Parts 2 and 3 of the New *Queen's Bench Rules of Court*

Prepared by:
Darryl J. Brown

Civil Law Division
Ministry of Justice and Attorney General

This paper was originally produced for the Saskatchewan Trial Lawyer's Association Queen's Bench Rule Changes: An Essential Overview, held on October 28 and 31, 2011.

Parts 2 and 3 of the New Queen's Bench Rules

Darryl Brown [1]

I. INTRODUCTION

The policy objectives underlying the crafting of rules of court which will facilitate access to justice, judicial efficiency and litigant economy within the context of a just resolution of claims are laudable. It is appropriate to inquire into how the average person or small business can effectively bring or defend their action if the amount at issue is neither very large nor of potentially life changing significance to the parties. Any profit that might remain in a transaction of modest size may be nonexistent if the full Queen's Bench litigation process runs its course to conclusion with counsel acting diligently throughout. Many matters, although not of particularly grand description, are nonetheless significant enough to warrant application of a just process.

In comments both from Mr. Justice Rothstein[2] and Chief Justice McLachlin[3] these concerns have been highlighted. It is not a concern that is unique to Saskatchewan; other jurisdictions have been dealing with the same issues. The identification of the concern right across Canada confirms the value in looking for modifications to the litigation process which may improve it by creating appropriate efficiencies while enhancing access to justice in a meaningful way.

The upcoming changes to the Queen's Bench *Rules* are an important step in the ongoing process of making the justice system by way of the litigation process responsive to the needs of society. Ensuring our focus as litigation counsel is firmly on achieving justice in as economical and effective a way as possible deserves to be emphasized. Methods to achieve this should be given consideration, particularly since the sometimes competitive elements of the adversarial process can have a tendency to foster "victory at whatever cost" sentiments at various points in the process. These sentiments at some point, at least on many files, can create a divergence of interests where the service we hope to provide to the client may not be the best form of justice in all the circumstances. In reality, who doesn't like to win, even the smaller skirmishes. However,

---

[1]Crown Counsel with the Ministry of Justice, 1874 Scarth Street, Regina, Saskatchewan, S4B 4V3

[2] Following one of the Ketcheson lecture series, Regina, Sask., fall, 2009

[3] To the Law Society of B.C., Public Forum on Access to Justice, Jan. 28, 2009

truly considering "the win" to instead be a successful resolution of the whole matter, (whether through a settlement or a decision), where a reasonable result is achieved within a reasonable time at a reasonable cost, bears much consideration. Assessing both the big picture and the end game early on in any litigation is critically important to bringing about the provision of justice in an economical and effective way. Keeping these objectives at front of mind throughout the litigation process is just as important given that the forest can quickly disappear in the trees if these values are not given a high priority. Rules of court that recognize and encourage this approach will be of considerable assistance in the attainment of these important objectives.

Part 1 of the new *Rules* sets out these objectives and, throughout the balance of the *Rules* these same goals are confirmed at various places. The redraft and reformatting of the *Rules* as well as the content directed at self represented litigants will assist in providing access to justice. Information notes and introductory summaries as well as the groupings of the *Rules* and the adoption of plainer language are all aimed at accomplishing these objectives. The provisions dealing with limited interest retainers to facilitate the seeking of expertise where it may be critical advances this approach even further. Expansion of the *Rules* to include duties of the parties and the duties of lawyers of record similarly contributes to the useful reminder to each of us as counsel of our role in seeing that justice is accessible, efficient, and moving towards a conclusion which itself will, in most cases, be of significance to the parties.

This brief paper seeks to identify some of the key changes in parts 2 and 3 of the new *Rules* that are of some significance and provide a summary description that assists in applying the new *Rules* to your litigation practice. A summary chart of the various proceedings and some of the key elements involved in each is provided at the end of the paper as a quick resource to utilize when considering which method is intended for a particular legal matter finding the new *Rules* becoming second nature, which will happen quickly enough. Any suggestions and comments on the contents of this paper or the summary chart are most welcome. Finally, the assistance of Lana Morelli in aspects of the research involved in this paper should be recognized - thanks Lana for your timely and helpful assistance.

