The Law Society of Upper Canada
Fifth Annual Civil Litigation for Law Clerks

Common Motions

Richard M. Bogoroch and Tripta S. Chandler
Bogoroch & Associates

Friday, October 21, 2005

Civil Litigation for Law Clerks
Common Motions
Richard M. Bogoroch and Tripta S. Chandler*

I. Introduction

In civil litigation, there are a number of motions which counsel and law clerks can expect to regularly encounter. Preparation for these motions is usually within the purview of the law clerk, who is generally responsible for all correspondence leading up to the motion as well as the preliminary drafting of the motion material itself. In view of the law clerk's important role in the motions process, a thorough understanding of the rules governing motions, as well as the principles behind some of the most common motions, is essential to proper preparation and drafting of motion materials. In addition, thorough preparation for a motion can often make the difference between a motion's success or failure, or the difference between being granted, or denied, an award of costs.

The most critical aspect of a motion is the foundation, or grounds, for the motion. The process of establishing grounds for a motion often commences weeks or months prior to the actual motion date and generally takes the form of letters of request, telephone calls and investigation. Much of this process can be performed or initiated by law clerks. In this paper, we will review the general principles underlying motion preparation and we will review a number of common motions, including motions for productions, motions to amend pleadings and motions dealing with issues regarding service. Although these motions are often brought by either plaintiff's or defence counsel, the motions will be discussed primarily from the plaintiff's perspective and from the point of view

* I gratefully acknowledge the substantial contribution that Tripta S. Chandler has made to this paper.

of the moving party. Copies of precedent motion materials have been attached to this paper and may serve as an illustrative guide for preparing motion material.

• Preliminary Matters

The foundation, or grounds, for the relief sought is the touchstone for the motion. While it may appear that motion preparation commences when the motion record (notice of motion, affidavit and exhibits) is drafted, in fact, preparation must begin as soon as a motion is contemplated.

The first step in bringing a motion is to **book the date**. In doing so, you must be aware of and understand the various rules and Practice Directions which govern civil motions. The Rules and Practice Directions are your roadmap to the motions process and govern such matters as the format for motions arising from Examinations for Discovery, the venue for motions and the method of booking motions.

A. Venue

The issue of venue is **twofold**. You must first determine in what county or region the motion will be held and, once this has been established, you must determine whether the motion will be heard before a Judge, a Master or a Registrar. Knowing the answer to these two questions will ensure that, on the date of the motion, the matter is heard in a court of competent jurisdiction.

Prior to July 1, 2004, Rule 37.03(3) provided that an opposed motion be brought in the region where the **responding party** (or their counsel, if represented) was residing (or practising, in the case of

counsel). However, effective July 1, 2004, **Rule 37.03** was amended and at present, Rule 37.03(1) requires that all motions be held in the **county where the action was commenced**.

In Toronto and certain other regions (eg., Ottawa), both Judges and Masters hear motions. However, it must be noted that there are no Masters in certain smaller regions and therefore, this issue will not arise in those areas, where all motions are heard by either a Judge or a Registrar. When in doubt, you should contact the local motions office to confirm the local practice.

The practical implication of having a system which includes both Judges and Masters is that, while Judges are permitted to hear and decide any type of motion, the jurisdiction of Masters is circumscribed. The first step in determining who may hear a motion is to refer to Rule 37.02(1). This rule describes the jurisdiction of Judges and Masters in dealing with motions.

In addition to providing examples of certain motions with respect to which either a Judge or a Master has jurisdiction, **Rule 37.02(2)(a)** states that a Master does not have jurisdiction to hear a motion **"where the power to grant the relief sought is conferred expressly on a judge by a statute or rule"**. Therefore, in determining whether a Judge or a Master has jurisdiction to hear the motion, you must always read the rule relating to the type of motion you wish to bring.

If a motion may be heard by a Master, the rule in question will generally refer to "the Court" as the entity hearing the motion. For example, Rule 30.03, which deals with disputes relating to the scope of an Examination for Discovery, begins with the words, "The ***court*** may on motion determine any

dispute relating to the scope of an examination". This is a clear indication that the motion may be heard by a Master.

