probable outcome. A dispute resolution conference is confidential (Rule 388) and must be completed within 30 days (Rule 386(2)).

The KB Rules also provide for case management (Rule 50.1). The court may order on its own initiative or on the request of a judge or a party that the parties attend case management where certain criteria are met and the judge determines that a judge's active management is required to ensure that the proceeding moves forward in an expeditious manner. The presiding judge may make any order or give any direction they consider necessary or advisable, and may exercise all of the powers a pre-trial judge.

While the KB Rules do not formally provide for other dispute resolution mechanisms, the court will, upon request, provide informal dispute resolution through judicially assisted dispute resolution (JADR) services or a neutral evaluation of a probable outcome of a matter. For each, the parties may make a joint written request to the Chief Justice or the Associate Chief Justice to have assigned one of at least three judges whom the parties have jointly agreed would be acceptable to conduct a JADR or a neutral evaluation.

A judge is then assigned and an initial meeting is held to set deadlines going forward and to discuss options for the conduct of the specific dispute resolution mechanism. Each mechanism has its own advantages and disadvantages. If you are considering requesting either a JADR or a neutral evaluation, review the court's practice directions in this regard. For example, see the November 7, 2017, Practice Direction: Court of Queen's Bench of Manitoba Re: Comprehensive Amendments to Court of Queen's Bench Rules (Civil) Effective January 1, 2018.

iv. Simplified Actions

Similar to KB Rule 20A with respect to expedited actions, the FC Rules provide in Rule 292 that a simplified action is mandatory where:

(a) each claim is exclusively for monetary relief in an amount not exceeding $100,000, exclusive of interest and costs;

(b) in respect of an action *in rem* claiming monetary relief, no amount claimed, exclusive of interest and costs, exceeds $50,000.

Also, parties can agree that the action should be conducted as a simplified action or can make a motion to the court requesting it. (Rule 292 (c) and (d)).

Pre-trial procedures (such as discovery of documents and examination for discovery) are more streamlined in a simplified action. Unless the court directs otherwise, evidence in a simplified action is adduced by affidavit. Note that the rules for a simplified action in Federal Court are not identical to those under KB Rule 20A.

v. Service and Filing of Documents

The primary tactical and procedural advantage that can be gained by suing in the Federal Court relates to the pace and momentum of the litigation. A cursory read of the FC Rules demonstrates that the emphasis is on ensuring that the timelines have limited flexibility and that the court can monitor them.

Of particular note is the fact that, with the exception of the statement of claim (and any other originating document), all documents must be served before they are filed. A document cannot be filed without proof that it was served within the time and in the manner prescribed by the FC Rules (Rules 73 and 146). This allows the court to keep track of the time that the respondent has to complete the next step.

The KB Rules set out time limits for service but do not require service before filing. Federal Courts Rules 127 to 148 provide details about the manner and timing of service. There are many convenient ways to serve documents, including by fax, by mail and by e-mail (in most cases).

Service of an originating document on the Federal Crown, the Attorney General of Canada or any Minister of the Federal Crown is effected by filing three copies of the document with the Federal Court Registry. The Registry will serve the Crown (Rule 133).

vi. Motions

Making a motion (i.e., a motion for an extension of time) is not a complicated matter in either the Federal Court or the King's Bench, but the processes are very different. In the King's Bench, for simple motions, you can draft your motion, file it on the uncontested motions list and, if the other side is prepared to consent, attend before the master with the order drafted. Once the master signs the order, counsel is responsible for filing the order at the Registry and serving the other parties. Where the other side will not consent to your motion, the King's Bench will require you to file your affidavits and motion brief prior to setting a date for a contested hearing.

In the Federal Court, you must file a motion record for every motion. A motion record consists of a notice of motion, an affidavit and written representations, all together with a table of contents and consecutively numbered pages (Rule 364).

Federal Courts Rule 366 specifies certain instances where, on a motion, a memorandum of fact and law is required instead of written representations. The FC Rules do not set out any formal requirements for written representations, but Rule 70 specifies the requirements for a memorandum of fact and law.

In the Winnipeg Registry Office, a motion must either be made in writing (see below) or returnable on a monthly motion day (Rule 34(1)(d)). If the motion will be longer than two hours, when the motion is filed, counsel should request from the Registry, in writing, a special sitting (Rules 35(2) and 360).

> Even if the other side is prepared to consent to a motion, you will need to set out the facts in your affidavit that satisfy the test for granting the relief sought. The other side's consent is a relevant consideration, but is not sufficient for the court to exercise its discretion.

Another significant difference is that the Federal Court generally drafts the orders (unless specifically requested of the parties) and once the order is issued, the court always serves it on all of the parties. Oral motion hearings are sometimes conducted by teleconference or videoconference if litigants live in different parts of the country.

vii. Motions in Writing

Civil litigation is often slow and expensive. One of the main factors in driving up costs and slowing the pace is the high number of motions filed. In the King's Bench, all motions that cannot be resolved by consent must be set down for a hearing. Accordingly, each motion can add three or more months to the life of an action and substantial expense to the client.

In the Federal Court, motions can be made in writing pursuant to Rule 369. The responding party has only 10 days to file material in response (including affidavit(s) and written representations), at which time the matter goes to a prothonotary for a decision. The court usually issues decisions within 30 days after a motion is filed. The timely resolution of motions keeps the litigation moving quickly and keeps both sides fully engaged. This speed and engagement are often the impetus for early settlement discussions and resolution.

Note that a respondent on a written motion may request that a written motion be heard orally (see Rule 369(2)). In this case, after being served with the motion record, within 10 days, the respondent must file a motion record in response indicating in the written representations or in the memorandum of fact and law the reasons why the motion should not be disposed of in writing and should be heard orally instead.

viii. Time Does Not Stop Running on Motions

In the Federal Court, unlike in the King's Bench, filing a motion does not suspend the running of the rule-imposed timelines. For example, if you file a motion to strike a claim for disclosing no cause of action, your time for filing a statement of defence continues to run and will certainly expire before your motion is heard. Experienced counsel will therefore include in any motion a request for an extension of time for the next step in the proceeding. The court consistently grants such orders.

c) Facilitated Fact-Finding and Issue Identification

Both the KB Rules and the FC Rules were designed to end the days of trial by ambush. Every aspect of the pleading and discovery process is intended to force parties to fully disclose their cases early in the proceedings. In the Federal Court, the practice for discovery of documents and examinations for discovery is essentially the same as in the King's Bench.

In terms of examinations for discovery in the Federal Court *Form 91* Direction to Attend is used to require a person's attendance. A person being examined must answer any question relevant to the pleadings or about the names and addresses of potential witnesses, other than an expert witness (Rule 240). The person being examined cannot object to a question on the grounds that the answer would be evidence or hearsay or that it would constitute cross-examination. The person could, however, object to a question that is irrelevant, unreasonable, unnecessary, would require revealing privileged information, or that it would be unduly onerous to find the answer (Rule 242).

Federal Court Rule 99 allows a party to examine a person by way of written examination for discovery or to cross-examine a person on an affidavit by serving that person with a list of written questions. A party can only conduct both an oral and a written examination for discovery with leave of the court or with the consent of the person being examined (Rule 234). Answers to a written examination are given by affidavit and it is also possible to object to a written question (Rule 99(2)).

Federal Court Rule 238 allows a party to seek leave to examine non-parties under oath if certain conditions are met.

For document production, Federal Court Rules 222-223 provide a regime that has many of the features found in the KB Rules. Rule 223 provides that the parties have to prepare an affidavit of documents disclosing a list of all documents relevant to the action, whether privileged or not. The affidavit must also list all relevant documents that the party believes are in the possession, power or control of a person who is not a party to the action. Where the party is the Crown, the affidavit must be sworn by an authorized Crown representative.

Prior to executing an affidavit of documents, the deponent must become informed by making all reasonable inquiries of present and former officers, servants, agents or employees of the party who might reasonably have knowledge relating to the action (Rule 224).