II. PART 2 OF THE NEW *RULES*: THE PARTIES TO LITIGATION

1. General

Part 2 facilitates court actions against personal representatives, trustees, partnerships, sole proprietorships and other entities. It also specifies who must be represented by a litigation representative. It describes the responsibilities of being the lawyer of record and when a lawyer ceases being the lawyer of record.

The initial provisions of this part, (to 2-32), are in essence a redraft of the current *Rules* relating to the same subject matter dealing with actions involving estates, partnerships, sole proprietorships as well as persons under disability (minors and those who are mentally disabled). There has been repackaging of some of these provisions for easier reference and various provisions have also been made gender neutral. Some changes of note include:

2. Representative Actions

Rule 2-10 maintains representative actions **(**formerly Rule 70). The new rule is quite similar, however, it utilizes different language. The wording "if numerous persons have a common interest in the subject of an intended claim" replaces previous language, being "the same interest in one cause or matter". As such, "common interest" is arguably broader than "the same interest", and therefore likely expands the scope of the rule, at least on its face. As well, the new rule doesn't list examples (i.e. prevention of waste, protection of property) as was the case with Rule 70 previously, but leaves the matter open, again suggesting a potentially broader application.

The new rule (2-10) also references *the Class Actions Act* such that a representative action under Rule 2-10 can be continued pursuant to *The Class Actions Act* if a certification order is ultimately made under *The Class Actions Act*. As noted (see information note following Rule 3-92), *The Class Actions Act* doesn't provide for a defendant class, therefore this rule would allow for that as a representative proceeding.

3. Intervenors

Subdivision 4 of Part 2; Rule 2-12 deals with intervenors to actions (currently Rule 39A). The new rule is broader than the previous rule. The Court may grant status subject to any terms and conditions and with rights and privileges specified by the Court. The new rule is not limited to "any law [that] is inconsistent with the Constitution of Canada", as the current rule is, therefore the new rule is of broader application relating to interventions. Similarly, the extensive notice requirements set out in current Rule 39A are replaced with the more flexible language; "subject to any terms and conditions and with the rights and privileges specified by the Court".

4. Friend of the Court (Amicus)

Rule 2-12 contains a slight enhancement over the current Rule 75 in that with the new *Rules* the Court may, of its own initiative, order a person become friend of the court rather than waiting for an application by someone seeking to fill that role as is the case with Rule 75.

5. Self Represented Litigants

Self represented litigants are specifically recognized in Part 2, starting at Division 3 Rule 2-33. Given that the number of self representing individuals continues to increase it is appropriate to recognize and address that trend in the *Rules*. As indicated earlier, the *Rules* redraft exercise has been deliberate in making the *Rules* easier to follow, cross referenced to other relevant *Rules* and statutes through information notes, and utilizes plainer language to hopefully bring about greater ease of understanding.

The second rule in the new *Rules* (Part 1 Rule 2) specifically draws to the attention of the self represented litigant that the *Rules* apply to whoever comes to the Court for resolution of a claim, including those that self represent (see 1-2(2)). Similarly, at a very early place in the *Rules* (1-5) the Court is shown as being equipped to implement and advance the purpose and intention of the *Rules* through the making of orders, granting or refusing of applications, setting aside processes that are abusive or improper, giving directions, imposing terms, conditions and time limits, adjourning or staying matters, making proposals, providing guidance and making suggestions

and recommendations (see 1-5). As such, a self representing litigant who has read the first part of the *Rules* should get a good sense of the obligation parties have and how those obligations can be met and fostered through the process, particularly when problems arise.

In essence Part 2 of the new *Rules* provides that people can represent themselves in an action unless the *Rules* provide otherwise. The *Rules* do provide otherwise in the following cases:

- Where someone is under disability (age or competency based) or in a representative capacity (representative actions, administrator *ad litem* etc.), (2-34(1));
- Where the party is a corporation (unless the court orders otherwise or for *Small Claims Act* judgment enforcement or Residential Tenancies order enforcement), (2-34(2));
- Where there is a lawyer of record for a party (they may not self represent without court permission), (2-36(2)).

These exceptions recognize that it is important to ensure the appropriate balance between self representation and the need to have legal counsel involved, both for the protection of the party themselves and to keep the process operating in a way that fosters confidence in it and preserves its integrity.