Similarly, if a motion must be heard by a Judge, this will often be specified in the rule itself. One example of this is Rule 21.01, which deals with determination of an issue of law before trial. This rule begins with the words, "A party may move before a ***judge***". Again, the rule in this case is clear as to the jurisdiction for seeking the relief sought.

You should also note that Registrars have jurisdiction to hear certain motions which are brought on consent. The scope of the Registrar's jurisdiction is also set out in Rule 37.02(3).

Once you have determined whether jurisdiction to hear the motion lies with a Judge, Master or Registrar, you must draft your Notice of Motion to reflect this. Rule 37.04 states that, when a motion is made to a Master or Registrar, the motion shall be made to "the court", and if the motion is made to a Judge, the motion shall be made to "a judge". In practical terms, this means that your Motion Record should indicate this in the text of the first line of your Notice of Motion (Form 37A). This first line will read as follows: "The (moving party) will make a motion to **the court/a judge**".

B. Booking the Date

According to the Toronto Practice Direction issued on June 15, 1993, counsel must canvass any proposed motion date (unless the motion is on consent, unopposed or without notice) with all opposing counsel. The motion date must be mutually convenient to all parties involved. Once the

date is booked, it is good practice to send a letter to all opposing counsel to confirm the date of the motion and confirming that the motion date was canvassed and agreed to by all parties.

Once the date of the motion is booked, timelines are of central importance and must be carefully noted. Rule 37.07(6) states that the Notice of Motion must be served four days prior to the hearing of the motion, and Rule 37.10(1) states that all other material in support of the motion (e.g., affidavits, facta and briefs of authorities) must be served and filed three days prior to the motion date. Pursuant to Rule 31.10(3), the responding party must serve and file all responding material no later than two days prior to the motion hearing date.

The moving party must also note that Rule 37.10.1 requires that a motion confirmation form (Form 37B) be faxed, filed or sent via e-mail to the motions office by 2:00 p.m. two days prior to the hearing date of the motion. If no confirmation form is filed, the motion shall not be heard (Rule 37.10.1(2)). Therefore, as soon as the motion date is confirmed, this two-day deadline should be diarized.

C. Rules of Note

There are a number of rules which you should carefully note. The most commonly used rules, and those which should be referred to in most Notices of Motion, are set out below. While not strictly necessary, it is always useful to include them in the event of any unforeseen development during the hearing of the motion, or in the event that the lawyer or student arguing the motion encounters a Judge or Master who requires that all rules to be relied on be cited in the motion material.

Rule 1.04 deals with interpretation of the rules, stating that the rules "shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits". This may form the grounds for an argument for a type of relief not specified in the rules.

Rule 2.01(1) states that a failure to comply with the rules is simply an irregularity and does not render a proceeding a nullity. This rule gives the court jurisdiction to grant any relief required to secure the just determination of the matters in dispute. This rule is particularly important, as it will allow counsel grounds to deal with any failure to serve documents in the manner provided for in the rules.

Rule 3.02(1) provides that the court may extend or abridge any time prescribed by the rules or an order. This rule will deal with any failure to serve documents in accordance with the relevant timelines.

Rule 37 is the rule governing motions in general. This rule sets out the requirements applicable to material to be used on motions, service requirements and the applicable timelines, and should always be pleaded. Rule 77 governs motions brought in case managed actions only and includes provisions relating to the use of the Form 77C Notice of Motion. Reference should be made to this rule when dealing with any motions in actions governed by the case management rules.

Rule 57 is the costs provision, which allows costs to be awarded on a motion. This rule should be included in all motion material where costs are sought.

III. Common Motions

A. Motions for Undertakings, Refusals and Questions taken Under Advisement

Rules 31.06 and 31.07, allow a party to bring a motion for answers to undertakings and questions refused or taken under advisement at the Examination for Discovery of a party. This type of motion is by far the most common type of motion.

In laying the foundation for a motion of this type, it is vital to ensure that all outstanding undertakings and questions refused or taken under advisement are **brought to the attention of opposing counsel well in advance of the motion date**. **The best approach** is to send a letter to counsel with a list of undertakings and refusals attached. The letter should clearly indicate **the date** by which answers to the questions are sought and should also state that, if such answers are not provided by the date specified, a **motion will be brought**. The date specified in the letter should be **diarized** and, if no response is received by that date, a further letter should be sent, and this process should be repeated until the motion hearing date. Doing so will demonstrate to the court that you have made efforts to secure counsel's co-operation and will provide a strong foundation for your motion and **for any award of costs**.