> Under Rule 222, "document" is defined broadly and includes all information devices such as audio/video recordings, computer systems and "any other device on which information is recorded or stored" (i.e. computer hard-drives and e-mail).

A party that becomes aware that its affidavit of documents is inaccurate or deficient must, without delay, serve a supplementary affidavit of documents correcting the inaccuracy or deficiency (Rule 226).

d) Encouraging Settlement in the Federal Court

The FC Rules, just like the KB Rules, are designed to facilitate settlement of all actions prior to trial. This policy can be found, for example, in the rules on costs, dispute resolution conferences, pre-trial conferences and offers to settle.

> Within 60 days after the close of pleadings, the lawyers for the parties must discuss the possibility of settlement of any or all issues or of referring the matter to a dispute resolution conference (Rule 257).

A pre-trial conference is mandatory before an action can proceed to trial. At the pre-trial conference, the parties must again be prepared to address the possibility of settlement or of referring any unsettled issues to a dispute resolution conference before setting a trial date (Rule 263(a)).

Federal Court Rule 400 provides the court with full discretion when awarding costs. Unless the court orders otherwise, costs are assessed in accordance with Tariff B, but the court may consider a variety of factors including any written offers to settle and conduct of a party that shortened or unnecessarily lengthened the proceedings. The

amount and allocation of costs can be used to penalize a party that unnecessarily prolongs the litigation.

Matters may also be disposed of by the court prior to trial. Similar to KB Rule 20, Rules 213 to 219 allow motions for summary judgment. Rule 221 permits a motion to strike out a pleading for disclosing no reasonable cause of action or defence, or on the grounds that the pleading is immaterial, redundant, scandalous, frivolous, vexatious or on other related grounds.

Under Rule 220 a party may move before trial for the determination of a question of law or admissibility of evidence. This can significantly narrow the issues for trial or even resolve the case (i.e., by deciding that a party has no standing to sue).

e) Access to the Federal Court

Always keep in mind that the Federal Court is a national court, fully functioning in French and English, with a bureaucracy spread from coast to coast. The court strives to make itself accessible to litigants across the country. Court administrators recognize that many lawyers are unfamiliar with the court's procedures and, therefore, are generally willing to help.

Access to the court is facilitated by the maintenance of a local registry office in each province. The local offices keep certified copies of all documents filed in a case. Access is also increased by the ability to bring motions in writing (without personal appearances) on interlocutory matters and the ability to conduct hearings by teleconference or videoconference. When required, the court provides interpretation services.

5. Conclusion

This brief review of some aspects of Federal Courts practice is in no way sufficient to prepare you for your first Federal Court file. There are many other FC Rules that place demands upon counsel and clients. Avoiding the potential traps and pitfalls will require that you prepare thoroughly for your first (and any subsequent) foray.

Saunders et al, *Federal Courts Practice 2023* (Toronto: Carswell, 2022) is an excellent resource. It contains the Act, the FC Rules, the Federal Courts Citizenship, Immigration and Refugee Protection Rules and portions of the *Canada Evidence Act*. This book also contains a thorough index, comprehensive case annotations, and helpful commentary about the Act and the FC Rules.

I. APPENDICES

1. Charts

a) Time to File and Serve Appeals in Civil Matters

Notice of Appeal	30 days after Judgment filed and entered in Court of King's Bench **Rule 11(1)(a)**
Notice of Cross-Appeal	15 days after service of the Notice of Appeal (this date must be specified in the preamble of the cross appeal) **Rule 14(1)**

b) When Transcript of Evidence Required

Transcript of Evidence Required with Appeal	…Where oral evidence was tendered in the court appealed from, the appellant shall file with the Notice of Appeal, confirmation satisfactory to the registrar that a transcript of evidence has been ordered… **Rule 16(1)**

c) Appeal Book Due Dates

Party	When Transcript of Evidence Required	When Transcript of Evidence Not Required
Appellant	File 45 days after transcript of evidence filed **Rule 22(1)** Serve 5 days after filing **Rule 25**	File and serve 45 days after Notice of Appeal filed **Rule 28(1)(a)**

d) Factum Due Dates

Party	When Transcript of Evidence Required	When Transcript of Evidence Not Required
Appellant	File 45 days after transcript deposited with the registrar **Rule 26(1)** Serve 5 days after filing **Rule 26(3)**	File and serve 45 days after filing Notice of Appeal **Rule 28(1)(a)**
Respondent	30 days after service of the appellant's factum **Rule 27(1)** Serve 5 days after filing **Rule 27(3)**	File and serve 30 days after service of appellant's factum **Rule 28(1)(b)**

e) Casebook Due Dates

Appellant's Casebook	14 days after the appellant files factum **Rule 31(1.1)(a)**
Respondent's Casebook	14 days after the respondent files factum **Rule 31(1.1)(b)**
Joint Casebook	14 days after the respondent files factum **Rule 31(1.1)(c)**

2. List of Names of Court of Appeal Justices (in order of seniority)

The Honourable Chief Justice Marianne Rivoalen

The Honourable Madam Justice Freda M. Steel

The Honourable Madam Justice Holly C. Beard

The Honourable Mr. Justice Marc M. Monnin

The Honourable Madam Justice Diana M. Cameron

The Honourable Mr. Justice Christopher J. Mainella

The Honourable Madam Justice Jennifer A. Pfuetzner

The Honourable Madam Justice Janice L. leMaistre

The Honourable Madam Justice Karen I. Simonsen

The Honourable Madam Justice Lori T. Spivak

* As of June 9, 2023. For a current list of Court of Appeal Justices, please see www.manitobacourts.mb.ca.

J. PRECEDENTS

1. Judicially Assisted Dispute Resolution

a) Letter Requesting JADR

Manitoba Court of King's Bench
The Law Courts
408 York Avenue
Winnipeg, Manitoba R3C 0P9

Attention: The Honourable Associate Chief Justice _____

Dear Sir:

Re: John Smith v. Jane Doe
Court of King's Bench File No. CI 23-01-XXXXX

I am the lawyer for the defendant, Jane Doe. Bill Jones of the firm _____ is the lawyer for the plaintiff, John Smith.

The parties have agreed to participate in a JADR, and have selected the following three judges who would acceptable to conduct the JADR (in order of preference):

1. Justice _____
2. Justice _____
3. Justice _____

A copy of the pleadings in the action are attached. The case is about the sale of a commercial property by the defendant to the plaintiff that failed to close, but the plaintiff commenced occupation of the premises. The plaintiff wants to remain in the property and complete the purchase, and the defendant is prepared to do so. The parties have various claims against each other relating to the aborted transaction and the terms on which the transaction may be completed are at issue.

We look forward to receiving your response and the appointment of a judge to conduct the JADR.

Yours truly,

c.c. Bill Jones

b) Mediation Agreement

THIS MEDIATION AGREEMENT is made as of the ___ day of _____, 20__.
BETWEEN:

Party 1

Plaintiff,

- and -

Party 2

Defendant.

WHEREAS the parties are presently involved in a dispute as set out in the pleadings in File No. _____ in the Court of King's Bench (the "*dispute*");

AND WHEREAS the parties desire to attempt to settle the dispute through mediation with the assistance of a mediator;

NOW THEREFORE, the parties themselves and, where below indicated, their respective counsel, agree as follows:

1. The parties submit the dispute to private and confidential mediation pursuant to the attached Rules of Operation and Procedure ("*Rules*") and adopt and incorporate by reference the Rules with the following modifications:

   None.

2. The parties have selected, and the Honourable _____ has agreed to serve as the mediator of the dispute (the "*mediator*").