Other matters which will necessarily have a significant impact on self represented litigants are contained in other Parts of the *Rules* and include the duties that apply to all parties and which are reflected in *Rules* 1- 3, 4-1 and 4-2. These are to the effect that the party, in this case self represented, must conduct the action such that the claim can be justly resolved by a court process in a timely and cost effective way including:

- identifying the real issues in dispute (1-3(2)(a));
- facilitating the quickest means of resolving a claim at the least expense (1-3(2)(b));
- encouraging resolution by the parties as early as practicable (1-3(2)(c));
- communicating openly, honestly and in a timely way (1-3(2)(d));
- periodically evaluating dispute resolution alternatives to a full trial (1-3(3)(b);
- refraining from filing applications or taking proceedings that do not further the purpose and intent of the *Rules* (1-3(3)(c));

- using court resources effectively (1-3(3)(d)); and,
- resolving claims justly in a timely and cost effective way that is "proportionate" to the amount, issues and complexity of the proceeding (1-4).

It is also worth mentioning in this context that the Court has considerable authority to deal with parties and assist the movement and resolution of matters, which will be of much assistance for both self represented litigants and lawyers who may find themselves across the file from self represented litigants should either encounter challenges in relation to moving forward with the matter. Examples include:

- rule 1-4; the Court has specific authority to grant remedies which may not be claimed in an action after notice and an opportunity to respond has been given to the parties;
- rule 4-3; the Court can direct the parties to prepare issues if the issues of fact in dispute are not sufficiently defined and the Court can identify those issues where they cannot be agreed to by the parties;
- rule 4-4(1); the Court can direct the parties to attend a conference to consider dispute resolution, the simplification or clarification of matters, case management and procedural or other issues. It is logical that this would be with a view to achieving the objectives of the new *Rules* as set out in 1-3;
- rule 4-44; the Court may dismiss all or part of a claim or make a procedural or other order to deal with inexcusable delay;
- rule 4-50; the Court may order a stay of a subsequent action if costs of a discontinued action for substantially the same matter have not been paid;
- rule 1-6 also enables the Court to remedy defects if not prejudicial which is the flipside of sanctions and important in attaining the goals at play in the new *Rules*.

In addition:

- the implied undertaking of confidentiality is now set out in the *Rules* which will assist the process as it will help self represented litigants more readily understand the restrictions on documents disclosed in the course of litigation (see 5-4);
- expedited procedure *Rules* in Part 8 which include limited duration of questioning, limited length of pre-trial briefs, and limited costs will assist in making the process more manageable for self representing litigants.

(See also Limited Purpose Retainers under Part 7 of this paper, p.10)

6. Lawyers of Record

A term that takes on some significance in the new *Rules* is "lawyer of record". A lawyer of record is the lawyer or firm of lawyers whose name appears on a commencement document[4] or pleading as well as on an affidavit or other document filed or served in an action as acting for a party (2-36(1)). The reason that being the lawyer of record is significant is primarily due to Rule 2-37, which imposes on lawyers of record the duty to conduct the action in a manner that furthers the purpose and intent of the *Rules* which are found at 1-3.[5] This means that the lawyer of record has a duty to conduct the action such that the claim can be justly resolved by a court process in a timely and cost effective way including identifying the real issues in dispute, facilitating the quickest means of resolving a claim at the least expense, encouraging resolution by the parties as early as practicable and communicating openly, honestly and in a timely way (1-3(1) and (2)).[6]

The duties placed on parties by the *Rules* are similar to the duties of lawyers of record, but the duties on parties also include periodically evaluating dispute resolution alternatives to a full trial, refraining from filing applications or taking proceedings that do not further the purpose and intent of the *Rules*, requires the using court resources effectively, and resolving claims justly in a timely and cost effective way that is "proportionate" to the amount, issues and complexity of the proceeding (1-3(3) and (4)). There is also a duty on the parties set out at 4-1 and 4-2 to manage their dispute and plan for its resolution in a timely and cost effective way.[7] As the lawyer for one or more parties, the lawyer's obligation would include making the party who is client aware of these duties and not acting in a way that is contrary to them.