At the same time as you send this preliminary letter to counsel, you should also ensure that you have the transcript(s) of the Examination for Discovery of the party whose productions you are seeking. Relevant transcripts will be important evidence at the hearing of the motion and a copy of the transcript should be filed with the court, together with your motion materials.

When drafting the moving party's motion material, you must follow the chart format set out in Schedule B to the Toronto Practice Direction issued on August 29, 2002. It is essential that the charts be completed properly and that they are provided to opposing counsel in advance of the motion date, as both parties must complete the charts, which are then submitted to the Court. To ensure that the charts are properly completed and to facilitate the completion of same, it is best to send a copy of the chart to opposing counsel via e-mail for completion.

It is important to recognize that the undertakings, refusals and under advisements charts form the primary basis for argument at the motion and therefore, these charts **must** be accurate. A thorough review of the relevant transcripts to properly identify the question asked is of fundamental importance, as these charts are what counsel, and the motions Judge or Master, rely on at the hearing of the motion.

B. Motion for Production of Information from Non-Parties

Rule 30.10 governs motions for production of material from non-parties. These motions often arise in the context of an undertaking given by an opposing party where the opposing party has made "best efforts" to obtain the information, but the non-party from whom the information is sought has failed or refused to respond. In other circumstances (for example, when a party to an action is deceased and has no estate trustee), a non-party may be legally unable to release certain information without a court order.

In either case, the foundation for the motion is established when the request for information is made, either by the moving party or the opposing party (in the case of undertakings). The relevant documentary evidence required at the hearing of the motion will consist of the letters of request sent to the non-party (there should be at least two) and any written response received.

Although it may seem to be a matter of common sense, it is essential that the letters of request were sent to the proper address of the non-party. Prior to bringing a **Rule 30.10** motion, you must confirm that the letters of request were sent to the appropriate address. While the telephone book and the internet are useful tools for confirming a non-party's address, it is also a good idea to telephone the facility from which you are seeking information to confirm their mailing address or, if you cannot obtain a response, to leave a message or messages requesting that they contact you.

Records must be kept of any telephone calls or emails made or sent regarding a pending motion. The record should include the name of the person you spoke with, the telephone number you called, the date and time of the call, and a summary of what was discussed. This information will form the basis for the affidavit in support of the motion and should therefore be accurately recorded.

A **Rule 30.10** motion is a type of motion which will require that notice of the motion be given to an individual or entity who is not a party to the litigation (the party from whom information is sought). While you are not required to canvass a motion date with the non-party, you must give them notice of the motion and you must also serve the motion material on them in advance of the motion.

When dealing with non-parties (who are almost always not represented by counsel), a motion record must generally be served in **one of two ways**, either by **personal service** or by regular mail. You should note that personal service must be done by a process server or other individual who will swear an affidavit of service. **Service by courier is not an acceptable form of service in any circumstances**.

If you choose to serve the motion record by mail, additional rules apply. **Rule 16.06** provides that, when a document is served by regular mail, a party must allow five days for service to be effected. This means that, when serving a Motion Record by mail, you must allow **an additional** five days (beyond the four days required under Rule 37.07(6)) for service to be effected.

C. Motions to Amend Pleadings

A motion to amend pleadings is generally quite simple and is another of the most common motions encountered in a civil litigation practice. Such motions are governed by **Rule 26**, which states that "on motion at any stage of an action, the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment". **Rule 26.02** states that a pleading (other than a pleading to add, delete or substitute a party) may be amended in one of three ways. If the amendment is made prior to the close of pleadings, the party may amend their pleading without consent of the parties or leave of the court. For amendments after the close of pleadings (or those involving the addition, substitution or deletion of a party), the moving party must obtain either the consent of the opposing party (including any party to be added) or, in the alternative, leave of the court.

Given the broad wording and mandatory language of **Rule 26**, motions to amend pleadings are not generally opposed, unless there is a legal basis to do so (for example, in the case of a limitation period defence in the case of a motion to add a party). If you are able to obtain the consent of opposing counsel to the amendments sought, the motions process is very simple. In this case, a Registrar has jurisdiction to hear the motion pursuant to **Rule 37.02(3)** and the moving party must simply file a consent form in the form specified under **Rule 37.02(3)** and executed by all counsel, together with the amended pleading, with the court. No Motion Record, Notice of Motion, or affidavit is required. Counsel need not attend to argue the motion, which may be brought in writing.

