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Gordon S. Cowan

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NOVA SCOTIA'S EXPERIENCE IN CIVIL PROCEDURE REFORM

By THE HONOURABLE CHIEF JUSTICE GORDON S. COWAN*

I. INTRODUCTION

Prior to 1966, civil procedure was governed by *The Judicature Act, 1950*¹ and the Rules of the Supreme Court as made by the judges of the Supreme Court under the authority given by the *Judicature Act*.² The rules then in force were based, with relatively few changes, on the rules in force in England in 1884.³

In 1957, Order XXXA, providing for oral examination for discovery, was introduced and provided for the oral examination of a party to an action. In 1960, Order XVIIA was introduced, dealing with third party procedure and contribution between defendants. The period 1962 to 1972 was a period of review, revision and modernization of the Civil Procedure Rules.

In 1967, a rule providing for pre-trial conferences was made as Rule 1 of Order XXXII. This rule was based upon the rules of the Federal Court in the United States⁴ and provided that a judge might direct the parties to appear or that any party might, with notice, require a hearing before a judge before trial to consider: a simplification of the issues; the necessity or desirability of amendments to the pleadings; the possibility of obtaining admissions of fact and of documents which would avoid unnecessary proof; a limitation of the number of expert witnesses and such other matters as might aid in the disposition of the action.

In 1968, a rule requiring pre-trial briefs was made, requiring each of the parties to a proceeding that had been entered for trial to deliver to the trial judge, on or before the fourth day preceding the trial, a brief containing a summary of the facts, issues and law, and a provision was made for the exchange of briefs between solicitors.⁵ The purpose of this rule was to require the parties to state the issues and the facts expected to be proved and the authorities that were to be relied upon. This enabled the trial judge to peruse the authorities in advance of the hearing and made it possible to have oral argument at the conclusion of the hearing of evidence, without requiring

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* Chief Justice Cowan was, prior to October 1, 1981, Chief Justice of the Nova Scotia Supreme Court, Trial Division.

¹ S.N.S. 1950, as consol. by S.N.S. 1949, c. 11 and S.N.S. 1950, c. 65.

² *The Judicature Act, 1950*, S.N.S. 1950, s. 45.

³ Rules of the Supreme Court, 1883, as created by s. 17 of the *Supreme Court of Judicature Act, 1873*, 36 & 37 Vict., c. 66, s. 27, as am. by 38 & 39 Vict., c. 77, s. 17 and 47 & 48 Vict., c. 61, s. 23.

⁴ *Federal Rules of Civil Procedure*, r. 16.

⁵ Ord. XXXIV r. 20, as am. Feb. 10, 1968; now rule 28.07.

post-trial briefs, transcripts and adjournments prior to any argument. The rule enabled trial judges to deliver oral judgments, in many cases, at the conclusion of the taking of evidence and the oral argument.

Also in 1968, the judges of the Supreme Court accepted some responsibility for actions after a defence had been filed. Provision was made for the maintenance of General Lists by prothonotaries and for the setting down by prothonotaries of cases for trial, where more than six months had elapsed from the close of pleadings which, at this time, was on the filing and delivery of a reply.⁶ By the application of this rule, many old cases which were lying dormant were brought on for trial and were either tried and decided, or settled. When the backlog of old cases had been processed, the application of the rule had the result of bringing matters to trial without undue delay.

II. THE RULES COMMITTEE

In 1967, the Attorney General of Nova Scotia appointed a committee to review and revise the rules of the Supreme Court. The Chairman was Chief Justice Cowan of the Trial Division of the Supreme Court, and the Secretary was Professor Meagher, Q.C., of the Faculty of Law, Dalhousie University. Other committee members represented the Attorney General and the practising Bar. The Council of the Nova Scotia Barristers' Society set up committees of practising barristers from time to time, to act as a liaison between the practising Bar and the Rules Revision Committee and to consider the various drafts prepared by the Committee.

The Committee reviewed all the rules relating to civil procedure in the other Canadian provinces, as well as the revised Rules of the Supreme Court of England, brought into force following the report of the Evershed Committee.⁷ The Committee felt that it would be desirable to adopt, if possible, rules of civil procedure that would be uniform with the common law provinces of Canada. The most modern rules of civil procedure were those being prepared in Alberta. The committee met with a representative of the Alberta Rules Committee with a view to benefiting from the work of the Alberta committee and to adopting, so far as possible, their proposed rules.