3. The parties and their counsel acknowledge and agree:

   (a) that the mediation process is an attempt to settle the dispute through mediation with the assistance of a mediator and that, therefore, all information, writings and disclosures ("*communications*") made during the mediation process among the parties and all communication between each party and the mediator will be "without prejudice" and will constitute confidential settlement negotiations;

   (b) that no party will, in any subsequent judicial, administrative or private proceeding ("*proceeding*"), attempt to introduce evidence of any communications made during the mediation process;

   (c) that the mediator's work product and case file, as well as all communications made in the course of the mediation, shall be confidential;

(d) that no party will attempt to call the mediator as a witness in any subsequent proceeding related to any matter which was a subject of or arises from the dispute or the mediation; and

(e) that the mediator shall not be made a party to any subsequent proceeding related to any matter which arises from the mediation, and in particular that none of the parties will file any claim against the mediator regardless of what occurs at the mediation.

4. The mediation shall be private unless the parties and the mediator otherwise agree. No session shall be recorded and no stenographic record shall be made.

5. The parties acknowledge and agree:

(a) that the mediator is not acting as legal counsel for any party in the mediation process and is serving in the capacity of a judge of the Court of King's Bench pursuant to the King's Bench Rules pertaining to pre-trial conferences and case management;

(b) that the parties have agreed to the mediator conducting private caucus meetings with each or any of them and that they consent and agree to the mediator not sharing everything that is said in such private caucus meetings with other parties; and

(c) that if any of the parties are not represented by counsel, it has been recommended to them that they should obtain independent legal advice with respect to the dispute and any matter which is subject to mediation.

6. The parties and their counsel acknowledge and agree to participate in the mediation process fully and in good faith.

7. If the parties do not represent themselves personally in the mediation process, they will be represented by counsel with full authority to settle, or with immediate access by telephone to a representative of that party who has the requisite authority. In the event such decisions require the majority vote of a board, executive or other body vested with such authority, both counsel and the representative of that party, either present or accessible by telephone, will have sufficient authority to make a meaningful recommendation with respect to settlement.

8. The parties agree the mediator will have access to the pleadings, such documents and transcripts as are available, and such additional materials in the form of pre-trial briefs, or otherwise, as the mediator might reasonably require to fully appreciate their respective legal theories of the matters involved and a review of settlement discussions to date.

9. The parties and their counsel will meet with the mediator on _____, 20___ at _____ a.m./p.m. at _____ and will continue in good faith thereafter to engage in the mediation process in such manner and on such further dates as they may agree.

10. If the dispute is resolved by mediation, counsel for the parties shall be responsible for attending to such documentation as is necessary to discontinue the court proceedings and to document the terms of the settlement.

11. Representatives and counsel affixing their signatures to this agreement confirm they have full authority to bind their respective employers or clients such that each party in this action will be bound by the terms contained in the agreement.

12. This agreement may be signed in counterpart by the parties, or their representatives, or by their legal counsel.

Per:

_____ _____

Date Lawyers for the Plaintiff

Per:

_____ _____

Date Plaintiff

Per:

_____ _____

Date Lawyers for the Defendant

Per:

_____ _____

Date Defendant

c) Rules of Operation and Procedure

RULES OF OPERATION AND PROCEDURE

Preamble:

1. **Initiation of Mediation:** Any party to a dispute may propose to the other party or parties that resolution of the dispute be submitted to a judge of the Court of King's Bench to act as mediator. The acceptance of this proposal by the other party or parties will be sufficient to initiate a mediation under these Rules.

2. **Disclosures:** A mediator shall disclose to the parties any circumstances that might adversely affect service as a neutral and impartial mediator. The parties shall disclose to each other any circumstances that might adversely affect the mediator's neutrality and impartiality. This obligation of the mediator and the parties shall be continuing throughout the mediation process.

3. **Agreement:** Once the parties have agreed upon a mediator and the mediator has agreed to serve, the agreement shall be reduced to writing *(a "mediation agreement")* and signed by the parties, their representatives and the mediator. The attached form may be used as the mediation agreement. The mediation agreement shall adopt these Rules by reference, except as expressly modified. Unless otherwise agreed, the parties shall equally share the costs of the mediation. If a party withdraws from mediation and the mediation continues, the withdrawing party shall not be liable for any costs incurred thereafter.

4. **Ground-Rules of Proceeding:**

   (a) mediation shall be private, voluntary and non-binding;

   (b) any party may withdraw from the mediation at any time before signing a settlement agreement upon written notice to each other party and the mediator;

   (c) the mediator shall be neutral and impartial;

   (d) after the execution of the mediation agreement, all procedures of the mediation process shall be controlled by the mediator, in consultation with the parties;

   (e) each party may be represented by more than one person, but the mediator may limit the number of representatives. At least one representative of each party shall be authorized to negotiate settlement;

   (f) the mediation may proceed in the following order of events:

      (i) the mediator shall make opening remarks;

(ii) each party and/or the party's counsel may make a position statement. Such statements shall be made first by the plaintiff, followed by the defendants and the third parties, following the order of the style of cause;

(iii) each party is entitled to a rebuttal statement, which shall proceed in reverse order of the style of cause;

(iv) the mediator shall make closing comments;

(v) the mediator shall decide the next step in the process;

(vi) the mediator shall meet privately with the parties to ascertain whether settlement is possible;

(g) the mediator shall assess, at an early stage, whether the parties are too far apart in their settlement positions and may advise the parties if they are of the view that the parties are taking unreasonable positions in terms of settlement;

(h) if the mediator continues to hold the view that settlement is possible, they shall continue to meet with the parties separately and together if more direction is required;

(i) if the mediator holds the view that settlement is not possible, they shall gather the parties together to so advise them;

(j) the mediator may not transmit information provided by one party to another party if the party providing the information has refused to permit the mediator to do so;

(k) unless the parties agree otherwise, the entire mediation process shall be confidential and without prejudice. The parties shall not disclose any information, documents, statements, positions or terms of settlement unless these matters are otherwise discoverable. Nothing said or done or provided by the parties in the course of the mediation shall be reported or recorded or, except as ordered by a court of competent jurisdiction, placed in evidence in any legal proceeding or construed for any purpose as an admission against interest;

(l) to the extent that the rights of a party are not prejudiced, the parties shall refrain during the course of the mediation from pursuing legal proceedings involving the subject matter of the mediation;

(m) the mediator shall be disqualified as a judge in any pending or future investigation, action, or proceeding relating to the subject matter of the mediation or any matter which becomes an issue during the mediation other than the continued case management or pre-trial conference functions in the action in question;

(n) the parties shall oppose any efforts to make the mediator a witness in any legal proceeding relating to the subject matter of the mediation. Except as ordered by a court of competent jurisdiction, the mediator shall be disqualified as a witness in any pending or future investigation, action or proceeding relating to the subject matter of the mediation;

(o) the parties shall not put into evidence in any legal proceeding information provided by another party to the mediation that is not otherwise discoverable, and the parties shall oppose any efforts to require that information and documents in the mediator's possession be produced in any pending or future investigation, action, or proceeding relating to the subject matter of the mediation;

(p) unless the parties and the mediator agree otherwise, the mediator shall not serve in any capacity if a settlement is not reached and the matter proceeds to arbitration or to any other form of binding dispute resolution;

(q) with the prior agreement of the parties, the mediator may obtain assistance and independent expert advice;

(r) the parties shall employ the services of interpreters as may be necessary to overcome language barriers. The parties shall share equally the costs of employing interpreters;

(s) the mediator shall not be liable for any act or omission in connection with the mediation.

5. **Presentation to Mediator:** All parties have filed and served materials in the form of pre-trial briefs. Any other mediation briefs shall be filed and served at least seven days prior to the commencement of the mediation proceeding.

6. **Negotiation of Terms:** Each party should be prepared to initiate proposals for settlement. Efforts to reach settlement shall continue until:

(a) a written settlement agreement is executed;

(b) the mediator concludes and advises the parties that further efforts would not be useful; or

(c) one of the parties or the mediator withdraws. If two or more parties remain, the remaining parties may elect to continue following the withdrawal of one party.

7. **Withdrawal of Mediator:** A mediator may withdraw at any time by giving written notice to the parties for the following reasons:

(a) overwhelming personal reasons;

(b) the mediator believes that a party is not acting in good faith; or

(c) the mediator concludes that further mediation efforts would not be useful.