---

[4] A statement of claim, originating application, counterclaim, third party claim or petition - (see 17-1)

[5] While these duties are new to the rules, there were, scattered throughout the former rules, certain specific references to duties of lawyers such as the former Rule 228(2); duty to communicate appointment for examination to person required to attend and former Rule 579 regarding no applications without reasonable cause in the case of needy person proceedings. The broader duty of Rule 2-37 is a change worthy of taking notice.

[6] Note also that certain specific duties relating to clients that appear in other parts of the rules, for example there is a duty on the parties to amend pleadings as necessary so as to determine the real question in issue between the parties (3-72(3)).

[7] Included is the responsibility of the parties to further the purpose and intention of the rules, act in a reasonable and timely way to any proposal for the conduct of the action, and when the complexity or nature of the action requires it, apply to the Court for direction or case management (4-2).

Given there are now both lawyers duties and clients duties in the *Rules*, this has provided an effective tool by which a lawyer can advise clients that the *Rules* do not allow for the advancing of spurious applications nor the inefficient use of court resources. If a client gives instructions contrary to the *Rules* and the lawyer of record advises that such actions are, in his view not allowed, and the client insists in any event, this enables the lawyer to withdraw and quite possibly even requires it.[8]

Precisely what might happen to a lawyer who fails to meet this duty isn't mandated in the *Rules* but could now, in addition to being a matter that the Law Society may be interested in, will be something the Court is interested in and for which the Court now has an articulated basis on which to address. As indicated earlier, one of the objects of the *Rules* is to provide an effective, efficient, credible system of remedies and sanctions so as to enforce the *Rules*, thus presumably costs against counsel personally is one option (see Part 11 in this respect and particularly 11-1 and 11-24). If the client and counsel are both the cause of the violation of the duty recognized in the *Rules*, costs against both can be ordered (see 11-1) or possibly the dismissal or setting aside of the proceeding (see 1-4 and 1-5). Rule 5-3 also enables the Court to waive or modify any right or power if a person acts vexatiously, abusively, oppressively, or make a costs award or other necessary order in the circumstances.

Verification

A person can seek verification whether a particular lawyer is the lawyer of record through a request and the lawyer requested shall respond as soon as possible (see 2-38).[9] If a lawyer's name appears as lawyer of record but that lawyer denies being the lawyer of record the matter is stayed until the Court permits it to proceed (2-38(2)(b)).

---

[8] See Saskatchewan Code of Professional Conduct, Chapter XII, which enables withdrawal where there is a loss of confidence that undermines the lawyer/client relationship and requires withdrawal if the lawyer is instructed by the client to do something inconsistent with the lawyers duty to the court or the client is taking a position solely to harass the other party.

[9] Note that the former provision in Rule 12B referencing the possibility of contempt for non response has been removed from the new provision.

Withdrawal as Lawyer of Record/Change to Lawyer of Record

In order to withdraw lawyers of record must serve on every other party a notice of withdrawal setting out the clients last known address and file it with the Court with the affidavit of service (2-41). As was the case previously under rule 12, this takes effect 10 days after filing. New to this rule is the authority of the court to order that a lawyer need not disclose the last known address of a client if necessary to protect the safety and well being of the client.[10] No service on the previous lawyer of record is effective after withdrawal is complete (2-42).

New to the withdrawal as lawyer of record scenario is the provision of 2-43 which requires the Court's permission to withdraw as lawyer of record after a pre-trial or trial date has been scheduled. While the new *Rules* restrict the withdrawal of counsel after the trial or pre-trial has been scheduled, the specific criteria on which court approval to withdraw are not listed and are therefore a matter of discretion for the Court. It is plausible that the practice pre-dating the new *Rules* will be of assistance in assessing when withdrawal after the trial or pre-trial have been set will be permitted.[11]

Previously, withdrawal in the course of litigation matters was governed by the Court through its inherent authority and via the Code of Professional Conduct, Chapter XII. The Code of Professional Conduct requires that a lawyer withdraw only for good cause and upon notice appropriate in the circumstances. Guiding principle 2 indicates that this must be in a way that minimizes expense and avoids prejudice to the client. Further, guiding principle 6 indicates that withdrawal for non payment of fees is not permitted where serious prejudice to the client would result. As such, by application of logic and analogy, if the matter is on the eve of trial the lawyer will likely be obliged to continue on. The issue will be whether prejudice would result that

[10] In the event of an application to not disclose the client's address an alternate address for service of the client can be provided (2-41(4)).