In the event that you must amend a pleading to add, substitute or delete a party, the motion must be brought on notice to all parties and, in the case of a party to be added, on notice to the proposed additional party. Such motions are often opposed and you will require a formal Motion Record. There is, however, one notable exception to this rule. If you have issued a Statement of Claim and it comes to your attention, **within the limitation period**, that you must add an additional defendant, it is possible to bring the motion to amend the pleading without notice. Although there have been no reported court decisions in this regard, the authority for doing so may be found in the fact that, if the limitation period has not expired, counsel could simply issue a second Statement of Claim as against the additional defendant, without leave of the court and without notice, and consolidate the two actions at a later date.

D. Motions for an Extension of Time to Serve the Statement of Claim

This motion is also very common in the context of a plaintiff's practice, where counsel are often

confronted with individuals whose addresses they are unable to locate, for a variety of reasons. As with the other motions mentioned above, compiling the appropriate evidence and keeping track of deadlines are essential.

The first rule to be noted is **Rule 14.08**, which provides that counsel have six months from the date of issuance of the Statement of Claim (or Notice of Action) to serve all Defendants to the action. When a Statement of Claim is issued, the 6-month limitation period should be carefully diarized and a note should be made to confirm that all parties have been served at least six weeks prior to the expiry of the deadline, in order to provide counsel with sufficient time to bring a motion should one be required.

The most common reason for seeking an extension of time to serve a Statement of Claim (as opposed to seeking an order for substituted service, which is discussed below) is when you are unable to confirm whether or not the Defendant you are attempting to serve resides at the address at which service has been attempted. Therefore, an important component of the motion material will be the efforts you have made to determine the Defendant's address.

In building a foundation for this type of motion, you should ensure that the appropriate searches are conducted. For example, in a motor vehicle accident case, searches can by conducted through the Ministry of Transportation to confirm an individual's last-known address. Canada 411 internet searches are also helpful. You may also wish to attempt to contact the Defendant by telephone, or retain a private investigator to assist. Your process server should also be instructed to make inquiries

of neighbours, landlords or superintendents to ascertain the Defendant's whereabouts, and these efforts should be set out in an affidavit of attempted service, which will be included as part of your Motion Record.

In insurance cases, you may be able to obtain assistance from the Defendant's insurer in locating the Defendant or alternatively, the insurer may agree to accept service on behalf of the Defendant. This is discussed in further detail under "Motions for Substituted Service", below.

Generally, a motion for an extension of time for service of a Statement of Claim is brought without notice, or *ex parte*. This means that you need not canvass a motion date or serve your motion material on any of the parties to the action, nor do you have to advise them that the motion is being brought.

E. Motions for Substituted Service of a Statement of Claim

These motions are governed by **Rule 16.04(1)**, which provides for substituted service of an originating process (or any other document required to be served personally) in situations where prompt service of a document has become "impractical for any reason". Reference must also be made to **Rule 16.01**, which describes the types of documents that are required to be served personally or by an alternative to personal service set out in **Rule 16.03.**

The basic principle behind a motion for substituted service is that, in order to be successful, you must demonstrate to the court that you have made sufficient (usually significant) efforts to serve the

document in the usual fashion, and that, if the document is served by the means proposed, it will likely come to the attention of the party. A motion for substituted service generally becomes necessary when counsel is unable to serve a Statement of Claim (as discussed below). In these circumstances, it is easy to see why a court would be reluctant to grant an order for substituted service without compelling evidence to do so.

In compiling evidence to support the efforts made to serve a Statement of Claim, you should follow the same procedure set out under motions for an extension of time to serve the Statement of Claim. However, you must also demonstrate that, if the Statement of Claim is served in the manner proposed, it is likely to come to the attention of the Defendant.