8. **Settlement:** If a settlement is reached, the mediator or the parties shall draft a written document incorporating all settlement terms. This draft will be circulated, amended as necessary, and executed by the parties when finalized.

2. Manitoba Court Precedents

a) Sample Pre-Trial Conference Brief of a Plaintiff

File No. CI 00-01-54454

THE KING'S BENCH
WINNIPEG CENTRE

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

PRE-TRIAL CONFERENCE DATE: September 8, 20___, at 9:00 a.m.

PRE-TRIAL CONFERENCE BRIEF OF THE PLAINTIFF

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

DOREEN DOWNING (204-666-4949)

File No. CI 00-01-54454

THE KING'S BENCH
WINNIPEG CENTRE

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

PRE-TRIAL CONFERENCE BRIEF
OF THE PLAINTIFF

I N D E X

Page Nos.

PART I
STATEMENT OF FACTS

1. On April 16, 20___, at approximately 11:00 a.m., the Plaintiff was shopping at the Defendant's retail grocery store when she slipped on a pool of clear liquid on the floor of the store, fell and injured her left hand and hip.

2. The pool of liquid was on the floor because earlier that morning one of the Defendant's customers had collided with a display of pickle jars causing one of the jars to break and its contents to spill. The Defendant's assistant manager had asked another employee to clean up the spill.

3. The Defendant's employee mopped up the spill but was unable to locate any of the Defendant's yellow safety cones marked "wet floor" which were usually located in the mop room. The employee went to the back of the store to try and locate the cones leaving no other employees in the area of the spill to warn customers of the existence of the spill or the wet floor.

4. The Plaintiff fell on the floor prior to the Defendant's employee returning to the site of the spill.

5. Dr. Rhodes, in his report of January 14, 20___, indicates that the Plaintiff suffered from previously existing arthritis which was aggravated by her fall. Although the pre-existing arthritis was pain free, after her fall the Plaintiff became symptomatic in the caro-metacarpal joint of her thumb.

6. As a result of the fall and the injuries sustained, the Plaintiff wears a hard plastic or fibreglass splint, takes mobiflex or extra-strength Tylenol for pain and applies ice and heat alternately to her hand and wrist. She experiences constant pain in the area between the base of her thumb and wrist which radiates further up her arm. She finds that she limps if she does too much walking and has difficulty standing for long periods of time or sitting in certain chairs.

7. Prior to the accident, the Plaintiff enjoyed sewing dresses and children's clothing but her activities in this regard have now been very much restricted. She has also been unable to continue with her gardening.

8. The Plaintiff attended physiotherapy for her wrist and hip for a few months but found that it helped only on the day of treatment. She stopped going for physiotherapy on the advice of her physician.

PART II
STATEMENT OF ISSUES

I. Did the Defendant fail in its statutory duty pursuant to *The Occupiers' Liability Act* ("the Act") to take reasonable steps to ensure that the Plaintiff was reasonably safe while on the premises? Put another way, did the Defendant's knowledge of the breakage of the pickle jar and subsequent escape of pickle juice and its unsuccessful attempt to clean up constitute a breach of statutory duty or negligence?

II. Did the Plaintiff willingly assume any risks in attending the Defendant's premises?

III. Was the Plaintiff contributorily negligent?

IV. What is the appropriate quantum of special and general damages?

V. Is there a genuine issue requiring a trial?

VI. What damages will the Plaintiff seek if a summary judgment motion is granted?

PART III
PLAINTIFF'S POSITION WITH RESPECT TO THE ISSUES

Did the Defendant fail in its statutory duty pursuant to *The Occupiers' Liability Act* ("the Act") to take reasonable steps to ensure that the Plaintiff was reasonably safe while on the premises? Put another way, did the Defendant's knowledge of the breakage of the pickle jar and subsequent escape of pickle juice and its unsuccessful attempt to clean up constitute a breach of statutory duty or negligence?

9. It is the position of the Plaintiff that the failure of the Defendant to clean up the pickle juice or take measures to warn its customers of the spill constituted a breach of statutory duty or negligence.

10. The statutory duty of occupiers under the Act is to take reasonable care to make the premises safe.

11. The issue of whether the Defendant breached its statutory duty cannot be determined solely by an examination of the general maintenance program implemented by the Defendant. What must be determined is whether the Defendant in all of the circumstances of the case discharged its statutory duty to ensure the premises were reasonably safe. The issue really is whether the Defendant's maintenance program worked as designed.

12. The Defendant apparently had a policy in effect, evidenced by its customer injury or property damage report, which obliged the store manager or assistant manager, in the event of an accident, to inspect the place of the accident and, if possible, remove or have the cause removed immediately to prevent further accidents. The store manager, or assistant manager, was further instructed to screen off or otherwise protect the area while cleanup is made.

13. It is the position of the Plaintiff that in the circumstances of this case the Defendant failed to immediately clean up the spill and failed to screen off or otherwise protect the area while the cleanup was under way so as to protect other customers.

Did the Plaintiff willingly assume any risks in attending the Defendant's premises?

14. It is the position of the Plaintiff that there is absolutely no evidence that the Plaintiff knew of or willingly assumed any risks associated with attending the premises of the Defendant and that such a plea is frivolous.

Was the Plaintiff contributorily negligent?

15. It is the position of the Plaintiff that there is no evidence that she was contributorily negligent. There is no evidence that her fall was occasioned by her failure to exercise reasonable care for her own safety.

Quantum of special and general damages.

16. It is the position of the Plaintiff that she is entitled to general damages in the range of $20,000.00. Representative legal authorities are appended to this brief.

17. As to past loss of income, the Plaintiff claims the sum of $35,584.00 based on the reduction in her work week from 20 to 24 hours per week to 16 to 20 hours per week and based on later advice from her physician that she stop working altogether.

18. The Plaintiff also has other miscellaneous items of special damages as follows:

Manitoba Health Care Services:	$ 668.55;
wrist splint:	25.00;
prescriptions:	350.00;
Tylenol:	120.00;
physiotherapy:	356.15.

Is there a genuine issue requiring a trial?

19. The Plaintiff's position is that this case is one which is appropriate for summary judgment as the defence is without merit and raises no genuine issues requiring a trial. It is respectfully submitted that this Honourable Court can make the necessary findings of fact, and decide the issues fairly, on the basis of the affidavit evidence that has been, or will be, tendered by the parties.

What damages will the Plaintiff be seeking if a summary judgment motion is granted?

20. In the event that a summary judgment motion is granted, the Plaintiff will be seeking damages as described in paragraphs 16, 17 and 18 herein.

PART IV
RELEVANT DOCUMENTS AND LEGAL AUTHORITIES

21. The relevant medical reports and the Defendant's customer injury or property damage report are appended to this brief.

22. Relevant legal authorities as to liability and damages are appended to this brief.

PART V
READINESS FOR TRIAL

23. Pleadings are closed, examinations for discovery have been held, and all undertakings have been answered. There are no motions contemplated. This action is therefore ready for trial.

24. The Plaintiff anticipates calling one lay witness and Dr. H. D. West. The Plaintiff does not intend to call any other medical doctors, unless required to do so by the Defendant, for the purposes of cross-examination.

25. The Plaintiff expects that the trial will require three days.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DOWNING & ASSOCIATES

Per:_____
Lawyers for the Plaintiff

b) Sample Pre-Trial Conference Brief of a Defendant

File No. CI 00-01-54454

THE KING'S BENCH
WINNIPEG CENTRE

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

PRE-TRIAL CONFERENCE DATE: September 8, 20___, at 9:00 a.m.

