PART 6, DIVISION 1: APPLICATIONS TO THE COURT

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INTRODUCTION

This paper will address the new rules with respect to interim or interlocutory applications or applications in the course of an action with respect to which a commencement document has been filed (Rule 6-2). This comprise Rules 6-1 – 6-27 (attached), and replace Rules 441-450. As these rules are restricted to interlocutory matters, they do not apply to matters addressed by originating motion, which are dealt with in Division 3, Part 3 of the new rules.

The focus of this paper will be to identify both what is new and what is similar to the current practice and procedures before the Court on interlocutory applications.

NEW LANGUAGE

As those of you that have attended these and other seminars on the new rules will realize, a majority of your precedents will have to be fundamentally reworked when the new rules are proclaimed. To a certain extent, we will also have to learn some new language. Interim or interlocutory applications are no different.

What was known as Ex-parte Applications will now be "Application Without Notice", and you will be required to file Form 6-4, a copy of which is attached to this paper. What was known as a Notice of Motion will now be a "Notice of Application" and will have to be in Form 6-5, also attached to this paper.

APPLICATIONS WITHOUT NOTICE, RULE 6-4

Other than the name and form, little has changed with respect to procedure. The jurisdiction for an application without notice is similar to the current ex-parte application jurisdiction. Similar material (affidavits and authorities) are to be filed, and there must be disclosure of representation.

NOTICE OF APPLICATION AND MATERIAL ON NOTICE OF APPLICATION, RULES 6-5 – 6-16

These are the general rules to be applied for interim or interlocutory applications. Form 6-5 is to be utilized. It is simplified and clearer, but not materially different than what is expected in the current Notice of Motion. There are two changes that should be noted.

(a) Notice

Rule 6-9 requires 14 days' notice, rather than the current three days' notice, unless the court grants leave for shorter notice. Affidavit material in support of the application must be served on the responding party concurrent with the Notice of Application (Rule 6-6).

The responding party must serve and file the Affidavits with Proof of Service no less than seven days before the date set for the hearing of the Application (Rule 6-14(1).

Finally, if the Applicant intends to file a rebuttal Affidavit to the Reply, this must be served at least "two clear days" before the date set for the hearing (Rule 6-14(2)).

Any brief of written argument must be filed two days before the date of the hearing (Rule 6-15).

There is a difference in the service language in Rule 6-14(2) ("two clear days") and Rule 6-15 (two days), which appears to suggest the brief can be filed as the current filing practice for Briefs of Law, but that the Court does not intend to permit the current filing practice for Affidavits; they will have to be filed earlier, and the Affidavit record for the Application will have to be complete in advance of the written argument being filed.

(b) Adjournments

Rule 6-16(1) appears to contemplate a more formalized process for adjournments. To request an adjournment of a hearing, Rule 6-16(1)(b)(i) contemplates a written memorandum

being filed by both parties consenting to the adjournment. Rule 6-16(1)(b)(ii) preserves a discretion of the Local Registrar to allow oral adjournments that is considered "appropriate".

(c) Conclusion

The overall direction of the new rules respecting service and notice appears to be an attempt by the Court to require parties to give reasonable notice of applications, except in true emergencies, and to impose upon parties' fair disclosure of the factual elements to be contested in the Application so as to hopefully prevent delays caused by late adjournments due to late notice of material. This will impose upon counsel the necessity to be somewhat more organized and responsive as a respondent, but will also, it is hoped, discourage long delays in applications, by imposing more moderate delays on scheduling the hearing.

NEW APPLICATION PROCEDURES

The general Notice of Application rules are somewhat complex, particularly for procedural applications. However, the rules do make provision to allow for more simplified and expeditious process for resolving consent, uncontested and simple applications.

A. APPEARANCE-DAY APPLICATION, RULE 6-22 – 6-27 AND FORM 6-24

This is a wholly new form of application not currently present in the rules. It has limited scope applying to only the following circumstances as defined in Rule 6-23(1):

(a) The only remedy sought is to compel compliance with the Rules;

(b) A party wishes to have the Court set a timetable for steps to be taken in a proceeding;

(c) The parties jointly request the Court's direction of an issue respecting the management of a Trial or proceeding.

In these limited circumstances, Form 6-24 (attached) is to be utilized, and no other material is to be filed (Rule 6-23(2)). In making the application, a party is limited to the

information provided in the Application, although they can also make representations of fact that "could not be reasonably contested" (Rule 6-26(1)), and in oral argument a party can expand upon the representations made in the Notice (Rule 6-26(2)).

The same notice provisions (a minimum of 14 days) apply to appearance-day applications, and they are to be made returnable on a regular chambers day. However, all appearance-day Applications are done by telephone, and are heard at the foot of the regular chambers list. Parties will need to make themselves available for the telephone call on the return date of the Application until 4:00 p.m. on that date (Rule 6-25).

The intention with the Appearance-day Application is to streamline primarily procedural applications. Rather than filing an Affidavit with letters showing the request for compliance, the party will simply now apply to have compliance compelled. In this fashion, it is hoped these applications will take less of the Court's time. It is to be observed that by imposing the same notice provisions (14 days) as in regular applications, there is some risk of additional systemic delay in circumstances where procedural compliance has become challenged. As this is an entirely new procedure, this process will need to be worked out as the new rules are implemented.

B. HEARING WITHOUT ORAL ARGUMENT

Another new rule, 6-18, contemplates a process by which an application could be heard without oral argument. Once again, this type of application is limited to the following circumstances, as defined in Rule 6-18(4):

(a) All parties must be represented by a lawyer;

(b) The application must be made on at least 14-days' notice;

(c) The Applicant must propose to that the application be heard without attendance of the parties because "the issues of fact and law are not complex";

(d) The Application must be both served and filed and all Affidavits upon which the Applicant intends to rely upon, together with a draft Order and a brief argument must be filed (note that this is different than the normal application, which contemplates filing of material up to two days before the hearing);

(e) The Respondent must, no less than 10 days before the return date of the Application, either consent to the Application, indicate that they do not oppose the Application, file their Affidavits, their brief written argument and a notice that they agree to have the Application determined without oral submissions, or advise the Court that they intend to make oral submissions.

The Applicant, upon being advised that the Respondent intends to make oral submissions, can choose to either appear and make oral submissions, or simply rely upon its written application.

The intention of the rule is to provide a process for applications that are not simply procedural (to which the Appearance-day Application apply), but are such that at least the Applicant does not believe oral argument is required. Again, unlike the Appearance-day Application, this particular procedure is more consensual, in that if the Respondent does not consent, the Respondent does not lose its right to make oral representations.

Counsel will need to determine whether or not this procedure is utilized. Also, as with any new procedure, certain matters will need to be clarified. For instance, if a Respondent chooses to make oral submissions, do the filing rules contained in Rule 6-14 apply, as opposed to the filing rules in Rule 6-18? Also, seen as "not complex" would likely be subject to some

disagreement. However, in keeping with the general philosophy behind the new rules, the Court's intention will be to simplify and streamline process, as opposed to complicate and delay. It is anticipated it will be in this spirit the rule will be interpreted.

CONCLUSION

Please also note Rule 6-17 now entitled "Electronic Hearing", which contains rules that are similar to the current Telephone Hearing rules, but are broader and may incorporate other forms of electronic hearings (for instance, perhaps someday the Court may allow a "Skype" hearing). Also note the rules for Affidavits are contained in Part 13-Subdivision 2. There is again a new form (Form 13-31) (attached). The affidavit rules themselves are not dissimilar to the current rules for Affidavits, but counsel is encouraged to review Part 13-Subdivision 2 in the context of the new rules.