

2003 01H 0023

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

**IN THE MATTER OF the Receivership of
Hickman Equipment (1985) Limited**

**AND IN THE MATTER OF the Application by
General Motors Acceptance Corporation
of Canada, Limited ("GMAC") for payment
to GMAC of the proceeds from the sale by
the Receiver of four Terex Trucks.**

BETWEEN:

**GENERAL MOTORS ACCEPTANCE
CORPORATION OF CANADA, LIMITED**

APPELLANT

AND:

CIT FINANCIAL LTD.

FIRST RESPONDENT

AND:

**JOHN DEERE LIMITED and JOHN DEERE
CREDIT LIMITED**

SECOND RESPONDENT

AND:

CANADIAN IMPERIAL BANK OF COMMERCE

THIRD RESPONDENT

AND:

**ABN-AMRO BANK CANADA and ABN AMRO
LEASING**

FOURTH RESPONDENT

AND:

ROYAL BANK OF CANADA

FIFTH RESPONDENT

AND:

TRIMAC EQUIPMENT LTD.

SIXTH RESPONDENT

AND:

HICKMAN LEASING LIMITED

SEVENTH RESPONDENT

AND:

GROUP HOLDINGS LIMITED

EIGHT RESPONDENT

AND:

**PRICEWATERHOUSECOOPERS INC, as
Trustee in Bankruptcy and Receiver of
Hickman Equipment (1985)Limited**

NINTH RESPONDENT

**IN THE MATTER of an Application
pursuant to Rule 57.20(9) of the Rules
of the Supreme Court, 1986 for an Order
extending the deemed abandonment date
for a period of 12 months**

**INTERLOCUTORY APPLICATION
(Inter Partes)**

**TO THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR, COURT OF APPEAL OR
ONE OF THE JUDGES THEREOF**

**This is the Application of the Appellant, General Motors Acceptance Corporation of Canada,
Limited ("GMAC") pursuant to Rule 57.20(9), requesting an Order extending the date of deemed**

abandonment by 12 months, or such later date as the this Honourable Court deems appropriate.
GMAC says:

1. On March 3, 2003, GMAC filed a Notice of Appeal in the within matter.
2. Leave to appeal was not sought by GMAC, as the Order was not interlocutory in nature. That is, the Decision was wholly dispositive of, and a final determination on the issue of GMAC's security interest in the Terex Trucks.
3. On May 5, 2003, GMAC filed volume 1 of the Appeal Book with the Court of Appeal Registry, and provided a copy to the Respondent on May 6, 2003.
4. On May 23, 2003, GMAC filed volume 2 of the Appeal Book with the Court of Appeal Registry, and provided the Respondents with the copy of same. Volume 2 of the Appeal Book contained the transcript of the proceedings being appealed.
5. By Application heard before Madame Justice Cameron on May 27, 2003, it was confirmed that leave to appeal was not required for the within appeal.
6. Pursuant to Rule 57.20 (4) the deemed abandonment date for the within appeal ought to be May 27, 2004, being 12 months from the date upon which the last step was taken.
7. GMAC and interested Respondents, Canadian Imperial Bank of Commerce ("CIBC") and CIT Financial Ltd ("CIT"), have been discussing settlement, and evaluating their respective positions in the within matter over the past 6 months.
8. GMAC would like to continue exploring the possibility of settlement with the interested Respondents, and estimates that 12 months would be an appropriate period of time to allow the parties to come to an agreement, or make the decision to abandon the negotiations.
9. If this matter is not settled within 12 months, GMAC intends to actively pursue its appeal.
10. If this matter is settled, GMAC will promptly file a Notice of Discontinuance with the Court of Appeal.

11. GMAC repeats the foregoing, and requests an Order pursuant to Rules 57.20(9) from this Honourable Court of Appeal as follows:

- (a) extending the date of deemed abandonment, May 27, 2004, by 2 months to May 27, 2005; or
- (b) extending the date of the deemed abandonment to such a later date as may be appropriate;

DATED at St. John's, Newfoundland, this 23 day of March, 2004.



Thomas Kendell, Q.C.
McInnes Cooper
Solicitors for the Appellant
Whose Address for Service is:
P. O. Box 5939
Fifth Floor, The Baine Johnston Centre
10 Fort William Place
St. John's, Newfoundland
A1C 5X4

TO: Court of Appeal
Registry
Duckworth St.
St. John's, NL

AND TO:

Gregory W. Dickie
White Ottenheimer & Baker
10 Fort William Place
St. John's, NL
Solicitors for CIT Financial Ltd.

Maureen Ryan
Stewart McKelvey Stirling Scales
Suite 1100, Cabot Place
100 New Gower St.

St. John's, NL
Solicitors for John Deere Ltd./John Deere Credit Inc

Geoffrey Spencer
Benson Myles
Suite 900, Atlantic Place
215 Water St.
St. John's, NL
Solicitors for Canadian Imperial Bank of Commerce

Greg Smith
Curtis Dawe
Fortis Bld, 139 Water St.
St. John's NL
Solicitors for ABN-AMRO and Royal Bank of Canada and Trimac Equipment

Griffith Roberts
Cox Hanson O'Reilly Matheson
Scotia Centre, 401-235 Water St.
St. John's, NL A1C 1B6
Solicitors for Hickman Leasing Limited and Group Holdings Limited

Anna Locke
Patterson Palmer
Scotia Centre, 235 Water St.
P.O. Box 610, Stn. C,
St. John's, NL A1C 15L3
Solicitors for PricewaterhouseCoopers Inc.

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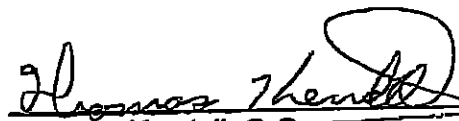
NINTH RESPONDENT

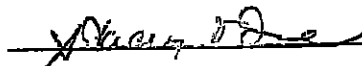
AFFIDAVIT

I, Thomas Kendell, Q.C., Solicitor, of the City of St. John's in the Province of Newfoundland,
Canada, make oath and say as follows:

1. That I am a partner with the law firm of McInnes Cooper, solicitors for the Appellant/Applicant in the within Application, and as such have knowledge of the facts deposed to except where otherwise stated to be based on information and belief.
2. On March 3, 2003, the Appellant filed a Notice of Appeal in the within matter.
3. On May 5, 2003, the Appellant filed volume 1 of the Appeal Book with the Court of Appeal Registry, and provided a copy to the Respondent on May 6, 2003.
4. On May 23, 2003, the Appellant filed volume 2 of the Appeal Book with the Court of Appeal Registry, and provided the Respondents with the copy of same. Volume 2 of the Appeal Book contained the transcript of the proceedings being appealed.
5. On May 27, 2003, the Appellant appeared on an application before Madame Justice Cameron where it was confirmed that leave to appeal was not required for the within appeal.
6. The Appellant has been discussing the prospects of settlement with Canadian Imperial Bank of Commerce ("CIBC") and CIT Financial Ltd ("CIT") throughout the past 6 months.
7. The Appellant would like to continue exploring the possibility of settlement with the CIBC and CIT, and estimates that 12 months would be an appropriate period of time to allow the parties to come to an agreement, or make the decision to abandon the negotiations.
8. I have read the foregoing Application and say that the facts therein deposed are true to the best of my knowledge, information and belief.