After considerable study, however, the Nova Scotia Committee decided that it would be best to draft new rules and not merely to amend the existing rules in force in Nova Scotia or to attempt to adopt and adapt the Alberta rules. The aims of the Committee were to prepare rules of civil procedure that would:

- (1) enable the court to accept some responsibility, after a defence had been filed, for bringing a matter on for hearing and decision without unnecessary delay;
- (2) simplify the procedures governing litigation and remedies;

⁶ Ord. XXXIV r. 21(e)-(i) made effective Feb. 10, 1968.

⁷ *Final Report of the Committee on Supreme Court Practice and Procedure* (Cmnd. 8878, 1953).

- (3) shorten "delays";
- (4) provide for the fullest possible disclosure prior to trial of the case of the parties;
- (5) require the parties to define and to narrow the issues;
- (6) avoid calling witnesses unnecessarily, wherever possible and without causing injustice;
- (7) enable the trial judges, wherever practicable, to decide the questions at issue at the conclusion of the hearing of the evidence through oral argument based upon previously submitted written memoranda as to the facts, the issues and the law; and
- (8) improve the enforcement procedures.

The work of the Nova Scotia Committee was carried on over a period of three years and, in the autumn of 1970, draft rules of civil procedure were submitted to the Attorney General and to the Council of the Nova Scotia Barristers' Society, the committees of which had been kept fully informed by the submission of drafts for consideration and suggested changes. The drafts were also submitted to the judges of the Supreme Court.

In Nova Scotia, the rules of court are "made" by the judges of the Supreme Court and are effective on publication in the *Royal Gazette*. They are laid before the House of Assembly and, "if an address praying that any such rules may be cancelled is presented to the Lieutenant Governor by the said House of Assembly within thirty days . . . the Governor in Council may thereupon, by Order in Council, annul the same."⁸ The rules made by the judges govern every proceeding in the Supreme Court and in County Court, except where an enactment otherwise provides. The *Judicature Act* authorizes the judges to make rules

generally for regulating any matter relating to the practice and procedure of the Court, or to the duties of the officers thereof, or to the costs of proceedings therein and every other matter deemed expedient for the better attaining the ends of justice, advancing the remedies of suitors and carrying into effect the provisions of this Act, and of all other statutes in force respecting the Court.⁹

It was felt by the Committee that it was necessary and desirable that the new rules, if adopted, should be brought into force by legislation. It was obvious that the rules would be printed in a form convenient for use by practising barristers and that it would be an unnecessary expense to print them in the *Royal Gazette*. It was also felt that some of the changes, particularly in the field of evidence, might be considered to be changing the law and not merely regulating matters relating to the practice and procedure of the court. The *Judicature Act, 1950*, was in the process of consolidation and revision, and the Attorney General was asked to consider bringing the new rules into force by a section of the new *Judicature Act*.

⁸ *Judicature Act*, S.N.S. 1972, c. 2, s. 46.

⁹ *Id.*, s. 42(i).

The Attorney General asked two senior members of the practising Bar to report to him regarding the draft. As a result, certain minor modifications were made in order to make improvements and to meet suggestions made by the reviewing barristers. One major change related to the question of trial by jury in civil matters. The Committee had recommended that parties be entitled, in defamation proceedings, to a jury trial; but, in other cases, jury trials would be held only if ordered by a judge on the application of any party. There was some resistance from certain members of the practising Bar to this suggestion which would have changed the existing rule whereby parties are entitled to trial by jury, unless a judge decides that the matter is not one that should be submitted to a jury. The Attorney General was not favourably disposed to the recommendation of the committee on this question, and the draft rules were changed to maintain the *status quo*.¹⁰

Consideration of these matters continued through 1971. The printing of the Civil Procedure Rules was proceeded with and, on December 2, 1971, the new Civil Procedure Rules were made effective by the judges of the Supreme Court on March 1, 1972. On February 29, 1972, the *Judicature Act*¹¹ came into force. Through section 43(2), the Civil Procedure Rules made by the judges of the Supreme Court on December 2, 1971 were ratified and confirmed and were declared to be the Civil Procedure Rules of the Supreme Court. The Rules were to have the force of law on and after March 1, 1972, until varied in accordance with the provisions of the *Judicature Act*.¹²

The judges also made Rule 57, the Matrimonial Causes Rules,¹³ effective on and after March 1, 1972, with respect to proceedings under the *Divorce Act*,¹⁴ replacing similar rules made in 1968.¹⁵ They also made: new Crown rules¹⁶ pursuant to section 438 of the *Criminal Code*¹⁷ with respect to *mandamus*, *certiorari*, *habeas corpus* and *prohibition*; new rules¹⁸ under the *Winding-Up Act*;¹⁹ new rules²⁰ under the *Controverted Elections Act*;²¹ and new rules²² under the *Dominion Controverted Elections Act*.²³

¹⁰ See r. 28.