[11] See notes 4 and 8 accompanying Chapter XII of the Code of Professional Conduct which includes *Myers v. Elman* [1940] A.C. 282 and the contents of a panel discussion on the subject of withdrawal and which directs that appropriate notice be made and the eve of trial is not sufficient as serious prejudice would result.

cannot be alleviated. Certainly putting other counsel in place with sufficient time to prepare for the pre-trial or trial will be of much assistance.

Ceasing to practice, suspension, disbarment and death of the lawyer of record or dissolution of the firm in the case of a firm being the lawyers of record is an automatic termination of the lawyer of record's status pursuant to the *Rules* (2-44). Service of documents after such an occurrence is a matter for which the Court's directions can be sought (2-44(2)).

If a party changes their lawyer of record to another lawyer or to a situation of self representation, that party must serve on every other party a notice of the change and file it with the Court with the affidavit of service in order to withdraw (2-40).

7. Limited Purpose Retainers

Given that becoming the lawyer of record carries with it certain duties and obligations as well as a clear process on how one ceases to be the lawyer of record, the difference between being the lawyer of record and being a lawyer who assists a self represented individual is a potentially important one to define. Thus limited purpose retainers are addressed in the new *Rules* at 2-39. Limited purpose retainers have been recognized as a useful way to assist ordinary litigants who cannot afford to obtain full service representation or obtain the necessary professional assistance with their case, an appropriate middle ground between "do it yourself" and full representation.[12]

The way a limited purpose retainer is communicated to the court is through the lawyer who will be appearing informing the Court of the nature of the appearance in advance of it by filing the terms of the retainer (other than the terms related to the lawyers fees). The self representing individual who retains a lawyer for a particular purpose is obliged to attend the proceeding for which the lawyer is retained unless the Court otherwise permits (2-39(2)).

While the *Rules* do not specify the form to be used nor what type of indication suffices to separate a limited purpose retainer lawyer from a lawyer of record, it seems reasonable to

[12] See *Gagnon v. Pritchard* 2003 CarswellOnt 4150, at para. 8.

conclude that if documents are filed by the lawyer who is retained for a limited purpose rather than as the lawyer of record for that action, an indication that the party is self representing but the lawyer has been retained for the limited purpose as briefly described therein would be prudent so as to avoid the ongoing responsibilities of being the lawyer of record for the whole of the action.

Additionally, the availability of limited purpose retainers is of assistance to the process in that it enables counsel opposite a self represented individual who is not meeting time lines or requirements in a particular piece of litigation to suggest it and to rely on the availability of the same to remove delay excuses which are becoming problematic.[13] Obvious considerations for utilizing limited purpose retainers would be arguing a complex point of law or attending the pre-trial settlement conference.

III. PART 3: COURT ACTIONS

1. General

Part 3 sets out how to commence and defend actions as well as where to start them. Two processes are prescribed for actions: statements of claim and originating applications. The ways that parties can be joined to actions (i.e. third party claims, etc.) is also in this part of the *Rules*. The process to bring about judicial review, habeus corpus and class action *Rules* are also contained in Part 3.

For the most part the process for initiating actions by statement of claim and the process of defending the action brought be statement of claim including cross claim, counterclaim and third party claim are essentially as they exist in the current *Rules* with some repackaging and formatting for the new *Rules*.

2. Default Judgment

[13] See para. 5 of *Marshall v. Truro* 2009 CarwellNS 466 citing Justice Bateman's lower court decision, para.14

Default judgment and final judgment processes remain very similar. One helpful addition is rule 3-29 which prevents judgment from being entered against a defendant while an application to strike the claim, stay the action, or set aside service of the claim is not yet decided. This is of particular value in situations where an undertaking not to note for default can either not be obtained from a plaintiff or cannot be relied upon as there is no governing body to impose sanctions for a breach of an undertaking so given.

3. Actions

As indicated, the new *Rules* provide 2 mechanisms through which to bring actions, the primary one being the statement of claim and the secondary one being the originating application. The originating application, however, takes the place of the originating notice and takes the place of the notice of motion for many matters, matters which are commencement proceedings. The originating application becomes one mechanism by which to initiate certain prescribed actions and the primary method of initiating a proceeding. The two processes will be commented on here.