SWORN TO before me at the City)
of St. John's, in the Province of)
Newfoundland and Labrador,)
this 20th day of March, 2004:)


Thomas Kendell, Q.C.


[illegible]

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NINTH RESPONDENT

ORDER

UPON APPEARING BEFORE

Justice

Justice

and

Justice

on the

day of

2004.

WHEREAS the parties listed in Schedule A to this Order having been served with notice of this Application; AND WHEREAS the parties listed in Schedule B to this Order having appeared and having been heard; AND UPON HEARING Thomas Kendell, Q.C., counsel for the Appellant, General Motors Acceptance Corporation of Canada, Limited; AND UPON READING the Affidavit of Thomas Kendell, Q.C., and materials filed in support of the Application; IT IS THIS DAY

HEREBY ORDERED THAT the date of deemed abandonment be extended by 12 months from May 27, 2004 to May 27, 2005.

DATED at St. John's, in the Province of Newfoundland and Labrador, this day of April, 2004.

REGISTRAR

2003 01H 0023

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NINTH RESPONDENT

NOTICE TO THE RESPONDENTS

You are hereby notified that the foregoing Application will be made to the Judge at the Court of Appeal sitting at St. John's, Newfoundland, on day of April, 2004 at the hour of 10 o'clock in the forenoon or soon hereafter as the Application can be heard.

TO: ATTACHED DISTRIBUTION LIST

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NINTH RESPONDENT

MEMORANDUM OF AUTHORITIES

THOMAS KENDELL, Q.C.
McINNES COOPER
Fifth Floor, The Baine Johnston Centre
10 Fort William Place
St. John's, Newfoundland
A1C 5X4
Solicitors for the Appellant

Gregory W. Dickie
White Ottenheimer & Baker
10 Fort William Place
St. John's, NL
Solicitors for the First Respondent

Authorities

Rule 57 of the *Rules of the Supreme Court, 1986* TAB 1

The Honourable J. Derek Green, *Recent Revisions to
Civil Procedure Rules in the Newfoundland Court of Appeal
(Law Society of Newfoundland and Labrador, Bar Admission
Course Materials, Practice and Procedure: 2003)* TAB 2

PART III APPEALS

RULE 57 CIVIL APPEALS COURT OF APPEAL

Analysis

PART III APPEALS	57.14 Appeal Books
	57.15 Facsimiles
	57.16 Form of Factum
RULE 57 CIVIL APPEALS COURT OF APPEAL	57.17 Application to Strike Out or Dismiss
	57.18 Application to Set Time for Hearing, etc.
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57.02 Leave to Appeal	57.20 Striking Out and Deemed Abandonment of Appeals
57.03 Appeals	57.21 Evidence
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57.12 Directions to Clerk of Trial Court	57.30 Interlocutory Applications to the Court
57.13 Security for Costs	57.31 Miscellaneous Powers

Definitions

Definitions

57.01. In this rule

- (a) "appeal" means an appeal to the Court and includes a cross-appeal, an application for leave to appeal (where the application is not required by a statute to be made to a Judge), an application for a new trial or to amend, quash or set aside an order or decision appealed from, and any matter reserved, case stated or reference presented to the Court under any statute or rule;

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- (b) "appellant" means any person who files a notice of appeal and includes a tribunal that reserves a matter, states a case, or presents a reference to the Court;
- (c) "Chief Justice" means the Chief Justice of Newfoundland and Labrador;
- (d) "Court" means the Court of Appeal, a Judge or a panel of Judges designated by the Chief Justice;
- (e) "court appealed from" means any court, judge, or tribunal from which an appeal lies to the Court;
- (f) "judgment" means the formal disposition of an appeal by the Court and includes an order for judgment;
- (g) "Judge", unless the context otherwise requires, means a Judge of the Court of Appeal;
- (h) "notice of appeal" means a document by which an appeal is commenced and includes an order, case stated or reference of a tribunal originating an appeal by it;
- (i) "order", when referring to an order appealed from, means the judgment, ruling, verdict, order, finding, direction, determination or award of the court or tribunal appealed from;
- (j) "Registrar" means the officer of the Court appointed as deputy registrar or a clerk of the Court discharging the functions of deputy registrar;
- (k) "respondent" means any person properly served with a notice of appeal and any other person, who, whether served with a notice of appeal or not, is authorized by the Court or by law to be a party to the appeal, and in an appeal under Rule 54 includes any court, judge, justice or justices, officer, clerk or tribunal to which the proceeding appealed from was directed;
- (l) "tribunal" means any person or body, from whom an appeal lies to the Court, including any board, commission, committee, municipal authority, minister, public official, or other public or governmental agency or authority, including the

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*Rules of the Supreme Court, 1986**Chapter 42 Sch D*

Lieutenant-governor in Council, but not including a Court or Judge; and

- (m) "tribunal appeal" means any appeal authorized by statute to be taken from a tribunal to the Court and includes any matter reserved, case stated or reference referred by a tribunal to the Court.

108/99 s1; SNL2001 c42 s45

Leave to Appeal

Leave to Appeal

57.02. (1) Leave to appeal shall be obtained by application to the Court where

- (a) during the course of a proceeding or prior to a final order, a party seeks to appeal from an interlocutory order, or
- (b) a party seeks to appeal from an order
 - (i) as to costs only, or
 - (ii) made by the consent of the parties.

(1.1) A failure to obtain leave to appeal or to make an application under paragraph (1)(a) does not prejudice the right of a party to appeal a final order.

(2) A notice of application for leave to appeal shall be served on any party in the proceeding in the court appealed from who may be directly affected by the appeal, within 10 days from the date of the order sought to be appealed, or within such further time as is allowed by the Court.

(3) The record on an application under paragraph (1) shall consist of

- (a) an index,
- (b) a copy of the notice of application,
- (c) a copy of the order sought to be appealed,

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- (d) a copy of the pleadings, if any, and
- (e) a copy of any affidavits or other evidence relevant to the appeal.
- (4) Leave to appeal an interlocutory order may be granted where
 - (a) there is a conflicting decision by another judge or court upon a question involved in the proposed appeal and, in the opinion of the Court, it is desirable that leave to appeal be granted,
 - (b) the Court doubts the correctness of the order in question,
 - (c) the Court considers that the appeal involves matters of such importance that leave to appeal should be granted,
 - (d) the Court considers that the nature of the issue is such that any appeal on that issue following final judgment would be of no practical effect, or
 - (e) the Court is of the view that the interests of justice require that leave be granted.

(5) The Court, on hearing an application for leave to appeal, may

- (a) grant leave,
- (b) refuse leave, or
- (c) postpone the granting or refusal of leave, but order that the appeal and the issue of leave to appeal be heard together,

and impose such terms as may be just, and give directions to expedite the hearing of the appeal.

(6) The Court may summarily grant leave to appeal at any time.

(7) A party who applies for leave to appeal from an interlocutory order may move in the alternative for an extension of time to issue and serve a notice of appeal in the event that the Court rules that the order is not interlocutory.

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(8) A notice of application for leave to appeal from an interlocutory order may be in Form 57.02A.

(9) An interlocutory order, from which there has been no appeal, shall not operate so as to bar the Court from giving such decision on the appeal as may be just.