¹¹ S.N.S. 1972, c. 2.

¹² See *id.*, ss. 42, 45.

¹³ As found in *Nova Scotia Civil Procedure Rules and Related Rules* (Halifax: Queen's Printer, 1971) at 293-329.

¹⁴ R.S.C. 1970, c. D-8, s. 19(1).

¹⁵ Ord. LXXI, April 22, 1968.

¹⁶ R. 58, *supra* note 13, at 330-34.

¹⁷ R.S.C. 1970, c. C-34.

¹⁸ R. 59, *supra* note 13, at 335-49.

¹⁹ R.S.C. 1970, c. W-10, s. 137(1).

²⁰ R. 60, *supra* note 13, at 350-63.

²¹ R.S.N.S. 1967, c. 55, s. 65.

²² R. 61, *supra* note 13, at 364-76.

²³ R.S.C. 1970, c. C-28, s. 83(1).

III. THE CHANGES

The principal changes made by the Civil Procedure Rules are as follows:

A. *General List*

A General List will be maintained by prothonotaries listing all proceedings in which defences have been filed. Where a proceeding has been on a General List for six months, the prothonotary is to give the parties fourteen days' notice of his intention to fix a date for trial.²⁴ This applies where the parties themselves have not applied for a date for trial. Unless the court orders otherwise, the prothonotary thereafter fixes a date for trial and gives notice to the parties. If a proceeding has been on a General List for a period of two years, it stands dismissed unless a date has been fixed for trial or an order has been obtained to continue the proceeding on the General List after that period.²⁵ Where a proceeding has been on a General List for a period of two years, the court may cause notice to be given to the parties of the time for a hearing at which the parties may show cause why an order should not be granted, confirming the dismissal of such proceeding. On such hearing, the court may make such order as appears to be just to the court in the circumstances.²⁶ In this way, dormant cases are brought on for hearing or, where appropriate, are dismissed.

B. *Abolition of the System of Writs*

The writ of *habeas corpus* has been preserved but all other writs have been abolished.²⁷ Instead of commencing an action by a writ of summons, followed by an appearance and a defence and, in some cases, a reply, a proceeding is generally commenced by an originating notice (action),²⁸ accompanied by a statement of claim.²⁹ Ten days after service are allowed for the filing and delivery of a defence.³⁰ Such filing and delivery closes the pleadings. This procedure has worked well in practice. In many cases, solicitors give an extension of time for filing a defence. In the early stages, the Bar was assured by the judges that default judgments would be set aside if it could be shown that a request for an extension of time for filing a defence had been unreasonably refused.³¹

The originating notice may be served in the province by any person. One important side-effect of the discontinued use of the writ of summons is that service out of the jurisdiction may be made without any order of the court, unless the service is to be made outside Canada or one of the states of

²⁴ R. 28.11.

²⁵ R. 28.11(3).

²⁶ R. 28.11(4).

²⁷ R. 56.02.

²⁸ R. 9.

²⁹ R. 14.

³⁰ R. 11.02(1).

³¹ See r. 12.06.

the United States of America,³² in which case it is necessary to apply for leave and for the fixing of a time for filing of a defence. The court may grant such leave on application, supported by affidavit or other evidence, stating that the plaintiff has a good cause of action and showing in what place or country the defendant is, or probably may be found.³³ In practice, this has been found to be most beneficial as it brings into Nova Scotia defendants who might otherwise make it difficult or expensive for plaintiffs to find them in their own jurisdictions.

In the defence, allegations of fact in the statement of claim need not be specifically denied. Any such allegations not specifically admitted are deemed to be denied.³⁴

Writs of execution are no longer used.³⁵ These have been replaced by an execution order, which is wide in scope and relatively simple. Under it, any property may be seized by a sheriff,³⁶ and an employer of an execution creditor is required to deduct and remit portions of salary or wages.³⁷ Garnishee proceedings are unnecessary. The execution order has been found by lawyers and sheriffs to be simpler, more direct and more efficient than the older remedies. Provision is also made for attachment orders,³⁸ receivership orders³⁹ and contempt orders,⁴⁰ for use in appropriate cases.