4. Statements of Claim

Statements of claim will remain essentially the same as before with the contents, time tables for service, etc. Statements of claim are the primary mechanism by which to bring an action.[14] The accompanying processes (defence, counterclaim, third party defence, cross claim, default processes, etc.) are also essentially the same as before.

5. Originating Applications

General Overview

Originating applications are more "notice of motion" like than "originating notice" like. Originating notices themselves were more "statement of claim" like than "notice of motion" like

[14] Defined as a "civil proceeding commenced by claim" or other authorized manner i.e. originating application or "any other original proceeding between a plaintiff and a defendant"; see rule 17-1.

(see current *Rules* 451-455). Originating applications will be served first and filed after service as with notices of motion, whereas originating notices required filing first then service.

Originating applications can be the initiating document to an action (as can a statement of claim; see Rule 3-23). There is a variety of other matters that are commenced by originating application as well.

Initially matters proceeding by way of originating applications don't have the procedural trappings of a statement of claim-based action with the disclosure requirements, questioning, pre-trial settlement conference, etc. (3-51, 3-55), however, if circumstances warrant, an originating application matter can come to include all or parts of those processes (3-53). This will be an important factor to keep in mind once an originating application matter has begun; when and if it is appropriate to engage some or all of the processes that accompany an action by statement of claim, particularly given the duty to conduct the matter efficiently and not engage those additional processes unnecessarily. Given that these processes are going to be somewhat truncated now as a result of the relevance test as well as proportionality, considerations will include; when is it proper to engage the more extensive procedural elements and when is it going to be counterproductive? Does the selected process properly balance the outcome as being just as against the value of the matter and the complexity of the issues? These types of issues are questions counsel will need to keep in mind when proceeding via originating application.[15]

Details; What is to be Brought by Originating Application

The originating application is the process which is to be used to start an action or commence a proceeding when the remedy claimed is:

[15] A Couple of other Questions re: originating applications arise as well; given that there is the potential for a more substantial process, quaere whether the application of the procedural aspects of an action such as disclosure, questioning, etc. (via parts 4 and 5) to the originating application proceeding will be in part dependent on the clarity and detail provided in the portion of the originating application which states the claim. It is difficult to argue a need for questioning if the "claim" is too thinly described. This is a potential consideration when drafting the originating application. Similarly, when might application of a pre-trial settlement conference to originating applications be appropriate and useful? Many matters which are the subject of originating applications will be unlikely to be easily settled, but there will be some matters where consideration of engaging the parties in a settlement conference with the benefit of a Queen's Bench judge will be worth attempting.

- the Court's opinion or direction re; a question affecting the rights of a person with respect to the administration of a deceased's estate or execution of a trust (3-49(a));

- an order directing executors, administrators or trustees to do or abstain from doing any act re; an estate or trust for which they are responsible (3-49(b));

- removal/replacement of executor, administrator or trustee or the fixing of their compensation (3-49(c));

- determination of rights dependent on the interpretation of a deed, will, contract, or other instrument or an enactment, order in council, bylaw or resolution (3-49(d));

- declaration of an interest in land (3-49(e));

- the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust (3-49(f));

- judicial review of a decision, act, or omission of a person or body (3-49(g));

- a remedy pursuant to the *Charter* (3-49(h))

- with respect to any matter where it is unlikely that there will be any material facts in dispute (i.e. a form of declaration of a pure point of law where the matter is of moment to parties and not moot) (3-49(1)).

- if an enactment or the *Rules* authorize or require an application, originating application, originating notice, originating summons, a notice of motion or a petition to be used.

- if an enactment provides for a remedy, direction or order to be obtained from the Court without describing the procedure to obtain it (i.e. default to the originating notice).

Form of the Originating Application

The form of an originating application is similar to the notice of motion used presently in that it is to include a notice to the respondent of date, time, location of the matter with 14 days notice required; (3-50), setting out the basis of the claim, the remedy sought, the affidavit or other evidence to be used in support and the contact information regarding the person who prepared it (3-49(4)).[16]

[16] Part 13 Div. 4 sets out the requirement to have style of cause, name of court and judicial centre, address, etc.