PRE-TRIAL CONFERENCE BRIEF OF THE DEFENDANT

GREEN & COMPANY
Barristers & Solicitors
600 Howe Street
Winnipeg, Manitoba
R3C 3R6

GREGORY GREEN (204-532-2898)

File No. CI 00-01-54454

THE KING'S BENCH
WINNIPEG CENTRE

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

PRE-TRIAL CONFERENCE BRIEF
OF THE DEFENDANT

I N D E X

PART I
STATEMENT OF FACTS

1. The Defendant agrees with the Statement of Facts put forward by the Plaintiff, however, the following facts not mentioned by the Plaintiff are particularly important from the perspective of the Defendant.

2. The Plaintiff injured, but did not fracture, her left hand. The Plaintiff is right-handed.

3. The Plaintiff had shopped at the Defendant's store for more than 20 years, usually attending the store more than once a week. The Plaintiff had never previously encountered any trouble with the flooring or had any occasion to complain to anyone about the condition of the store, the floor or the lighting. The Plaintiff agreed that the floor was usually kept clean.

4. The Plaintiff agrees that the area where the fall occurred is an area that she has walked through on numerous occasions, that she was familiar with the area and that it was well lit. The Plaintiff's only knowledge of what was on the floor where she fell was that there was some wetness on the left side of her clothing that smelled like pickles.

5. The Defendant's representative testified that there has been a spill on the floor, that the floor had been mopped and that he was in the process of getting a wet floor sign at the time the Plaintiff fell.

6. The area in which the Plaintiff fell had been swept at regular intervals as documented by a floor sweeping log which is appended to this brief.

7. Dr. Rhodes says in his report of January 14, 20___ , that the osteoarthritis of the left thumb was not caused by the injury which the Plaintiff sustained by her fall and that he did not believe that the process of osteoarthritis was accelerated by the injury.

8. Dr. Hunt reported on February 23, 20___, that the Plaintiff thought that her wrist and thumb had considerably improved by February 3, 20___, and concluded that the Plaintiff had improved utilizing conservative treatment to this point and should hopefully continue to do so if she is compliant with her exercises and medication.

9. The Plaintiff did not require the use of a cane or walker to provide relief from her hip pain.

PART II
STATEMENT OF ISSUES

I. Did the Defendant fail in its statutory duty pursuant to *The Occupiers' Liability Act* ("the *Act*") to take reasonable steps to ensure that the Plaintiff was reasonably safe while on the premises?

II. Did the Plaintiff willingly assume any risks in attending the Defendant's premises?

III. Was the Plaintiff contributorily negligent?

IV. Quantum of special and general damages.

V. Is there a genuine issue requiring a trial?

PART III
DEFENDANT'S POSITION WITH RESPECT TO THE ISSUES

Did the Defendant fail in its statutory duty pursuant to *The Occupiers' Liability Act* ("the Act") to take reasonable steps to ensure that the Plaintiff was reasonably safe while on the premises?

10. The Defendant denies liability. Its maintenance and safety systems were reasonable and adequate. The Defendant is not an insurer and cannot be expected to maintain a constant vigil to ensure that spilled liquids are immediately cleaned.

11. The obligation of the Defendant to make the premises reasonably safe should not be fixed at a level of constant inspection to thwart possible injury from every bit of spillage. Some allowance must be made for reasonable time to learn of the spill and reasonable time to arrange for the cleaning of the area. See, for example, Ball v. Canada (1989), 29 F.T.R. 182 (F.C.T.D.) where the Court found no liability in the case of a spilled clear liquid. The Court noted that in order for the Defendant to be liable the Plaintiff would have had to show that the Defendant had notice of the spill and did not remove it with reasonable dispatch. In the alternative, the Plaintiff would have had to show that the Defendant failed to take reasonable steps to ensure that it would be notified of the condition in a timely manner so that the Defendant could act with reasonable dispatch to remove that condition once notified.

Did the Plaintiff willingly assume any risks in attending the Defendant's premises?

Was the Plaintiff contributorily negligent?

12. The Plaintiff was fully familiar with the store and willingly assumed any risks. If the fall was not the result of pure accident, it was caused at least in part by the Plaintiff's failure to exercise reasonable care for her own safety.

Quantum of special and general damages.

13. The Defendant suggests that general damages are in the range of $15,000.00. Representative cases are appended to this brief.

14. As to loss of income, the Plaintiff was a part-time sales clerk who earned approximately $7,500.00 per year prior to her fall. She discontinued her employment approximately one year after the fall and, as of the date of the examination for discovery, had made no effort to obtain other employment. She testified that while at home and not working it was easier for her to care for her retired husband who had a kidney transplant and to care for her infirm mother who was living with her and was 88 years of age.

Is there a genuine issue requiring a trial?

15. The Defendant's position is that the issues of whether the Defendant is liable for breach of statutory duty and whether the Plaintiff was contributorily negligent are both genuine issues requiring a trial of the action.

16. These issues cannot be determined on affidavit evidence alone, and require oral testimony in order to be properly determined.

PART IV
RELEVANT DOCUMENTS AND AUTHORITIES

17. Copies of relevant documents and relevant legal authorities are appended to this brief.

PART V
READINESS FOR TRIAL

18. This matter is ready for trial.

19. It is anticipated that all relevant documents will be filed by consent.

20. The Defendant anticipates calling three witnesses. No expert witnesses are anticipated.

21. It is expected that the trial will require three days.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

GREEN & COMPANY

Per:_____
Lawyers for the Defendant

c) Offer to Settle

File No. CI 00-01-54454

THE KING'S BENCH
WINNIPEG CENTRE

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

OFFER TO SETTLE

GREEN & COMPANY
Barristers & Solicitors
600 Howe Street
Winnipeg, Manitoba
R3C 3R6

GREGORY GREEN (532-2898)

Lawyers for the Defendant

File No. CI 00-01-54454

THE KING'S BENCH
WINNIPEG CENTRE

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

OFFER TO SETTLE

The Defendant offers to settle this proceeding (or the following claims in this proceeding) on the following terms:

1. The Defendant to pay to the Plaintiff the sum of $15,000.00, in full settlement of the Plaintiff's claim, interest and costs.

2. The Plaintiff to provide the Defendant with a duly executed release in a form satisfactory to counsel for the Defendant and a registrable Notice of Discontinuance without costs.

This offer will expire on the commencement of the hearing (or on the _____ day of _____, 20_____, at _____ a.m./p.m.)

October 1, 20___

GREEN & COMPANY
Barristers & Solicitors
600 Howe Street
Winnipeg, Manitoba
R3C 3R6
GREGORY GREEN
Lawyers for the Defendant

TO: DOWNING & ASSOCIATES
Barristers & Solicitors
500 Edmonton Square
Winnipeg, Manitoba
R3C 3R8
ATTENTION: DOREEN DOWNING
Lawyers for the Plaintiff

d) Agreed Book of Documents

File No. CI 23-01-12345

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

FELIPE CANDOR

plaintiff

– and –

SECURITY INSURANCE COMPANY
and DONALD PETERS

defendants

AGREED BOOK OF DOCUMENTS

BLACK AND WHITE LLP
Litigation Counsel
15 Grey Lane
Winnipeg, Manitoba R4T 6Y7

Andrew Black
Telephone: (204) 798-6543
Fax: (204) 798-6544
File No. **15789**

JACKSON JOHNSON LLP
Barristers & Solicitors
89 Pine Street
Winnipeg, Manitoba R6T 7J9

Anna Rhone
Telephone: (204) 888-9976
Fax: (204) 888-9977
File No. **77777**

File No. CI 23-01-12345

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

FELIPE CANDOR

plaintiff

– and –

SECURITY INSURANCE COMPANY
and DONALD PETERS

defendants

AGREED BOOK OF DOCUMENTS

These documents are being submitted jointly by counsel for the plaintiff, and counsel for the defendant, as an Agreed Book of Documents, and the documents referred to herein are hereby agreed to be authentic within the meaning of King's Bench Rule 51.01 specifically:

(1) a document that is said to be an original was printed, written, signed or executed as it purports to have been;

(2) a document that is said to be a copy is a true copy of the original; and

where the document is a copy of a letter, telegram or telecommunication, the original was sent as it purports to have been sent and received by the person to whom it is addressed.