108/99 s1; 2/01 s1; 2/03 s1

Appeals

Appeals

57.03. (1) Unless a statute otherwise provides, an appeal, other than a tribunal appeal, shall be by way of rehearing and shall be brought by filing a notice of appeal with the Registrar

(a) in the case of an appeal, not requiring leave, from an order in an interlocutory proceeding, within 10 days;

(b) in the case of an appeal from any other order, within 30 days.

(2) The times referred to in paragraphs (a) and (b) of rule 57.03(1) shall run from the date upon which the order is settled and filed pursuant to rule 49.04.

(3) A notice of appeal, other than in a tribunal appeal, shall be served as soon as practicable after the filing of the notice of appeal and as prescribed by rule 6.11 on any party in the proceeding in the court appealed from who may be directly affected by the appeal.

(4) A notice of appeal in an appeal (other than from an Interlocutory Order) under Rule 55 or in an appeal in a declaratory proceeding relating to or affecting a provincial statute or a tribunal shall also be served as prescribed by rule 6.11 on the Provincial Court judge or tribunal involved, if not a party in the court appealed from, and on the Attorney General of Newfoundland and Labrador, but only the Attorney General of Newfoundland and Labrador shall be a Respondent. Service on a tribunal may be effected by service on its secretary or chief executive officer.

(5) When filing the notice of appeal with the Registrar, the appellant also shall file:

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(a) a letter from the appellant undertaking to request within 10 days the immediate preparation of a transcript of the proceeding under appeal and to provide copies thereof; or

(b) a letter from the appellant undertaking to apply within 10 days for an order of the Court dispensing with the filing of all or any part of a transcript of the proceeding under appeal.

(6) When the appellant elects to provide an undertaking referred to in rule 57.03(5)(a), the appellant shall not permit the preparation of the transcript to be suspended without the prior written consent of each respondent unless a notice of discontinuance of the appeal has been filed.

(7) In the event that the appellant fails to comply with the provisions of rule 57.03(5), a respondent may apply to the Court in accordance with rule 57.30 for an order dismissing the appeal.

(8) A notice of appeal may be in Form 57.03A.

108/99 s1; SNL2001 c42 s45; 10/03 s1

Tribunal Appeals**Tribunal Appeals**

57.04. (1) If a statute authorizing a tribunal appeal prescribes how the appeal shall be brought or when, how and to whom any notice of appeal may be delivered, the prescriptions shall be observed.

(2) Subject to rule 57.04(1), a tribunal appeal shall be by way of rehearing and shall be brought by filing a notice of appeal with the Registrar within 30 days from the date of the order appealed from.

(3) Unless otherwise ordered by the Court, a notice of appeal in a tribunal appeal shall be served as soon as practicable after the filing of the notice of appeal, as prescribed by rule 57.04(2) and as prescribed by rule 6.11, on the tribunal or its chief executive officer and on any other party in the proceeding before the tribunal. If there is doubt as to the form of the notice of appeal, the appellant may apply to the Court for directions.

108/99 s1; 10/03 s2

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*Rules of the Supreme Court, 1986**Chapter 42 Sch D***Extension of Time****Extension of Time**

57.05. The time limited for filing of a notice of application for leave to appeal under rule 57.02 or a notice of appeal under rule 57.03 or rule 57.04 may be extended either before or after the expiration of the time limited where, in the opinion of the Court, refusal to do so would create an injustice.

108/99 s1

Transcripts**Transcripts**

57.06. (1) The Court, upon application and upon such terms as it considers appropriate, may order that a transcript of the proceeding under appeal be prepared from a copy of the sound record.

(2) All transcripts shall be prepared in accordance with the *Recording of Evidence Act* and the Transcript Standards Manual of the Court Reporters' Office and, together with the requisite affidavit, shall be filed with the Court and served upon the other parties to the appeal within the time limited by these rules.

(3) When a party to an appeal disputes the accuracy of a transcript and applies for a review within 30 days of the receipt of the transcript, the Court may review the portion of the transcript that is said to be inaccurate and the sound record of it and make such order as it considers appropriate, or may remit the matter for determination by the judge or tribunal who presided over the proceeding under appeal, whose decision shall be final.

108/99 s1

Form of Notice of Appeal**Form of Notice of Appeal**

57.07. (1) A notice of appeal shall specify the order and court appealed from, the grounds of appeal and the relief or disposition sought and whether the whole or only part, and if so which part, of the order is being appealed from. An appellant may not, without leave of the Court, rely on any ground not specified in the notice of appeal.

(2) A notice of appeal in a tribunal appeal shall also specify the errors of law allegedly committed, or in an appeal by a tribunal shall specify the matters being reserved, stated or referred to the Court.

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*Rules of the Supreme Court, 1986**Chapter 42 Sch D*

(3) A notice of appeal shall give the names and addresses of the appellant or the appellant's solicitor, if any, and of the persons being served with the notice of appeal.

(4) The notice of appeal may be amended within twenty days of filing and thereafter only with leave of the Court, and as amended shall be forthwith filed and served.

108/99 s1

Notice of Intention to ParticipateNotice of Intention
to Participate

57.08. (1) Any person served with a notice of appeal in a tribunal appeal, other than the tribunal itself, may participate in that appeal as a respondent, if that person files with the Registrar and delivers to the appellant a notice of intention so to participate, within 10 days of service on that person of the notice of appeal, containing that person's name and address or the name and address of that person's solicitor, if any.

(2) The tribunal appealed from shall not be considered a respondent, but may file a notice of intention to participate and other documentation as if it were a respondent, and may participate in the appeal to the extent permitted by the Court.

(3) No notice or other paper need be served on a person entitled to file a notice of intention to participate who has not filed and delivered a notice of such intention within 10 days after being served with the notice of appeal.

(4) A person who is entitled to file and who files a notice of intention to participate whether or not that person is or is deemed to be a respondent shall have the benefit of and be bound by these rules as if that person were a respondent.

108/99 s1

Cross-appeal

Cross-appeal

57.09. (1) A respondent who wishes to cross-appeal or who intends to contend on the appeal that

(a) the order appealed from should be varied in any event;

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- (b) the order appealed from should be affirmed on grounds other than those given by the court appealed from; or
- (c) the respondent is entitled to other or different relief or disposition than that given by the order appealed from,

shall, within 30 days after service of the notice of appeal on the respondent, file with the Registrar and serve on the appellant and any other party affected by the appeal, a notice of cross-appeal specifying the grounds thereof.

(2) Failure of a respondent to file and serve a notice of cross-appeal shall not diminish the power of the Court to deal with any matter that arises, but it may be grounds for an adjournment of the appeal or a special order as to costs.

(3) Rule 57.07 shall, with the necessary changes, apply to a cross-appeal.

108/99 s1

Stay

Stay

57.10. (1) The filing of a notice of appeal shall not operate as a stay of the order appealed from.

(2) The Court, on the application of a party to an appeal, may, pending disposition of the appeal, stay any order appealed from or any order of or proceeding before a judge of the Provincial Court or a tribunal in respect of which an order granting or refusing relief under Rule 54 or otherwise has been appealed.

(3) A stay of an order for the payment of money shall not prevent interest from accruing in accordance with the rules generally and any other law.

(4) An order for a stay under this rule may be granted on such terms as the Court deems just.