Supporting Materials, Responses and Briefs

The supporting material (affidavits and other evidence) must be served with the originating application (3-50(1)) at least 14 days prior to the matter proceeding. The respondent must thereafter serve the applicant with any responding affidavit or other evidence at least 10 days before the originating application is heard. If the applicant responds with affidavit or other evidence to the respondents material, that must be served at least 5 days before the originating application is heard and this material must only reply to the respondent's affidavit or other evidence (no new material which does not respond to the respondent's evidence) (3-52).

The brief (if one is going to be filed) of **either** applicant or respondent must be served and filed at least 3 days before the date scheduled for the hearing of the originating application (3-50(2)).

Other Originating Application Issues/Matters

Cross examination on affidavits may be allowed (3-54). It is anticipated that the tests of proportionality, relevance and efficiency in the attainment of justice within the context of the matter itself will be engaged here as well and that the opportunity to cross examine on affidavits will be somewhat closely regulated and not simply permitted as a matter of course.

The evidence that may be considered at the hearing can include evidence taken in another action if proper notice is given (5 days) and the Court's permission is obtained (3-55(d)). It is assumed the implied undertaking rule still applies so that issue would still need to be dealt with. Oral evidence may also be given with the Court's permission (3-55(e)).

6. Judicial Review - Differences from Other Matters Brought by Originating Application

Given the fact that this is a form of "review" of a decision rather than a first instance determination as are the other originating application matters, a judicial review will naturally be

somewhat different in kind. Some specific differences from a regular originating application process include:

- Evidence available for other originating application matters is not applicable to judicial review (3-55). Instead, the record of proceedings is provided (3-57) which includes the decision that is the subject of the originating application, the reasons for the decision, the document that started the proceeding, and the evidence and exhibits filed with the person or body (3-57(2)(a)-(d)).

- The provincial and federal Attorneys General are to be served if it appears they have an interest (3-56(4)c) and (d)).

- the Court has broad powers to make interim orders and stay proceedings (3-60) as well as order additional remedies (3-61)

While the provisions in the judicial review portion of part 3 are quite similar to the previous *Rules* it is worth noting that the former reference to damages as a ground of relief (rule 664(2)(b)) in the *Rules* has been removed. This is logical as that reflects the general approach to that issue; where judicial review lies, damages is not appropriate (see *Wellbridge Holdings v. Winnipeg* [1971] SCR 957 and cases following).

It is also worth considering the possibility that seeking an injunction by originating application may well affect the requirement of also issuing a statement of claim in the matter. In the usual course of applying for an interlocutory injunction by notice of motion it is also necessary to issue a statement of claim so as to request the permanent injunction by action and thus properly support the motion-based request (*Lazarescu-King v. Transgas Ltd.* 2005 CarswellSask 284). Given that the new originating notice procedure can be expanded to include the incidents of an action, it seems logical to conclude that all that will be necessary when bringing an application for an interlocutory injunction is to bring the application for both the interlocutory injunction and a permanent injunction in the same originating application. The application for the interlocutory injunction would proceed based on the usual test while the permanent injunction could be adjourned pending the outcome of the interlocutory injunction application and the determination of which procedural incidents should accompany determination of the permanent injunction. This manner of proceeding would embody the objectives of the *Rules* in making matters more straightforward and would not prejudice the interests of the respondent/defendant as there would

still ultimately be access to a process where the underlying factual basis for the matter could be fully explored.

A matter of similar complexion relates to the current difficulty in obtaining a declaration by way of motion. Previously this was considered problematic in most situations as a declaratory order is by its nature a final order which requires a full hearing of all facts as it will pronounce on the rights of the parties (see *International General Electric Co. v. Commissioners of Customs and Excise* (1962) 1 Ch. 784 and *Bush v. Wiens et al* 1994 CarswellSask 205 (QB)). Given that originating applications are now capable of having the necessary processes added to the matter, (be it documents, questioning or both), so as to ascertain underlying facts in order to properly ground a declaratory order, it would seem the days of defeating an application for a declaration on the basis it was brought by motion rather than statement of claim are over. The question of what particular processes should be required in order to provide the proper factual foundation to enable a declaratory order to be made will now form part of the response to an originating application, which also seems like an appropriate response to the matter and a more appropriate way to reach a determination on the issues than to simply dismiss the matter. This too would be in keeping with the objectives of the new *Rules*.