The inclusion of a document in this Agreed Book of Documents is not an admission of the truth of any statement in the document.

TAB	DATE	DOCUMENT
VOLUME ONE		
1	20xx 01 15	List of Security Insurance Company ("Security") Policies prepared by Felipe Candor (plaintiff's answer to undertaking #1)
2	20xx 01 19	Security List of Policies of Felipe Candor (defendant's production #41)
3	19xx 01 09	Application for Life Insurance No. 1234 of Felipe Candor for Policy ____, Part I, pp.1- 2 and Data Page (defendant's production #2; plaintiff's production #26)
4	19xx 01 22	Application for Life Insurance No. 5678 of Felipe Candor for Policy _____, Part I, pp. 1-2, Data Page, and Designation of Beneficiary (defendant's production #2; plaintiff's production #26)
5	19xx 03 15	Application for Life Insurance No. _____ of Felipe Candor for Policy _____, Part I, pp. 1-2, Data Page, and Premium Calculation (defendant's production #4; plaintiff's production #26)
6	19xx 03 15	Application for Life Insurance No. _____ of Felipe Candor for Policy _____, Part I, pp. 1-2, and Premium Calculation (defendant's production #3)
7	1981-1983	Security Policy General Provisions and Conditions for Policies _____, _____, _____ and _____ (plaintiff's production #26; defendant's production #2)
8	1981-1983	Security Total Disability Rider included in Policies _____, _____, _____ and _____
9	19xx, 03 16 to 19xx, 05 23	Disability Claim Direction; Handwritten note; Disability Calculating, Requisition and Code Sheets and Major Change in Process forms for Policies _____,_____,_____ and _____; List of Policies with handwritten note "All policies now on disab. 19/5/xx" (defendant's production #6 to 11)
10	20xx 06 24	Application for policy change of Felipe Candor for Policy _____, excerpts (defendant's production #14)
11	20xx 07 08	Security Policy Information Sheet and Summary for Policy _____ (defendant's production #14)

TAB	DATE	DOCUMENT
12	20xx 07 08	Security Policy Information Sheet and Summary for Policy _____ (defendant's production #15)
13	20xx 07 08	Security Policy _____ (Peters production #5)
14	20xx 07 13 20xx 08 10	Policy Delivery Illustration for Policy _____ and Policy Delivery Receipt and Acknowledgement signed by Felipe Candor (defendant's production #16; plaintiff's production #5)
15	20xx 03 19	Security Annual Policy Statement for Policy _____ (plaintiff's production #13)
16	20xx 03 19	Security Annual Policy Statement for Policy _____ (plaintiff's production #13)
17	20xx 02 11	Security Annual Policy Statement for Policy _____ (plaintiff's production #14)
18	20xx 03 19	Security Annual Policy Statement for Policy _____ (plaintiff's production #16)
19	20xx 03 19	Security Client Contact Event showing Policy Statement mailed for Policy _____ on March 19, 20xx; and Security Annual Policy Statement for Policy _____ 3 as of April 3, 20xx (reprinted May 12, 20xx) (defendant's production #101 and #111; plaintiff's production #20)
20	20xx 06 17	Security Annual Policy Statement for Policy _____ (plaintiff's production #17)
21	20xx 07 16	Summary of Life Insurance Policies for: • Felipe Candor • Ann Candor • Lisa Candor • George Candor • Howard Candor • Tanner Candor • Randy Candor (plaintiff's production #6)
22	20xx 12 04	Letter to Felipe Candor from Betsy Glenn, Security re Policy Number: _____; Security Memorandum to Financial Inc. ("Peters"), and Life Insurance Illustration (defendant's productions #21, 22, 23)

TAB	DATE	DOCUMENT
23	20xx 12 12 to 20xx 12 19	Emails between Candace and Will Stone and Security representatives (defendant's productions #25, 26, 28)
24	20xx 01 08	Letter to Felipe Candor from Sandra Lynx, Security re Policy Number: _____, Security Memorandum to_____ ; and Life Insurance Illustration (defendant's productions #30, 31, 32)
25	20xx 01 14	Email correspondence between Jane Smythe and Felipe Candor re _____'s phone # (plaintiff's production #27)
26	20xx 01 15	Email correspondence between Felipe Candor and Hannah Kane re:_____ From _____ (plaintiff's production #29)
27	20xx 01 19	Letter to_____ from _____
28	20xx 01 20	Letter to _____ from _____
29	20xx 01 22	Security Investigation Sheet, Policy # _____ (defendant's production #44)
30	20xx 01 24 to 20xx 01 26	Email from Felipe Candor to (defendant's productions #46, 47)
31	20xx 02 19 20xx 02 18	Assignment/Release of assignment forms from CIBC for Policy Nos. _____ and ____, from CIBC to Security (defendant's productions #57, 59, 67, 68)

Note: for the purposes of illustration, this sample is incomplete

VOLUME TWO

32	20xx 10 15	Letter from Security to Felipe Candor re: Policy Number: _____, Cheque Number: 6789 Amount: $25,000.00, Issue Date: 20xx-05-07 with attached Replacement Cheque Declaration (plaintiff's production #52; defendant's production #115)
33	20xx 10 20	Emails between Felipe Candor, Dave Peters and _____ re: Concerns (plaintiff's production #55; defendant's production #118)

Note: for the purposes of illustration, this sample is incomplete

DOCUMENTS RELATING TO PLAINTIFF'S PAYMENTS

A. Renovations to Home

34	20xx 07 28	Construction Proposal from Waller Builders Ltd. for Candor Residence Renovation (plaintiff's answer to undertaking #9)
35	20xx 11 20 20xx11 30 20xx 02 12	Invoices from Waller Builders Ltd. to Felipe Candor (plaintiff's answers to undertaking #10)
36	20xx 05 31	Invoice from Waller Builders Ltd. to Felipe Candor (plaintiff's supplementary documents #4)
37	20xx 12 19	CIBC Loan Details for Felipe Candor (plaintiff's answer to undertaking #16)

B. Payment for Tuition Payments for Children

38	20xx-20xx	University of Winnipeg Account Activity Details for George Candor for Fall Term 2014, Fall/Winter Term 20xx, and Winter Term 20xx (plaintiff's documents #194, 195 and 196) *Note: for the purposes of illustration, this sample is incomplete*
39		**AFFIDAVIT OF DONALD PETERS SWORN JUNE 27, 2019 (including List of Exhibits)** *Note: for the purposes of illustration, this sample is incomplete*

e) Subpoena

File No. CI 00-01-54454

THE KING'S BENCH
WINNIPEG CENTRE

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

SUBPOENA

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

DOREEN DOWNING (204-666-4949)
Lawyers for the Plaintiff

File No. CI 00-01-54454

THE KING'S BENCH
WINNIPEG CENTRE

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

TO: Dr. H. D. West
2429 Young Avenue
Winnipeg, Manitoba
R3C 0P8

SUBPOENA

YOU ARE REQUIRED TO ATTEND TO GIVE EVIDENCE IN COURT at the hearing of this proceeding on Tuesday, November 15, 20___, at 10:00 a.m., at the Law Courts, Broadway and Kennedy Street, Winnipeg, and to remain until your attendance is no longer required.

YOU ARE REQUIRED TO BRING WITH YOU and produce at the hearing the following documents and things:

(a) all clinical notes and records in your possession concerning the Plaintiff.

ATTENDANCE MONEY FOR one-half day(s) of attendance is served with this subpoena, calculated in accordance with Tariff "B" of the King's Bench Rules, as follows:

Attendance allowance of $36.25 per half-day	$36.25
Travel allowance	$ 4.35
Overnight accommodation and meal allowance	$____
TOTAL	$40.60

If further attendance is required, you will be entitled to additional attendance money.

IF YOU FAIL TO ATTEND OR TO REMAIN IN ATTENDANCE AS REQUIRED BY THIS SUBPOENA, A WARRANT MAY BE ISSUED FOR YOUR ARREST.