This can be achieved in a number of ways. The first issue that must be considered is the person or entity who will serve as the "substitute recipient" of the document. In insurance cases (e.g., in motor vehicle accident cases), a Defendant is generally insured by an insurance company who will defend the action on his/her behalf. It is reasonable, therefore, to move for substituted service of the Statement of Claim on the Defendant's insurer. Similarly, if you are able to ascertain that a Defendant is ill or hospitalized, you may be able to justify service of the Statement of Claim on a spouse or family member who either resides with or visits the Defendant regularly. Again, in this situation, a proper foundation must be laid. You must have strong evidence to support your contention that the Defendant will in fact be made aware of the claims against them, even if they are not served personally with the document in question. This means that the relationship between the Defendant and the substitute should be thoroughly investigated and described in the Motion Record.

A motion for substituted service is another motion that may be brought without notice to any of the parties involved and, while it may be brought in writing, it is generally more prudent to arrange for personal attendance, given that the court often has questions arising out of the facts and circumstances in support of the motion.

F. Motions for Approval of Settlements Involving Minors and Other Persons Under Disability

Another common type of motion is a motion for court approval of a settlement on behalf of a minor or adult mentally incompetent plaintiff. These motions, which are governed by **Rule 7.08**, require that a Judge approve any settlement entered into on behalf of a party (usually a plaintiff) under a disability, on the principle that such a party is incapable of consenting to the settlement on their own behalf. This is also an example of a motion that must be heard by a Judge rather than a Master.

A motion for court approval of a settlement is one of the most important motions brought by plaintiff's counsel. Before approving a settlement, the judge hearing the motion must be provided with a **clear outline** of the nature of the case, the injuries, damage or loss sustained by the plaintiff under disability and a full and detailed analysis of the reasons why, based on the facts of the case, counsel believes that the settlement entered into is in the best interest of the incompetent plaintiff.

A Motion Record for court approval of a settlement is generally more complex than most other Motion Records. The Motion Record must include an **affidavit from counsel for the plaintiff**, an affidavit from the litigation guardian confirming that they understand and consent to the settlement

and to counsel's fees, and Minutes of Settlement executed by and a Judgment approved by all parties to the litigation. The affidavit of the solicitor must comply with Rule **7.08(4)(b)**, "setting out the solicitor's position in respect of a proposed settlement" and the affidavit of the litigation guardian must comply with **Rule 7.08(4)(a)**.

It should also be noted that, while parties under the age of 18 years are considered persons under disability and therefore incapable of entering into a settlement, **Rule 7.08(c)** requires that minors over the age of 16 years must provide their written consent to the settlement, which must also be included in the Motion Record.

Counsel's affidavit is the document in which the foundation for the motion is set out. This affidavit, which may be quite lengthy, must include all information relevant to the motion, including a description of the case, a description of the plaintiff's losses and a detailed discussion of the strengths and weaknesses of the case. Counsel must clearly demonstrate to the court all the reasons why the claim might be won or lost at trial, and why, in the circumstances, the settlement represents a fair and reasonable result. Counsel must also obtain the court's approval of all solicitor's fees to be charged to the incompetent plaintiff and the rationale for the fees charged (in other words, why the fee is reasonable in the circumstances) must also be set out in counsel's affidavit. The affidavit should be supported by as much documentary evidence is available, in order that the Judge is provided with all necessary information to analyse the case.

By comparison, the affidavit of the mentally incompetent plaintiff's litigation guardian is generally relatively simple, including a brief description of the facts and circumstances giving rise to the action and confirmation that the litigation guardian agrees with both the amount of the settlement and counsel's fee.

In general, motions for court approval of a settlement are brought in writing and opposing counsel is not served with any motion material, other than the Minutes of Settlement and the Judgment, which must be executed and approved, respectively, in advance. In certain circumstances, however, the settlement may be opposed by the plaintiff's litigation guardian or another interested party, in which case the motion must be heard and argument advanced. In yet other circumstances, the Judge reading the motion material submitted may require that counsel attend before the court to further explain the nature and effect of the settlement.

IV. Conclusion

The motions described above are integral to most civil litigation practices and the experienced law clerk must have, or develop, a thorough understanding of the motions process and the evidentiary basis required to form the foundation for a successful motion. A successful law clerk will have a complete understanding of the *Rules of Civil Procedure* and the way in which the litigation process is governed by these rules. For law clerks who have, or hope to have, exposure to the motions process, understanding the rules will allow you to develop a more complete understanding of the litigation, and, in particular, the motions process.