7. Summary Regarding Processes

It is hoped that the chart attached to this paper will assist in the process of getting to readily know which of the various applications is necessary in a given fact situation. Within a short period of time of implementation of the new *Rules* it is likely that this will be second nature, just as the present processes are to us at this point. To summarize this rather substantially, the following *Rules* of thumb may be of assistance initially:

- When bringing an action, assume it will be by statement of claim unless the list in 3-49 specifically addresses the matter, in which case it is by originating application.
- Originating applications apply to commencement proceedings, not to interim or interlocutory types of applications where a matter has already been commenced.
- Where statutes say “Notice of Motion”, read “Originating Application”.

- Where a matter has already been commenced, an application within that proceeding would be brought by notice of application as set out in Part 6 where the matter is beyond the simplest of matters, such as determining basic practice directions or setting time tables where no facts are in dispute and the issue can be argued in less than 30 minutes.
- If it is a simple matter such as determining basic practice directions or setting time tables where no facts are in dispute and the issue can be argued in less than 30 minutes, then the appearance day application will be the process to engage.

8. Changes to Pleadings

The balance of Part 3 contains *Rules* related to demands for particulars (now called "requests"), amendments to pleadings and the refining of claims through joinder, separation, consolidation and changes to parties. These matters are set out in Division 4 of Part 3 and are very similarly dealt with when compared with the current *Rules* therein. A few of the new items worth mentioning include;

- There will be unlimited amendments to the claim prior to the filing of a statement of defence (3-72(1)) rather than just one (as provided by current Rule 166). This may have the effect of moving the action along too as a defendant will have a greater incentive to provide a defence early on;
- There is now a duty on the parties to amend pleadings as necessary so as to determine the real question in issue between the parties (3-72(3));
- the costs of a response to amended pleadings is now indicated as not being a cost to the responding party (3-75(a)), the current rule (172) being silent on that front;
- a new provision enables judgment to stand where a party is added or given leave to defend after judgment (3-87).

9. Class Actions

Contained in Division 6 of part 3, the new *Rules* are essentially the same as the current *Rules*. One change to note is that an application to the Chief Justice for a designated judge is now 90 days from filing the statement of defence or default therein (3-90) rather than 30 which was previously the case (current Rule 79). This likely accords with current practice more closely.

IV. CONCLUSION

The changes to the *Rules* respecting manners of bringing actions forward will perhaps be foreign to the legally initiated such as ourselves. This is as a result of our having become so accustomed to the current system of application processes. However, the new processes will ultimately prove to be a logical division of the application mechanisms based on the function they perform and the need for accompanying procedural incidents which rightly become part of the matter based on the complexity of the issues involved in the process.

Through the remaining parts of the *Rules* following the foundational statement of purpose and intent in Part 1, including through Parts 2 and 3, the objectives of facilitating access to justice, promoting judicial efficiency and litigant economy within the context of a just resolution of claims show through in several ways. The recognition of self represented litigants, the duties placed on the parties as well as the duties placed on lawyers to advance the litigation so as to meet the objectives of the *Rules* as set out in Part 1 are important to both recognize and keep firmly in mind. This emphasis, the statement of underlying principle to the litigation process itself, is perhaps the most significant matter to keep in mind when considering the new *Rules*. If litigants and counsel alike maintain a commitment to those principles, the worthwhile goals which brought about the *Rules* revision process are sure to be accomplished with the

corresponding benefit of enhancing confidence in and, as a result, support for and commitment to that system.[17]

[17] This paper was initially provided as part of the STLA Queen's Bench Rules Changes presentation in October of 2011

Darryl J. Brown

Graduated U of S Law School - 1988, (distinction)

Articled with Saskatchewan Justice - 1988-1989

Admitted to the Saskatchewan Bar - 1989

Practiced with Saskatchewan Justice, Civil Law Division to present,

- in civil litigation
- with clients consisting of all government ministries and departments
- is fortunate enough to have had the pleasure to appear at each level of court in Sask. as well as the SCC and to participate in the settlement of numerous matters including national tobacco smuggling settlements

Presently Coordinator of Civil Litigation section, Civil Law Division

Married, father of 2