September 12, 2___ Issued by _____
Deputy Registrar

Address of Court Office:
Broadway and Kennedy Street
Winnipeg, Manitoba

This subpoena was issued at the request of, and inquiries may be directed to:

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

ATTENTION: DOREEN DOWNING
Lawyers for the Plaintiff

f) Judgment

File No. CI 00-01-54454

THE KING'S BENCH
WINNIPEG CENTRE

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

JUDGMENT

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

DOREEN DOWNING (204-666-4949)
Lawyers for the Plaintiff

File No. CI 00-01-54454

THE KING'S BENCH
WINNIPEG CENTRE

THE HONOURABLE)
) Tuesday, the 17th day of November, 20___
MR. JUSTICE ROBERTS)

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

JUDGMENT

THIS ACTION was heard on November 15-17, 20___ , in the presence of counsel for all parties.

ON READING THE PLEADINGS AND HEARING THE EVIDENCE and the submissions of counsel for the parties;

1. THIS COURT ORDERS that the Defendant shall pay to the Plaintiff the sum of $_____ together with pre-judgment interest in the sum of $_____ to November 17, 20___, and costs.

THIS JUDGMENT BEARS INTEREST at the rate of 5% per year.

November 17, 20___

APPROVED AS TO FORM:

GREEN & COMPANY

Per:_____
Lawyers for the Defendant

g) Bill of Costs

File No. CI 00-01-54454

THE KING'S BENCH
WINNIPEG CENTRE

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

BILL OF COSTS

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

DOREEN DOWNING (204-666-4949)
Lawyers for the Plaintiff

File No. CI 00-01-54454

THE KING'S BENCH
WINNIPEG CENTRE

BETWEEN:

ANN ANDREWS,

plaintiff,

- and -

BROWN & SONS GROCERIES LIMITED,

defendant.

BILL OF COSTS

(CLASS 2 ACTION)	Disbursements	Costs
Pleadings		$ 1,250.00
- filing Statement of Claim	$ 250.00	
- service of Statement of Claim	50.00	
Discovery of Documents		625.00
Examinations for Discovery (4 half days)		2,500.00
- paid for transcripts	201.75	
	215.50	
	106.75	
Motion		1,250.00
Preparation for Trial		1,250.00
- photocopies of Exhibits and authorities for trial	100.00	
Pre-Trial Conference		450.00
Counsel fee at Trial (3 days)		3,750.00
All Other Services after Judgment		200.00
TOTAL:	$924.00	$11,275.00

TOTAL FEES & DISBURSEMENT ($11,275.00 + $924.00) = $12,199.00

h) Notice of Appeal

File No. AI 20-01-54312

IN THE COURT OF APPEAL

BETWEEN:

ANN ANDREWS,

(Plaintiff) Respondent,

- and -

BROWN & SONS GROCERIES LIMITED,

(Defendant) Appellant.

NOTICE OF APPEAL

GREEN & COMPANY
Barristers and Solicitors
600 How Street
Winnipeg, Manitoba
R3C 3R6

Gregory Green (204-532-2898)
Lawyers for the Defendant (Appellant)

IN THE COURT OF APPEAL

BETWEEN:

ANN ANDREWS,

(Plaintiff) Respondent,

- and -

BROWN & SONS GROCERIES LIMITED,

(Defendant) Appellant.

NOTICE OF APPEAL

TAKE NOTICE that a motion will be made on behalf of the defendant, Brown & Sons Groceries Limited, before the Court of Appeal, as soon as the motion can be heard, by way of appeal from the Judgment of The Honourable Mr. Justice Roberts, of the Court of King's Bench, Winnipeg Centre, pronounced on the 17th day of November, 20___ and filed on the _____ day of November, 20___, whereby the learned judge did order:

1. that the plaintiff's claim be allowed; and
2. that the defendant, pay to the plaintiff general damages in the amount of $25,000.00 plus $2,000.00 for loss of opportunity to invest;

That the defendant pay to the plaintiff special damages for loss of income and out-of-pocket expenses in the amount of $20,000.00 plus prejudgment interest to November 17, 20__;

That the defendant pay costs to the plaintiff, to be taxed unless agreed upon between the parties.

ON THE APPEAL, this Court will be asked to set aside the said Judgment of The Honourable Mr. Justice Roberts and order that the plaintiff's action be dismissed with costs on the following grounds:

1. The learned trial judge erred in law by finding that the defendant failed to discharge its duty to exercise reasonable care in all of the circumstances to see that persons would be reasonably safe while on its premises, and was therefore negligent;
2. The learned trial judge erred in law and/or made palpable and overriding errors by failing to find that the defendant had a reasonable inspection and maintenance system in place, which was properly implemented, to ensure persons would be reasonably safe while on the premises, such that it fully discharged its duty within the meaning of The Occupiers Liability Act, C.C.S.M. c. O8;
3. The learned trial judge erred by failing to find that the plaintiff was contributorily negligent;
4. The learned trial judge erred by finding that the plaintiff suffered any loss or damage, including any personal injury or loss of income, as a result of the fall on the defendant's premises, or alternatively, by awarding general and special damages in amounts that are inordinately high and unsupported by the law and evidence;
5. The learned trial judge erred in law and/or made palpable and overriding errors on the issues of liability and damages by misapplying the law to the facts, misconstruing the evidence and drawing erroneous conclusions from it, and/or by basing the decision on findings that are not supported by, and are inconsistent with, the evidence;
6. Such further and other grounds as counsel may advise and this Honourable Court may permit.

Has a transcript of the evidence with respect to the judgment appealed from been ordered from transcription services?

☒ Yes ☐ No ☐ Not Required

DATED this ____ day of December, 20___.

GREEN & COMPANY

Per:_____
Gregory Green,
Counsel for the Defendant (Appellant),
Brown & Sons Groceries Limited

TO: Registrar of the Court of Appeal

AND TO: ANN ANDREWS

AND TO: DOWNING & ASSOCIATES
Barristers and Solicitors
500 Edmonton Square
Winnipeg, Manitoba
R3C 3R8

Doreen Downing
Counsel for the Plaintiff (Respondent)

NOTE: Court of Appeal Rule 112 requires that the Notice of Intention to Exercise Language Rights in Form C1 be attached to the Notice of Appeal.

i) Factum Index

File No. AI 20-01-54312

IN THE COURT OF APPEAL

BETWEEN:

ANN ANDREWS,

(Plaintiff) Respondent,

- and -

BROWN & SONS GROCERIES LIMITED,

(Defendant) Appellant.

FACTUM OF THE (DEFENDANT) APPELLANT

GREEN & COMPANY
Barristers and Solicitors
600 Howe Street
Winnipeg, Manitoba
R3C 3R6

Gregory Green (204-532-2898)
Lawyers for the Defendant (Appellant)

IN THE COURT OF APPEAL

BETWEEN:

ANN ANDREWS,

(Plaintiff) Respondent,

- and -

BROWN & SONS GROCERIES LIMITED,

(Defendant) Appellant.

FACTUM OF THE (DEFENDANT) APPELLANT

I N D E X

Page No.

Note: Pursuant to Court of Appeal Rule 29(1), counsel must indicate at the end of the Factum an estimate of the amount of time required for argument.

j) Appeal Book Index

File No. AI 20-01-54312

IN THE COURT OF APPEAL

BETWEEN:

ANN ANDREWS,

(Plaintiff) Respondent,

- and -

BROWN & SONS GROCERIES LIMITED,

(Defendant) Appellant.

APPEAL BOOK

GREEN & COMPANY
Barristers and Solicitors
600 Howe Street
Winnipeg, Manitoba
R3C 3R6

Gregory Green (204-532-2898)
Lawyers for the Defendant (Appellant)

IN THE COURT OF APPEAL

BETWEEN:

ANN ANDREWS,

(Plaintiff) Respondent,

- and -

BROWN & SONS GROCERIES LIMITED,

(Defendant) Appellant.