C. *Discovery and Disclosure*

1. Discovery and Production of Documents

Rule 20 requires a party to a proceeding to serve on the opposing party a list, in the prescribed form, of the documents that are or have been in his possession, custody or control, relating to every matter in question in the proceeding. True copies of each document for which privilege from production is not claimed must be delivered to the opposing party or produced for his inspection⁴¹ and the party serving the list must undertake to produce the documents at the trial or hearing of the proceeding.⁴² The list must show every document relating to every matter in question in the proceeding and is not restricted to those documents which the party preparing the list regards as essential to his case.⁴³ There is intended to be a full disclosure of all relevant documents.

³² R. 10.07(1).

³³ R. 10.07(2).

³⁴ R. 14.14(a).

³⁵ See rr. 52, 53.

³⁶ R. 53.02.

³⁷ R. 53.05.

³⁸ R. 49.

³⁹ R. 54.

⁴⁰ R. 55.

⁴¹ R. 20.01(4)(a),(b).

⁴² R. 20.01(4)(c).

⁴³ R. 20.01.

2. Examination For Discovery

Very wide powers of examination for discovery are given by Rule 18. Any person who is within or without the jurisdiction may, without an order, be orally examined on oath or affirmation by any party regarding any matter not privileged, that is relevant to the subject matter of the proceeding.⁴⁴ The person being examined shall answer any question regarding any matter, not privileged, that is relevant to the subject matter of the proceeding, even though it is not within the scope of the pleadings.⁴⁵ At a trial, a deposition,

so far as admissible under the rules of evidence, may be used against any party who is present or represented at an examination for discovery, or who received due notice thereof, for any of the following purposes:

- (a) to contradict or impeach the testimony of the deponent as a witness;
- (b) where the deponent was a party, or an officer . . . [of] a corporation . . . for any purpose by an adverse party; [and]
- (c) where the deponent is dead, or is unable to attend or testify because of age, infirmity, sickness, or imprisonment, or is out of the jurisdiction, or his attendance cannot be secured by subpoena, or exceptional circumstances exist that make it desirable in the interests of justice to allow the deposition to be used, for any purpose by any party.⁴⁶

This rule, providing for widened examination on oral discovery, has been found most useful and works very well.

3. Written Interrogatories

These are provided for by Rule 19 and have been preserved for use in certain cases in which detailed information is required and can be given in written form.

D. *Pre-trial Conference*

The pre-trial conference rule has been in force in Nova Scotia for more than twelve years⁴⁷ and has proved to be very effective in shortening hearings and in bringing parties together so that settlements result. The pre-trial conference in Nova Scotia is trial-oriented and not settlement-oriented. It is normally presided over by the judge who will be hearing the case, but this is not essential.⁴⁸ Any judge may preside at the pre-trial conference without the necessity of having the same judge preside at the hearing. If the parties wish to have a different judge preside at the hearing, after the pre-trial conference has been held, an assurance that this will be done has been given to the Bar.

The question of settlement is not pushed by the presiding judge, who does not enter into any discussion with regard to settlement. Settlements are, however, a useful by-product of the pre-trial conference.

⁴⁴ R. 18.01(1).

⁴⁵ R. 18.09(1).

⁴⁶ R. 18.14(1).

⁴⁷ See text accompanying note 4.

⁴⁸ R. 26.01(3).

The pre-trial conference has been accepted by the lawyers and judges in Nova Scotia, who have made it a useful tool which they would not now give up.

E. *Delivery of Pre-trial Brief*

As previously stated,⁴⁹ this enables the trial judge to hear oral evidence at the conclusion of the taking of evidence, without the necessity of an adjournment for the purpose of obtaining a transcript or for the preparation of arguments. After the argument, the trial judge may in many cases, dispose of the matter by an oral judgment without appearing to disregard the authorities cited on the argument, since the authorities will already have been submitted in the pre-trial brief, and the judge will have had an opportunity to review and consider them. Transcripts are rarely required or permitted at the trial level and, if judgment is reserved, they are usually delivered in written form within a few days or weeks of the conclusion of the hearing.

The pre-trial brief also enables the judge to focus his attention on the basic issues during the hearing. The pre-trial brief may be short and may consist of a letter, or it may be longer, depending upon the circumstances. It does not deal with the evidence in detail, but merely sets out the basic facts that the party expects to be established by the evidence.