(5) Where by an Act of Parliament or an Act of the Legislature or by these rules, the court, tribunal or judge appealed from is authorized, pending appeal, to stay the order appealed or the order of or proceeding before a judge of the Provincial Court or a tribunal referred to

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*Rules of the Supreme Court, 1986**Chapter 42 Sch D*

in rule 57.10(2), an application under this rule shall not be made unless and until, where authorized, an application is made before the court, tribunal or judge appealed from, except in the case of interlocutory orders of an injunctive nature.

108/99 s1

Applications Respecting Initiation of Appeal

Applications
Respecting Initia-
tion of Appeal

57.11. (1) In addition to any other powers conferred by Rule 57 or otherwise, the Court may at any time and on such terms as it deems just, on its own motion or on the application of any party to an appeal, order that

- (a) a notice of appeal or of cross-appeal be served on a person not a party to the appeal, and make any further order as might have been made if the person had originally been a party;
- (b) service of a notice of appeal or notice of cross-appeal be effected by substituted service or that service be waived;
- (c) leave or permission to appeal be granted or refused where by a statute application for leave or permission to appeal must be made to a judge before a notice of appeal can be filed;
- (d) a notice of appeal be struck out because of failure by the appellant to comply with Rule 57 in respect thereof, provided that 10 days notice has been given to the appellant; and
- (e) the time within which the notice of appeal could be filed be extended to include the date on which it was actually filed.

108/99 s1; 2/01 s1

Directions to Clerk of Trial Court

Directions to Clerk
of Trial Court

57.12. Except in an appeal from an interlocutory order or an appeal as to costs only or a tribunal appeal or where otherwise ordered by the Court, the Registrar, on receiving a notice of appeal, shall forthwith request the clerk of the court appealed from to transmit to the Registrar

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the documents in the proceeding being appealed and a list of any exhibits that are not documents.

108/99 s1

Security for Costs

Security for Costs

57.13. (1) No security for costs shall be required in appeals unless by reason of special circumstances security is ordered by the Court upon application.

(2) Unless the Court otherwise orders, an appellant who fails to give security for costs as ordered shall be deemed to have abandoned the appeal and the respondent is entitled to costs.

108/99 s1

Appeal Books

Appeal Books

57.14. (1) Except in an appeal from an interlocutory order or an appeal as to costs only or where otherwise ordered by the Court, the appellant shall, within sixty days from the filing of the notice of appeal

(a) file with the Registrar four copies of an appeal book for the use of the Court; and

(b) deliver to each respondent or the respondent's solicitor a copy of the appeal book.

(2) When an appellant files a notice of appeal the appellant may give notice in writing to the Registrar and serve such notice on the other parties to the appeal that, instead of an appeal book as prescribed by this rule 57.14, the appellant will file and deliver a printed case in the form required by the Rules of the Supreme Court of Canada.

(3) Except in an appeal from an interlocutory order, an appeal as to costs only or a tribunal appeal, or except where otherwise ordered by the Court or agreed to in writing by the parties, and filed with the Court, an appeal book shall consist of the following:

(a) Part I - Documents

(i) index of the documents therein,

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- (ii) the notice of appeal and cross-appeal of any party,
- (iii) the documents filed in the court appealed from but not including those required under rule 57.14(3)(b),
- (iv) the decision or order appealed from.

(b) Part II - Evidence

- (i) index of witnesses,
- (ii) list of all exhibits,
- (iii) copies of all exhibits that may be conveniently copied and are not voluminous,
- (iv) printed transcript of the evidence at the trial and, if authorized or ordered by the Court, one electronic copy of such evidence,
- (v) affidavits, written admissions, interrogatories and discovery evidence filed at the trial,
- (vi) statement of facts agreed to by the parties in lieu of any or all of items (iv) and (v).

(c) An appeal book shall be printed double-spaced on one side of letter size paper with the printed pages to the left and with each page numbered at the upper left. If Part II is not lengthy it may be bound in the same volume with Part I. Printing includes reproduction of copies by typing, offsetting, mimeographing, photocopying or any other process.

(d) The cover of the appeal book shall be grey and have marked thereon the number and short title of the appeal and each volume shall have marked thereon its number and the number of each part therein, and where any Part contains more than one volume, each volume shall repeat the index and show on its cover the page numbers contained in it.

(4) In a tribunal appeal, an appeal book shall be prepared so far as possible as prescribed by rule 57.14(3) but if any question arises, or if, except where the appellant is the tribunal itself, any transcript, ex-

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hibit or other document is in the control of the tribunal, the appellant may apply to the Court for directions and assistance, which may give directions as to the form and contents of the appeal book and may direct the tribunal to send to the Registrar any transcript, exhibit or other document for use on the appeal.

(5) The parties to an appeal or their solicitors may by agreement (which shall be part of the appeal book) agree to omit part or all of the transcript of evidence or of any other material which would normally be included in an appeal book, or agree to the inclusion of an agreed statement of facts in lieu of the transcript or exhibits, with the object of avoiding undue expense or delay by reproduction of material not necessary for the appeal.

(6) If a party wishes to abridge the appeal book as provided in rule 57.14(5), but is unable to secure agreement in writing of the opposite party or parties, the party so wishing may apply to the Court which may give directions as to the form and content of the appeal book. Where the parties, or any of them, do not make reasonable efforts to abridge or limit the appeal book and it becomes apparent that such should have been done, the offending party or parties may be penalized in costs.

(7) The Court may require the parties, either jointly or severally, to file excerpts of relevant evidence.

108/99 s1

Factums**Factums**

57.15. (1) The appellant shall within 30 days after filing of the appeal book, or, subject to rule 57.20, within such further time as the parties agree upon or the Court allows, file with the Registrar four copies of a factum as prescribed by rule 57.15(3) and deliver a copy to each respondent.

(2) Each respondent shall within 30 days after being served with the appellant's factum, or, subject to rule 57.20, within such further time as the parties agree upon or the Court allows file with the Registrar four copies of a factum as prescribed by rule 57.15(3) and deliver a copy to each other party to the appeal.

(3) A factum shall consist of

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- (a) An Index;
- (b) Part I - Concise Statement of Facts;
- (c) Part II - List of the Issues;
- (d) Part III - Argument, not ordinarily to exceed 40 pages, unless otherwise authorized by the Court;
- (e) Part IV - Order or relief sought, including any order as to costs;
- (f) Appendix A - Copies of cases, from recognized law reports, and materials referred to in Part III with appropriate indexing and tabulation;
- (g) Appendix B - Statutes and Regulations with appropriate indexing and tabulations (all relevant provisions shall be set forth in this appendix or in the appellant's factum, or off-prints may be filed and served with the factum).

(4) If a cross-appeal involves matters not conveniently covered by a section of the respondent's factum, the respondent shall file and serve with the factum a second factum as a cross-appellant and the appellant (respondent on the cross-appeal) shall have 10 days after receiving the respondent's factum to file and serve, if the appellant wishes so to do, a separate factum as cross-respondent.

(5) Unless otherwise ordered by the Court, this rule 57.15 shall not apply to an appeal from an interlocutory order or an appeal as to costs only.

108/99 s1

Form of Factum**Form of Factum**

57.16. A factum shall be double-spaced on one side of the paper only with the typed pages to the left. All pages shall be numbered consecutively. All paragraphs in a factum shall be numbered consecutively throughout the factum. The covers of the appellant's factums shall be coloured buff or yellow and the covers of the respondents' factums (including factums as cross-appellants) shall be coloured blue.