APPEAL BOOK
I N D E X

3. Federal Court Precedents

a) Notice of Application – Rule 301 and Form 301

Court File No. T-2222-11

FEDERAL COURT

BETWEEN:

_____

Applicant

and

HIS MAJESTY THE KING

Respondent

Notice of Application

Joe Jones
Barrister and Solicitor
Address
Winnipeg, Manitoba

File No. 12345
Tel: (204) 962-2233
Fax: (204) 965-2233

Court File No. T-2222-11

FEDERAL COURT

BETWEEN:

_____

Applicant

and

HIS MAJESTY THE KING

Respondent

Notice of Application

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at *(place where Federal Court of Appeal (or Federal Court) ordinarily sits)*.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date

Issued by: _____
(Registry Officer)

Address of local office:
Federal Court of Canada
363 Broadway, 4th Floor
Winnipeg, Manitoba
R3C 3N9

TO: HIS MAJESTY THE KING
Department of Justice (Canada)
Prairie Region, Winnipeg Office
301-310 Broadway
Winnipeg, Manitoba
R3C 0S6

APPLICATION

(*Where the application is an application for judicial review*)
This is an application for judicial review in respect of
(Identify the tribunal.)
(Set out the date and details of the decision, order or other matter in respect of which judicial review is sought.)

The applicant makes application for: *(State the precise relief sought.)*
1.
2.

The grounds for the application are: *(State the grounds to be argued, including any statutory provision or rule relied on.)*
1.
2.

This application will be supported by the following material*: (List the supporting affidavits, including documentary exhibits, and the portions of transcripts to be used.)*
1.
2.

(If the applicant wishes a tribunal to forward material to the Registry, add the following paragraph:)

The applicant requests *(name of the tribunal)* to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the *(tribunal)* to the applicant and to the Registry: *(Specify the particular material.)*
1.
2.

Date

" *Joe Jones* "

Barrister and Solicitor
Address
Winnipeg, Manitoba
Tel: (204) 962-2233
Fax: (204) 965-2233

b) Applicant's Motion Record for a Specially Managed Proceeding – Form 359 and Rules 364, 369 and 384

Court File No. T-2222-11

FEDERAL COURT

BETWEEN:

HIS MAJESTY THE KING

Applicant

and

_____

Respondent

Applicant's Motion Record

ATTORNEY GENERAL OF CANADA

Per: _____
Department of Justice (Canada)
Prairie Region, Winnipeg Office
Lawyer in charge of the file: _____
301-310 Broadway
Winnipeg, Manitoba
R3C 0S6

Email: _____
Telephone: (204) 962-3242
Facsimile: (204) 963-3242

Court File No. T-2222-11

FEDERAL COURT

BETWEEN:

HIS MAJESTY THE KING

Applicant

and

_____

Respondent

Applicant's Motion Record – Table of Contents

Page

Court File No.: T-2222-11

FEDERAL COURT

BETWEEN:

HIS MAJESTY THE KING

Applicant

and

_____

Respondent

Notice of Motion

TAKE NOTICE THAT the applicant will make a motion to the Court in writing under Rule 369 of the *Federal Courts Rules*.

THE MOTION IS FOR an order pursuant to Rule 384 of the Federal Courts Rules for an order that this action proceed as a specially managed proceeding.

THE GROUNDS FOR THE MOTION ARE:

a) the complex scientific, mathematical and statistical nature of the evidence, and its volume, is likely to make strict compliance with the timelines established by the *Federal Courts Rules* difficult, if not impossible;

b) the complex scientific, mathematical and statistical nature of the evidence, and its volume, will require the Court to authorize, pursuant to rule 316, that the cross-examinations of some or all of the witnesses take place in court;

c) due to the nature and volume of the evidence and the nature of the relief that the applicant seeks, the parties will likely need to seek direction from the court throughout the litigation process; and

d) the respondent consents to the relief sought in this motion.

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

a) affidavit of _____, affirmed November 1, 20__;

b) affidavit of _____, sworn December 8, 20__;

c) the notice of application, filed December 6, 20__; and

d) the signed consent of the respondent's counsel, to be filed.

February 22, 20__.

_____

Per: *(counsel's name)*
Department of Justice (Canada)
Prairie Region, Winnipeg Office
301-310 Broadway
Winnipeg, Manitoba
R3C 0S6

Telephone: (204) 983-2331
Facsimile: (204) 983-2333

Solicitor for the Applicant

TO: *(Name and address of responding party's solicitor or responding party)*

Court File No. T-2222-11

FEDERAL COURT

BETWEEN:

HIS MAJESTY THE KING

Applicant

and

_____

Respondents

Applicant's Written Representations

1. The applicant brings this motion to have this proceeding managed as a specially managed proceeding.

Issue

2. Is this an appropriate action to proceed as a specially managed case?

Applicant's Submissions

3. On December 6, 20__, the applicant filed and served a notice of application.

4. The applicant filed two affidavits in support of the application. Both affidavits contain large amounts of scientific evidence that require extensive explanation.

5. In reply to the applicant's evidence, the respondent filed two affidavits between January 15, 20__ and December 8, 20__. Each affidavit contains large amounts of scientific evidence which requires extensive explanation.

6. The dispute in the application revolves, in large part, around the scientific sampling and analysis techniques used by either party. The Court will be asked to weigh the different scientific evidence when deciding whether the respondents are in contravention of the Storage of PCB Materials Regulations (SOR/92-507).

7. To conduct full and complete cross-examinations on the affidavit material filed, it will be necessary for all counsel to prepare extensively with the assistance of experts. It is also quite probable that these cross-examinations will be lengthy.

8. Pursuant to the Federal Courts Rules, both the applicant and the respondent must complete cross-examinations in this matter by February 27, 20__.

9. It might also be necessary for the applicant to file additional evidence to respond to the respondent's evidence.

10. Further, due to the complex nature of the expert evidence, the parties agree to seek an order pursuant to Rule 316 authorizing cross-examinations of the witnesses to take place in court.

11. Accordingly, the applicant (and the respondent) submits that, in pursuing this application, the complex nature and the volume of the material in question will make strict compliance with the timelines imposed by the Federal Courts Rules difficult, if not impossible.

12. Further, the guidance and assistance of the Court through case management over the course of the litigation will assist the parties to resolve aspects of the dispute early, particularly about the manner of proceeding. For example, it may be possible to narrow the dispute sufficiently so that it could be decided through the "trial of an issue" process pursuant to Rule 107, with the assistance of a case management judge.

13. The parties therefore request that this motion be granted, and that the application proceed as a specially managed proceeding. The parties also agree that a case management teleconference should be arranged as soon as possible.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Winnipeg, in Manitoba on February 22, 20__.

_____

Per: *(counsel's name)*
Department of Justice (Canada)
Prairie Region, Winnipeg Office
301-310 Broadway
Winnipeg, Manitoba
R3C 0S6

Telephone: (204) 983-2331
Facsimile: (204) 983-2333

Solicitor for the Applicant

TO: *(Name and address of responding party's solicitor or responding party)*

Court File No. T-2222-11

FEDERAL COURT

BETWEEN:

HIS MAJESTY THE KING

Applicant

and

_____

Respondent

Consent

THE RESPONDENT HEREBY consents to the relief that the applicant seeks in its motion to have the proceeding proceed as a specially managed proceeding.

February 22, 20__.

_____

Solicitor for the Respondent

c) Order re: Specially Managed Proceeding

Date:
Docket: T-2222-11

Ottawa, Ontario, March 5, 20__

PRESENT: Madam _____,
Prothonotary

BETWEEN:

HIS MAJESTY THE KING

Applicant

and

_____

Respondent

UPON motion on behalf of His Majesty the King dated February 22, 20__ for an order pursuant to rule 384 of the *Federal Courts Rules* that this action proceed as a specially managed proceeding, and upon reviewing the consent to this motion signed by the respondent's counsel.

THIS COURT ORDERS that

The motion is granted as requested.

" *signature* "
Prothonotary