F. *Medical Examination of Parties*

Rule 22.01(1) provides that, where the physical or mental condition of a party is in issue, the court may order the party to submit to a physical or mental examination by a qualified medical practitioner. The medical practitioner may ask the party any relevant questions concerning his medical condition and history, and the party shall answer the questions.⁵⁰ Where a person to be examined consents in writing, or the court so orders, the examining medical practitioner may examine hospital records and X-rays previously made or taken, have analyses made of samples of blood and body fluids and have any other tests made that are recognized by medical science.⁵¹ Provision is made for disclosure of the written report of the examination by the examining medical practitioner⁵² and for use of such reports.⁵³

G. *Calling Adverse Party*

Rule 31.03(3) provides that a party may call an adverse party or an officer of a corporation that is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party. The witness so called may be contradicted and impeached by, or on behalf of, the adverse party also, but may be cross-examined by the adverse party only upon the subject matter of the examination-in-chief.

⁴⁹ See text accompanying note 5.

⁵⁰ R. 22.02(1).

⁵¹ R. 22.02(2).

⁵² R. 22.04.

⁵³ R. 22.05.

H. *Expert Witnesses and Reports*

Unless a copy of a report containing the opinion of an expert, the facts upon which the opinion is based and his qualifications, has been served upon each opposite party at least twenty days before the evidence of the expert is to be given, and a copy of the report is delivered with the pre-trial brief to the trial judge, the evidence of the expert is not admissible on the trial without leave of the court.⁵⁴ An opposite party may, by notice in writing, require the attendance of the expert at the trial if notice is given within ten days after service of the report on that party.⁵⁵ If an expert has been required to attend, and the court is of the opinion that any evidence so obtained does not materially add to the information in the report, the court may order the party requiring the attendance of the expert to pay costs.⁵⁶

I. *Variation of Divorce Decrees—Powers of Family Court Judges*

There is no unified Family Court in Nova Scotia. Many orders for corollary relief contained in *decrees nisi* granted by trial division judges are reviewed, from time to time, by Family Court judges who are required to consider issues such as questions of custody, maintenance and the enforcement of maintenance orders. Provision has been made by which an application to the Trial Division of the Supreme Court to vary or rescind an order for corollary relief may be made by filing an application with the Family Court.⁵⁷ If the Family Court is satisfied that the circumstances have changed and that the order for corollary relief should be varied, rescinded or suspended, the Family Court files the application and report with the prothonotary of the Supreme Court at Halifax, and a copy of the application and of the report, with an appropriate notice, is served on the parties.⁵⁸ After a period of twenty days has expired from the date on which the prothonotary at Halifax receives the report of the Family Court, the Trial Division may deal with the report in the same manner as the report of a referee.⁵⁹ This enables many of the matters that would normally come to the Supreme Court, because the Family Court judge does not have the power to vary or rescind, to be considered and dealt with by the Family Court judge. In the vast majority of cases no objection is taken to the recommendation of the Family Court judge, and the Trial Division judge merely grants an order giving effect to the recommendation. If an objection is taken, the matter is dealt with by the judge of the Trial Division.

IV. THE EXPERIENCE SINCE 1972

The Civil Procedure Rules have been found to be relatively simple, easy to apply, and effective in achieving the objects for which they were designed.

⁵⁴ R. 31.08(1).

⁵⁵ R. 31.08(3).

⁵⁶ R. 31.08(4).

⁵⁷ R. 57.30(1).

⁵⁸ R. 57.30(7).

⁵⁹ R. 57.30(8).

Initially, the practising Bar was apprehensive and questioned the need for change and the need for what were quite drastic changes in the existing rules and procedures. Assurances were given that every effort would be made by judges to interpret the rules sensibly and liberally, with a view to achieving the sought-after policies. The judges and the practising Bar accepted the recommendations of the Committee and the assurances that the rules appeared to be workable, and that changes would be made if it was found that they were, in any way, unsatisfactory. Practice memoranda are issued from time to time to deal with matters that do not require an amendment to the Rules and require merely explanation and direction.

It is my impression that the practising Bar has found that the Civil Procedure Rules bring matters on for trial in an orderly, efficient way, without undue delay, and that matters are heard and determined promptly. Pre-trial conferences are asked for by the Bar in many cases and have proved to be effective in narrowing the issues, in shortening trials and, in many instances, in enabling settlements to be reached. Lawyers find that their files are closed more quickly and that more work can be done for clients in the time available.

As one knowledgeable observer from outside the province said, "In Nova Scotia you started with a reluctant Bar and ended with an enthusiastic Bar."