ANATOMY OF AN ACTION:
GOING THROUGH THE MOTIONS

Every Action constitutes a series of steps, each of which may have strategic and/or tactical implications to the ultimate outcome of a case. Like chess, the failure to make a move or counter-move at the right time may result in disadvantage to your client, which could hamper or even thwart your chances of success at trial or settlement negotiations. On the other hand, an ill-conceived and/or unnecessary move may cause you to digress from the best possible outcome you are trying to achieve. These moves and counter-moves, motions and responding/cross-motions are the "tools" that every civil litigation lawyer must master, or at the very least, become familiar with.

This paper will focus on identifying the most common types of motions that counsel encounter in litigation. As it is impossible to list every conceivable type of motion in this paper, we will attempt to focus on the most common, effective and important motions that counsel should be aware of.

While every motion should be considered in the larger context of the Action within which it is brought, it is also important to recognize the key elements or essentials of the motion in question, such as proper timing, the test that must be met, as well as the proper Rule(s) in support of the motion. These elements are the pillars of every motion, which, in the hands of a great litigation strategist, crystallize and become the cornerstones of an Action.

I. EVOLUTION OF AN ACTION

Every motion must be brought in conformance with Rule 37 of the *Rules of the Civil Procedure*. Rule 39 governs the evidence on motions.

a) Initial Considerations

Every Action begins with the issuance of a Statement of Claim or a Notice of Action. The key consideration at this stage should be any applicable limitation periods, naming of proper parties, as well as sufficient and appropriate details of the allegations and damages alleged. If a timing issue exists, counsel may bring a motion for an extension or abridgment of time.[1] Counsel may also bring a motion for joinder of claims and parties in certain circumstances, such as where two or more persons are represented by the same solicitor of record,[2], or where necessary parties must be added to ensure the proper adjudication of the Action.[3] However, counsel may seek relief against joinder if it appears that the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing, or cause undue prejudice to a party.[4] The Ontario Court

[1] Rule 3.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
[2] Rule 5.02.
[3] Rule 5.03.
[4] Rule 5.05.

of Appeal has affirmed that it is a basic right of a litigant to have all issues resolved in a single trial. A split trial should be ordered only in the clearest of cases.[5]

Further, at any stage of the proceeding parties may bring a motion to add, delete or substitute a party, or correct the name of a party incorrectly named, subject to the usual prejudice analysis undertaken by a Court in such circumstances.[6] Parties may also bring a motion for consolidation or the hearing together of two or more proceedings.[7]

Parties Under Disability

Counsel must be aware of cases involving a party or parties under disability. Unless a Court orders, or a statute provides otherwise, a proceeding shall be commenced, continued or defended on behalf of a party under disability by a litigation guardian.[8] In some circumstances, a litigation guardian must be appointed by a Court, in which case a motion for same must be brought.[9] Further, the removal or substitution of a litigation guardian may also be sought in certain circumstances.[10] However, counsel must be mindful that any settlement involving a party under disability must be approved by the Court.[11] Similarly, a discontinuance or withdrawal of a proceeding involving a party under disability only with leave of a judge obtained on a motion under Rule 7.07.1.[12]

Unascertained Persons

In situations where the outcome of litigation may have an impact on unborn or unascertained persons, or persons that cannot be readily found or served, or deceased persons, a motion may be brought for appointment of a representative of such persons.[13]

Intervenor

A person who is not a party to a proceeding may bring a motion for leave to intervene as a party,[14] or as a friend of the Court.[15] Similarly, a party may move to obtain leave of the Court to intervene in Divisional Court or the Court of Appeal.[16] In one

[5] *Sempecos v. State Farm Fire & Casualty Co.* (2002), 29 C.P.C. (5th) 99 (Div. Crt.); affirmed [2003] O.J. No. 2886 (Ont. C.A.): In this case, the Court refused to sever a claim for punitive damages for bad faith by an insurer from the claim for breach of the insurance contract.
[6] Rule 5.04.
[7] Rule 6.01.
[8] Rule 7.01.
[9] Rule 7.02(1.1).
[10] Rule 7.06.
[11] Rule 7.08. In Small Claims Court, settlements involving parties under disability require that a motion be brought in Small Claims Court pursuant to section 4.07 of the *Small Claims Court Rules*.
[12] Rule 23.01(2).
[13] Rule 10.
[14] Rule 13.01.
[15] Rule 13.02.
[16] Rule 13.03.

instance, an insurer who had denied coverage to a Defendant was allowed to intervene and oppose a motion for judgment brought by the Plaintiff.[17]

Jurisdiction

If a jurisdictional dispute arises where the proper forum becomes a contested issue, a motion to the Court for transfer of the proceeding would likely be required.[18] In one case the Court held that financial hardship is a ground for ordering a change of trial venue since "fair trial" is to be read broadly.[19] In another case, the Court refused to change the place of trial from Sudbury to Toronto where the balance of convenience substantially favored Sudbury and there was no good reason a fair trial could not be conducted in Sudbury.[20]

Service – Statement of Claim

The next step is the service of the Statement of Claim. Defects in service or filing or other irregularities may give rise to procedural issues, which may be resolved by way of a motion to the Court, such as where leave to commence a proceeding is required.[21] Timing of service and filing may be extended.[22] Where a document does not reach the person served despite being served in accordance with the *Rules*, the person meant to be served may bring a motion to set aside the consequences of default, for an extension of time, or in support of a request for an adjournment.[23] Further, where a document has been served in a manner other than one authorized by the *Rules*, a Court may, on a motion, make an order validating the service in certain circumstances.[24]

Moreover, unless a proceeding falls within the boundaries of Rule 17.02, leave for service outside Ontario must be sought by way of a motion.[25] Where a party has been served outside Ontario, it may bring a motion to set aside the service.[26]