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108/99 s1

Application to Strike Out or DismissApplication to
Strike Out or
Dismiss

57.17. (1) Any party to an appeal may apply to the Court in accordance with rule 57.30 at any time before or at the hearing of the appeal for an order

(a) striking out the notice of appeal; or

(b) dismissing the appeal

on the grounds that:

(c) no appeal lies to the Court,

(d) the appeal is frivolous, vexatious or without merit,

(e) the appellant has unduly delayed the preparation and perfection of the appeal, or

(f) the appellant has failed to apply to have the appeal set down for hearing.

(2) The application shall state the reasons therefore and shall be supported by an affidavit setting forth any relevant facts not set forth in the order appealed from.

108/99 s1

Application to Set Time for Hearing, etc.Application to Set
Time for Hearing,
etc.

57.18. (1) The Court shall at the beginning of each session set aside a day or a number of days in each month when applications for hearings shall be made to the Court. Notice of such application shall be filed with the Court and served on other parties at least four clear days prior to the application day.

(2) Where the time for the filing of a factum by a party to an appeal other than the appellant has expired and the factum has not been filed, the appellant or any other party to the appeal who has filed a factum may apply to the Court to set a time for the hearing of the appeal.

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(3) An application made in pursuance of rule 57.18(1) shall be accompanied by an affidavit verifying that the matter is ready for hearing. Subject to further direction from the Court, an appeal shall be deemed to be perfected upon the filing of such application and affidavit.

(4) Where an application to set a time for the hearing of an appeal has been filed with the Court pursuant to rule 57.18(2), no factum in the matter shall thereafter be filed without leave of the Court.

(5) Leave to file a factum pursuant to rule 57.18(4) may be given upon such terms as the Court deems just and no such factum shall be filed otherwise than in accordance with such terms.

(6) A party to an appeal who has not filed a factum shall not be entitled to be heard on the hearing of the appeal, unless the Court otherwise orders.

(7) The Court may of its own motion set a time for the hearing of an appeal.

108/99 s1

Discontinuance*Discontinuance*

57.19. An appellant may discontinue an appeal by filing with the Registrar and serving upon the respondent a notice stating that the appellant has so discontinued it, whereupon the appeal shall be at an end and the respondent shall be entitled to costs unless the respondent consents in writing on the notice that the respondent waives costs.

108/99 s1

Striking Out and Deemed Abandonment of Appeals*Striking Out and
Deemed Abandonment of Appeals*

57.20. (1) Where on a pending appeal six months have passed since the last step was taken, the Registrar may fix a time for the Court to consider whether to strike out the notice of appeal.

(2) After the Registrar has given notice in the manner required by this rule, the Court may

(a) after hearing any party who appears, or

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(b) where no one appears,

strike out the notice of appeal.

(3) Notice referred to in rule 57.20(2) may be effected by service on the solicitor for the appellant or the appellant at the last known address indicated in the documents filed, and if any document filed to date indicates the solicitor of record for a respondent or respondents, or the address or addresses of a respondent or respondents where there is no solicitor of record, notice shall be so served. Service may be by ordinary mail or by delivery confirmed facsimile transmission.

(4) Where on a pending appeal, in respect of which the notice of appeal was filed after January 1, 2000, 12 months have passed since the last step was taken and no order has been made pursuant to rule 57.20(2), the appeal shall be deemed to have been abandoned, the Registrar shall record the abandonment and the respondent shall be entitled to costs.

(5) Where on a pending appeal, in respect of which the notice of appeal was filed prior to January 1, 2000, 12 months, after January 1, 2000, have passed since the last step was taken and no order has been made pursuant to rule 57.20(2), the appeal shall be deemed to have been abandoned, the Registrar shall record such abandonment and the respondent shall be entitled to costs.

(6) Upon recording abandonment of any such appeal under rules 57.20(4) and (5), the Registrar shall send notice by ordinary mail or by facsimile transmission to the solicitors of record or to the parties at the last known addresses of such solicitors or parties as indicated in the documents filed in the appeal. In the case of appeals referred to in rule 57.20(5) the Registrar shall, within three months of entry of such abandonment, publish notice of the same in the Newfoundland and Labrador Gazette, which notice may be a single notice containing a list of all such appeals abandoned during the preceding three months.

(7) Inability or failure of the Registrar to effect any notice required by rule 57.20(6) shall not affect the deemed abandonment of an appeal.

(8) No proceedings shall thereafter be taken in any appeal deemed abandoned pursuant to rules 57.20(4) or (5) unless the same shall have been re-instated by the Court, which the Court may do on

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such terms as the Court deems just, which terms may include the payment to the respondent or respondents of costs to date on a solicitor and client basis, which the Court may order be paid by the solicitor who filed the notice of appeal or any solicitor named in a notice of change of solicitors, or both, personally if the Court is satisfied that the solicitor or solicitors is or are responsible for the failure to have proceeded with the appeal on a timely basis.

(9) The Court may, on application by a party prior to the date on which the appeal would be deemed to be abandoned, extend the date of deemed abandonment to such later date as may be appropriate.

108/99 s1; SNL2001 c42 s45

Evidence

Evidence

57.21. (1) The Court on the application of a party may on special grounds authorize evidence to be given to the Court on the hearing of an appeal on any question of fact as it directs.

(2) The evidence shall be taken by oral examination before the Court or by affidavit or deposition or in such manner as the Court directs.

(3) The Court on an appeal may on special grounds inspect or view any place, property or thing.

108/99 s1

Prehearing ConferencesPrehearing Confer-
ences

57.22. (1) The Court may at any time direct a prehearing conference.

(2) Where a direction is made under rule 57.22(1), the parties or their counsel shall attend before a Judge personally at a time and place directed, or in such other manner as the Judge may direct, to consider

(a) the simplification or isolation of issues on the appeal,

(b) the appropriateness of conducting a settlement or mediation hearing, or

(c) any other matter that might expedite the appeal.

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(3) Discussions at a prehearing conference are without prejudice and shall not be referred to at the hearing of the appeal.

(4) The Judge conducting a prehearing conference, except by consent of the parties, shall not sit on the hearing of the appeal and shall not disclose to any member of the appeal panel what positions were taken or what admissions or concessions were made by the parties or their counsel at the conference.

(5) After a prehearing conference, the Judge who held it may make a direction on any matter referred to in rule 57.22(2), (a) to (c).

108/99 s1

Powers of the Court

Powers of the Court

57.23. (1) Subject to the jurisdiction, powers and authority conferred on the Court by the Act or any other statute the Court may

- (a) amend, set aside or discharge any order appealed from except one made in the proper exercise of such discretion as belongs to the court making the order or decision, unless an enabling statute specifically so authorizes;
- (b) draw inferences of fact, allow any amendment, or make any order which might have been made by the court appealed from;
- (c) make such order as to the costs of the proceeding or appeal as it deems fit;
- (d) direct a new trial by jury or otherwise, or a further hearing for determination of any matter, and for that purpose direct that the order appealed from be set aside;
- (e) postpone or adjourn the hearing of an appeal for such period as it deems just;
- (f) make any order which the appeal may require.

(2) The powers of the Court may be exercised in respect of all or any part of the order or proceedings appealed from, notwithstanding that the notice of appeal states that part only of the order is complained

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of, and may be exercised in favour of all or any of the parties or other persons interested in the appeal, although they have not complained of the order appealed from.

(3) On or after hearing an application for leave to appeal, the Court, if it grants leave to appeal and if the merits of the appeal have been fully argued, may decide the appeal without further argument.

108/99 sl: 2/01 sl

Sessions of the Court

Sessions of the Court

57.24. (1) The Court shall sit at St. John's or elsewhere as the Chief Justice may direct.

(2) The Court shall sit at the following times, except as varied from time to time by the Chief Justice;

(a) between the Monday in September following Labour Day and the Friday in December nearest the fifteenth day of December, and

(b) between the Monday in January nearest the tenth day of January and the Friday in June nearest the thirtieth day of June.

(3) The Chief Justice or, in the absence of the Chief Justice, the senior Judge present or such other Judge as may be designated by the Chief Justice or the senior Judge present, shall preside at each sitting of the Court.

108/99 sl

Delivery of Judgment

Delivery of Judgment

57.25. (1) The judgment of the Court may be given orally or determined from the judges' written reasons for judgment to be filed with the Registrar.

(2) An oral judgment may be given at the conclusion of the hearing of an appeal, or subsequently. The Court may, at the time of giving oral judgment or subsequently, file written reasons explaining the oral judgment. Where, at the time of delivery of oral judgment the

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Court does not file, or express an intention to file, written reasons explaining the oral judgment, the chairperson of the panel shall prepare, sign and file with the Registrar a memorandum succinctly explaining the disposition of the matter by the Court.

(3) Written reasons explaining an oral judgment or, where no reasons are filed, the memorandum of disposition, shall be the decision of the Court.

(4) Where written reasons are filed by more than one judge, the judgment of the Court shall be that indicated by the majority of the panel hearing an appeal.

(5) Unless delivered orally, the judgment of the Court shall be deemed to have been delivered on the date when a majority of the decisions of the Judges of the panel hearing the appeal have been filed or, if those decisions are in conflict, when a sufficient number of written decisions have been filed or assented to from which the majority view of the panel hearing the appeal may be determined.

(6) The Registrar shall send without charge a copy of all written reasons for judgment, the reasons explaining oral judgment or the memorandum of disposition, as the case may be, to the parties or their solicitors, to the court appealed from, and to such libraries and other persons as the Chief Justice directs in the particular case or generally. Copies may be supplied to other persons on payment of the applicable charge therefor.

2/01 s1

Consent Judgment**Consent Judgment**

57.26. The parties or counsel for the parties may consent to the reversal or variation of the judgment, order or proceeding appealed from by giving to the Registrar a notice of consent signed by the parties or counsel for the parties and thereupon the Court may, subject to such conditions as the Court may impose, pronounce judgment of reversal or variation accordingly.

108/99 s1

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*Rules of the Supreme Court, 1986**Chapter 42 Sch D***Formal Order**

Formal Order

57.27. (1) Upon a decision having been filed or deemed filed, an order shall be prepared by the successful party or may be prepared by any party stating the disposition of the appeal as directed by the Court and served upon other parties. Such order shall be approved by the Judge who acted as chair of the panel or in the absence of that Judge, the next senior Judge on the panel, and be signed by and filed with the Registrar, who shall then notify all parties or their solicitors of the filing.

(2) Any party to an appeal who wishes the order amended to express better the intent of the decision of the Court may apply to the Court, which may thereupon correct or otherwise amend the formal order, and the amended order shall then without a change of date be signed and entered by the Registrar as the formal order disposing of the appeal. For greater certainty, the provisions of rule 15.07 shall apply, with the necessary changes.

(3) Where the order appealed from has been reversed, and the order of the Court provides for the payment of money, the order shall, unless otherwise directed by the Court, bear interest from the date of the order reversed.

108/99 s1; 2/01 s1

Disposition of Files, etc.Disposition of Files,
etc.

57.28. After completion of the appeal, the Registrar shall preserve the appeal book, factums, other documents and orders, and unless the Court otherwise orders, return to the court appealed from all files and exhibits received from it, unless the matter is appealed to the Supreme Court of Canada, in which event the Registrar shall comply with the rules of that court. The Registrar shall not return the files and exhibits to the court appealed from until the time for appeal or application for leave to appeal to the Supreme Court of Canada has expired.

108/99 s1; 2/01 s1

Entry of Orders by RegistrarEntry of Orders by
Registrar

57.29. (1) Where an order of the Court has been certified by the Registrar to the clerk of the court or tribunal from which the appeal was taken, the latter shall thereupon cause it to be entered in the proper

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book and all subsequent proceedings may be taken thereon as if the order had been granted by the court appealed from. For the purposes of the *Judgment Enforcement Act*, enforcement proceedings may be taken as if the date of the order appealed from is the date on which the order of the Court is filed in this Court.

(2) When an order of the Supreme Court of Canada has been certified by the Registrar of that court to the clerk of the court or tribunal from which the appeal was taken, the clerk shall thereupon cause it to be entered in the proper book and all subsequent proceedings may be taken thereon as if the order had been granted by the court or tribunal appealed from.

108/99 s1

Interlocutory Applications to the Court

Interlocutory
Applications to the
Court

57.30. (1) An interlocutory application may be made to the Court under this rule 57.30 in any appeal or other matter where by this or any other rule or under the *Supreme Court of Canada Act* or any other statute an interlocutory application may be made by notice, motion, petition or otherwise to the Court.

(2) An interlocutory application to the Court shall be in Form 57.30A and shall concisely set out the grounds of the application and the relief sought, be supported by affidavit as to the facts raised and to be relied upon in the application, and be accompanied by a memorandum of the points of argument and a list of authorities relied upon.

(3) An intended applicant may apply *ex parte* to the Registrar of the Court to set a time for the hearing of the interlocutory application and that date having been set, shall serve copies of the documentation filed and a copy of any proposed order on all other parties at least four clear days before the hearing, unless by any rule or statute any other length of notice is required or permitted.

(4) A party opposing the application shall file with the Registrar any affidavit or memorandum on which that party relies and serve a copy thereof on the applicant and on any other parties at least 48 hours before the time of hearing. The memorandum shall contain the points of argument and a list of authorities relied on.

(5) An application may be made *ex parte* where

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- (a) under a statute or rule notice is specifically not required;
 - (b) the opposing party has in writing waived notice or consented to the order proposed by the applicant; or
 - (c) the Court authorizes the application to be made *ex parte*.
- (6) The Court may order that
- (a) notice of an interlocutory application be served on such persons as it directs;
 - (b) the hearing of an interlocutory application be adjourned to permit such service;
 - (c) the hearing of an interlocutory application be adjourned, continued or dismissed if a person, who ought to have been served, has not been served;
 - (d) the interlocutory application be referred to the Court for hearing and disposition as if it were an appeal.
- (7) In cases where the giving of evidence is permissible, rule 29.09 shall, with the necessary changes, apply to the hearing of an interlocutory application under rule 57.30.
- (8) Rules 29.11 and 29.12 shall, with the necessary changes, apply to an interlocutory application under rule 57.30.
- (9) Costs of any interlocutory application shall be in the discretion of the Court.

108/99 s1; 2/01 s1

Miscellaneous PowersMiscellaneous
Powers

57.31. (1) On an appeal, the Court may give any directions respecting the conduct of the appeal that it considers necessary.

(1.1) Where the Registrar considers it necessary, the Registrar may apply to the Court for directions respecting the conduct of a pending appeal.

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(1.2) Where an application is made under rule (1.1), the Registrar shall give notice to the parties.

(2) The Court may dispense with compliance with a rule in a proceeding, except in relation to reinstatement of an appeal deemed abandoned under rule 57.20.

(3) The Court may issue practice notes on any matter respecting appeals.

(4) Where an application is heard and disposed of by a single judge pursuant to Section 10 of the *Judicature Act*, the matter may, with leave of the Chief Justice, be reheard by a panel of the Court.

(5) The Court may order that

(a) service of notice on a person be dispensed with; and

(b) any time prescribed by this rule be extended or abridged before or after the expiration thereof.

108/99 s1; 2/01 s1; 2/03 s2

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Form 57.02A

(rule 57.02)

19 ____ No. ____

In The Supreme Court Of Newfoundland and Labrador
Court Of Appeal

BETWEEN A.B. _____ INTENDED APPELLANT

and

C.D. _____ INTENDED RESPONDENT

Notice Of Application For Leave To Appeal

TAKE NOTICE THAT the Appellant applies for leave to appeal and, if granted, will appeal from the order or decision of (the Honourable Justice _____) dated the (day) day of (month), (year), being an interlocutory order or decision respecting (set out matter) in proceedings in the (Supreme Court) bearing No. ____ (insert trial court number).

AND THAT the grounds of the proposed application are:
(set out grounds for allowing application)

AND THAT the Appellant will request that *leave be granted to appeal* the order or decision appealed from *and that the Appellant be permitted to issue a Notice of Appeal on the following grounds:*

(set out grounds of appeal)

DATED AT _____, Newfoundland and Labrador, this (day) day of (month), (year).

(Sgd.) A.B.

or

(M.N.)

Solicitor for Applicant

Whose address for service

is _____, Newfoundland and Labrador)

TO: (the Respondent or his or her Solicitor
(give name and address)

108/99 s1; SNL2001 c42 s45

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Form 57.03A

(rule 57.03)

19____ No. ____

In The Supreme Court Of Newfoundland and Labrador
Court Of Appeal

BETWEEN A.B. _____ APPELLANT

and

C.D. _____ RESPONDENT

Notice Of Appeal

TAKE NOTICE THAT the Appellant appeals from the order or decision of (the Honourable Justice _____) dated the (day) day of (month), (year) in proceedings in the (Supreme Court) bearing No. (trial court number).

AND THAT the grounds of the proposed appeal are:

(set out grounds of appeal)

AND THAT the Appellant will request that the order or decision appealed from be (reversed)(rescinded)(varied) as follows:
(Set out the relief or other disposition that is sought).

DATED AT _____, Newfoundland and Labrador, this
(day) day of (month), (year).

(Sgd.) A.B.

or

(M.N.)

Solicitor for Applicant

Whose address for service

is _____, Newfoundland and Labrador)

TO: (the Respondent or his or her Solicitor
(give name and address)

108/99 s1; SNL2001 c42 s45

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Form 57.30A

(rule 57.30)

19____ No. ____

**In The Supreme Court Of Newfoundland and Labrador
Court Of Appeal**

BETWEEN A.B. _____ APPELLANT

and

C.D. _____ RESPONDENT

Interlocutory Application

**The Application of A.B., the (Appellant) (Respondent)
herein says:**

1. (Set forth material facts).

**2. The (Appellant) (Respondent) therefore applies for an order
that (set forth relief sought).**

**DATED at _____, Newfoundland and Labrador the (day)
day of (month), (year).**

(Sgd.) A.B.

or

(M.N.

Solicitor for Applicant)

(Attach Affidavit of Applicant in support)

108/99 s1; SNL2001 c42 s45

The Law Society of Newfoundland

2003 Bar Admission Course

Civil Procedure



Chapter 6: Civil Appeals

Chapter 6
Civil Appeals

Bar Admission Course 2003: Civil Procedure

Recent Revisions to Civil Procedure Rules in the Newfoundland and Labrador Court of Appeal

by

Hon. J. Derek Green¹

¹This paper was prepared by the Hon. J. Derek Green, Chief Justice, Supreme Court of Newfoundland and Labrador, Trial Division and was presented at a Continuing Legal Education Seminar in February 2000, at which time Chief Justice Green was a Justice of Appeal with the Supreme Court of Newfoundland and Labrador, Court of Appeal. The opinions expressed in this paper are the personal views of the author and do not necessarily reflect those of the Court.

Chapter 6: Civil Appeals

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Chapter 6: Civil Appeals**Striking Out and Deemed Abandonment of Stale Appeals**

The records of the Court are clogged with a large number of stale unperfected appeals⁸² that the parties or their counsel seem to have no interest in processing to conclusion. Frequently, a dissatisfied party at trial will file a Notice of Appeal but very quickly decides, for cost or other reasons, not to proceed with the appeal. In other cases, counsel settle the case but fail to honour their obligation⁸³ as officers of the court to notify the Court of the settlement and to file a Notice of Discontinuance of the appeal. In some other cases, counsel fail to proceed expeditiously with the appeal. In still others, subsequent events overtake the importance of the appeal but the parties forget to notify the Court. Unlike the situation in most other jurisdictions, the rules did not contain a provision deeming an appeal to be abandoned after a period of inactivity. The result is that the Court maintained as "active" a large number of appeal files that in reality had little or no likelihood of ever being resolved by a hearing. Not only did this cause unnecessary file management work for the court staff but it also skewed court statistics relating to the operation of the court.

(a) Registrar's Application to Strike

Former Rule 57.18 provided what has turned out to be an imperfect means of rectifying this problem. It provided that the Registrar could initiate an application to the Court to have a stale appeal dismissed. All parties to the appeal had to be notified either by service on the solicitors of record or the parties themselves. The requirement of service was interpreted as necessitating service either in the traditional way, by personal service⁸⁴, or by certified mail. Personal service became a problem because no provision was ever made in the Court budget to pay the cost of service. Furthermore, the limited postage budget meant that only a few notices could be mailed each year! Although service by facsimile was not recognized by the rule, the Court attempted to use this method in some cases, but was reluctant to proceed if a party or counsel did not appear on the day set for the application to be heard, for fear that notice had not been properly received.

Another problem resulted from the fact that addresses of parties who were acting for

⁸²The Deputy Registrar of the Court estimates that, despite action taken under the old rule, there are as many as 1200 stale unperfected civil appeals still on the books, some as old as 1976.

⁸³See *Wheatley v. Lumley Brick Co., Ltd.* [1914] W.N. 346

⁸⁴It is true that Rule 6.12 provides that personal service is not required for service of documents other than "originating documents" (defined in Rule 1.03(n) as including only statements of claim and originating applications), and permits service by ordinary mail or by delivery to a relevant address shown on other documents, it was felt that where the application dealt with the severe consequence of striking a notice of appeal, which is the document which "originates" an appeal in the Court of Appeal, the Court ought to be sure that the notice was brought home personally to the party or his or her counsel, and that therefore, personal service, or service by certified mail, should be required.

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themselves, and even some lawyers (who had ceased practice or moved away), would change over time and the rule did not specifically make service effective if served on the address of record even though it was no longer current.

Rule 57.20 provides, it is to be hoped, a more streamlined method of dealing with this problem of stale appeals. In the first place, it continues to allow for Registrar's applications, as under the former Rule 57.18, but with the following changes:

- (i) The period of inactivity that must exist before the Registrar can initiate an application has been reduced from 12 months to six months;
- (ii) Service of the notice of application may be by ordinary mail or by "delivery confirmed facsimile transmission";
- (iii) Service may be effected on the solicitor for the appellant or on the appellant at "the last known address indicated in the documents filed";
- (iv) The rule contemplates service on the respondent only where there is an indication in the court record of the respondent's solicitor or the respondent's address; thus, if as often happens, a notice of appeal has been filed and languishes in the file without anything more being done, and there is no indication from the notice of appeal as to the address of the respondent or his or her solicitor, the only party to be notified will be the appellant;
- (v) The result of a successful application will be the "striking out"⁸⁵, instead of the "dismissal" of the appeal.

(b) Deemed Abandonment

Secondly, and more importantly, Rule 57.20 institutes a new concept of "deemed abandonment" of appeals after the expiration of a certain period of inactivity. The Rule divides inactive appeals into two categories: (i) those in which notices of appeal were filed after January 1, 2000; and (ii) those in which notices of appeal were filed before that date.

In the first category, an appeal will be deemed to have been abandoned where

⁸⁵The former rules used the terms "dismiss", "quash" and "strike" as describing different dispositions that the Court could make in circumstances where it was not prepared to allow the appeal in whole or in part. The new rule now employs only the words "dismiss" (to indicate a disposition on the merits that, subject to certain limited and exceptional circumstances dealing with amendment and reconsideration of orders, effectively renders the court *functus*) and "strike" (to indicate a disposition that is not merits-based, does not render the Court *functus*, and allows the Court in appropriate circumstances to re-instate the appeal if the interests of justice require it). The use of the word "strike" in the context of a Registrar's application, therefore, indicates that although the appeal has been struck and removed from the active records of the Court, it may nevertheless be reinstated, on application, if sufficiently compelling reasons can be given as to: (a) why there was no appearance on the hearing of the application to strike; (b) the reason for the inactivity; (c) why there are merits in the appeal; and (d) why there has been no intervening non-compensable prejudice to the other side.

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twelve months⁸⁶ have passed since the "last step"⁸⁷ was taken and provided no order has already been made upon a Registrar's application⁸⁸. In the second category, the appeal will be deemed to have been abandoned on the later of (i) January 2, 2001⁸⁹ or (ii) twelve months after the last step taken following January 1, 2000; and, as well, provided no order has already been made following a Registrar's application⁹⁰.

Upon the appeal being deemed abandoned, the Registrar will record the matter as an abandoned appeal and the respondent will automatically become entitled to costs, if any. The Registrar must also send notice by ordinary mail or facsimile transmission to the parties at their last known addresses or those of their solicitors⁹¹, but failure or inability of the Registrar to give such notice does not affect the validity of the deemed abandonment⁹². In the case of deemed-abandoned appeals that had been commenced prior to January 1, 2000, the Registrar must, within three months of the entry of the abandonment in the record, publish notice of the abandonment in the *Newfoundland and Labrador Gazette*⁹³.

An appellant may postpone the running of time with respect to deemed abandonment by making an interlocutory application to the Court pursuant to Rule 57.30 for an extension of the date upon which the appeal would otherwise be deemed to be abandoned⁹⁴. The

⁸⁶For the means of calculating the expiration of the 12 month period, see Rule 3.01(g).

⁸⁷The notion of "last step" is not defined in the rules. It is, however, essentially the reverse of the concept of a "fresh step" that appears in Rule 2.02. Consequently, the case law that has developed over the concept of a fresh step may have some relevance. See, e.g., *Newfoundland v. Churchill Falls (Labrador) Corp Ltd & Quebec Hydro Electric Comm.* (1977), 16 Nfld & P.E.I.R. 460; *Healey v. Daley et al* (1983), 45 Nfld & P.E.I.R. 17 (TD); *Jeans v. Kuty* (1983), 45 Nfld & P.E.I.R. 13 (TD); *Hynes v. Miller* (1940), 14 Nfld. L.R. 393 (N.F.S.C.). Just as an act must have "some vitality" (per Goodridge, J. in *Churchill Falls*) to constitute a fresh step, so also, it may be argued, not every act in the Court will constitute a "last step" for the purpose of postponing the running of the 12 month deemed abandonment rule.

⁸⁸Rule 57.20(4)

⁸⁹This assumes that January 1st remains a statutory holiday and January 2nd is a court business day and not also a holiday. See Rule 3.03(a), (g).

⁹⁰Rule 57.20(5)

⁹¹Rule 57.20(6)

⁹²Rule 57.20(7)

⁹³Rule 57.20(6)

⁹⁴Rule 57.20(9)

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application must be filed⁹⁵ prior to the regular deemed abandonment date. The application should set out the reason for the requested extension (such as delays in the preparation of a necessary transcript or the need for additional time to analyze the trial record before preparing a factum) and the estimated amount of additional time that will be needed. Provided some understandable explanation is presented, thereby indicating that the appeal is still being actively pursued, as opposed to being the subject of indifference, it is expected that the Court will attempt to accommodate such a request subject only to having to balance the appellant's needs in this regard against the existence of any intervening prejudice to the respondent, and accommodating the Court's concerns for efficient processing of appeals and management of the appeal process.

(c) Re-instatement of Abandoned Appeals

An appeal deemed abandoned under Rule 57.20 is not considered to have been dismissed on its merits. Accordingly, the Court will, on application, entertain a request to have the appeal "re-instated"⁹⁶. The grounds upon which an application for re-instatement will be entertained are not set out in the rule. It is to be expected, however, that they would be similar to those that the Court now applies in applications to set aside, *ex debito justitiae*, an order striking out a notice of appeal under such rules as Rule 57.17(e) which allows a notice of appeal to be struck out on the ground that the appellant has unduly delayed the preparation and perfection of the appeal⁹⁷. Thus, an application for re-instatement, made *inter partes*, would likely be expected to deal with: (a) an explanation for not applying for an extension of time under Rule 57.20(9); (b) an explanation for any delay in applying to re-instate following the deemed abandonment; (c) the existence of any discernible merit in the appeal if it is re-instated; (d) an indication of a continuation of a bona fide intent to appeal; and (e) the means whereby any prejudice to the respondent resulting from re-instatement can be ameliorated.

In granting an order for re-instatement, the Court may impose terms to eliminate or minimize prejudice to the respondent. Those terms could include the payment by the appellant to the respondent of costs thrown away, as well as the respondent's costs on the re-instatement application itself. Payment may be on solicitor-client basis. The costs order may contain punitive elements; the rule contemplates payment by the appellant all of the respondent's "costs to date" regardless of whether they have been wasted. Further, the Court may order that the costs be paid by the appellant's solicitor personally if the court is satisfied that it is the solicitor himself or herself who was "responsible for the failure to have

⁹⁵Quaere whether it must also be heard?

⁹⁶Rule 57.20(8)

⁹⁷As to the circumstances when the Court will *ex debito justitiae* set aside an order striking out a notice of appeal, see *Re Philpott Estate* (1998), 166 Nfld & P.E.I.R. 130 (N.S. CA).