Removing Solicitor of Record

A solicitor may also move, on notice to his or her client, for an order removing him or her as solicitor of record.[27] However, where the party for whom the solicitor is acting is a party under disability, the notice of motion and order shall also be served on the litigation guardian.[28]

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[17] *Amondsen v. Hunter* (1995), 36 C.P.C. (3d) 55 (Ont. Gen. Div.).
[18] Rule 13.1.02.
[19] *Ridley v. Ridley* (1989), 37 C.P.C. (2d) 167 (Ont. H.C.).
[20] *Leveille v. Sudbury Regional Police Services Board* (2000), 12 C.P.C. (5th) 141 (Ont. S.C.J.).
[21] Rule 14.01(3).
[22] Rules 1.04(1), 1.05, 2.01, 3.02.
[23] Rule 16.07.
[24] Rule 16.08.
[25] Rule 17.03.
[26] Rule 17.06.
[27] Rule 15.04(1).
[28] Rule 15.04(3)

Service – Statement of Defence

Following service of the Statement of Claim is the delivery of a Notice of Intent to Defend and/or Statement of Defence, both of which must be done within the prescribed time periods. Failure to do so may result in being noted in default and subsequent default proceedings.[29] In such circumstances, a motion to set aside the noting in default[30] or default judgment[31] would need to be sought. Counsel should be advised, however, that the test for setting aside a noting in default is not the same as that for setting aside default judgment. In either case the Court has a broad discretion, which takes into account, the behavior of the parties, the length of the Defendant's delay, the reasons for the delay, and the complexity and value of the claim in involved.[32]

A Defendant who is not in default under the *Rules* or an order of the Court may move by motion to have an Action dismissed for delay under certain circumstances.[33] In one instance, where the Defendants shared the responsibility for delay in prosecuting the Action, the Ontario Court of Appeal set aside the order dismissing the Action for delay but ordered security for costs.[34] Further, counsel should be mindful that to bring a motion for dismissal for delay, they must not be in default under the *Rules*. In one instance, a Defendants' motion to dismiss for delay was denied where they had not served an Affidavit of Documents and were thus "in default" under the *Rules*.[35]

Counsel should also note that where the Plaintiff is under a disability, notice of a motion to dismiss for delay must be served on the litigation guardian of the Plaintiff and, in some circumstances, on the Children's Lawyer, unless the Public Guardian and Trustee is the litigation guardian of the Plaintiff, or unless a judge orders otherwise.[36]

Mandatory Mediation

Parties may be exempt from mandatory mediation in case management jurisdictions (City of Toronto and the Regional Municipality of Ottawa-Carleton) by motion.[37]

Crossclaims, Counterclaims, Third Party Claims

Any crossclaims, counterclaims and third party claims must be served and filed within the prescribed time periods,[38] failing which a motion must be brought to extend

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[29] Rule 19.05.
[30] Rule 19.03.
[31] Rule 19.08.
[32] *Metropolitan Toronto Condominium Corp. No. 706 v. Bardmore Developments Ltd.* (1991), 3 O.R. (3d) 278 (Ont. C.A.).
[33] Rule 24.01.
[34] *Danrus Construction Ltd. v. Underwood McLellan Ltd.* (1997), 17 C.P.C. (4th) 89 (Ont. C.A.).
[35] *Ship v. Longworth* (1988), 65 O.R. (2d) 124 (Ont. Div. Crt.)
[36] Rule 24.02
[37] Rule 24.1.05.

the time limits.[39] If counsel wishes to deliver a pleading subsequent to a reply, he or she must obtain the consent of the other party or parties, or bring a motion for leave of the Court for same.[40] Further, a party may demand particulars of allegations made in a pleading of an opposite party. If the opposite party fails to provide the requested particulars within 7 days, a motion can be made to the Court for the particulars to be delivered within a specified time.[41]

On motion, a Court may, in certain circumstances, strike out or expunge all or part of a pleading or other document.[42]

Jury Notice

Before the close of pleadings, the parties should turn their minds as to whether they would like a jury notice delivered. A motion can then be brought to strike the jury notice.[43] Grounds for striking a jury notice include non-compliance with a statute (i.e. can't have a jury in a trial where a municipality is a Defendant), complex trials,[44] or where a jury notice was delivered out of time.

Counsel should also keep in mind that re-opening pleadings at a later stage in the Action may open the door for another party to deliver a jury notice. In such circumstances, counsel that re-opened the pleadings may bring a motion to strike this jury notice. Further, although a motion to strike a jury notice prior to trial may be unsuccessful, a trial judge may, it his or her discretion, strike the jury notice at trial.

Amending Pleadings

A party may at any stage of an Action bring a motion for leave to amend a pleading and the Court shall grant same unless prejudice would result that could not be compensated for by any costs or an adjournment.[45]

Separation of Actions

A party may bring a motion for separate trials of the main Action and counterclaim where it appears that the counterclaim may unduly complicate or delay the trial of the main Action, or cause prejudice to a party.[46] Moreover, a Plaintiff may bring a motion for separate trials of the main Action and crossclaim where it appears that the

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[38] Rule 25.04.
[39] Rules 1.04(1), 1.05, 2.01, 3.02.
[40] Rule 25.01(5).
[41] Rule 25.10.
[42] Rule 25.11.
[43] Rule 47.02.
[44] For instance, in *Wheater v. Walters* (1992), 7 C.P.C. (3d) 197 (Ont. Gen. Div.), the Court struck out a jury notice where the Plaintiff had been involved in four separate motor vehicle accidents, each giving rise to an Action with all Actions to be tried together. This case was too complex for a jury.
[45] Rule 26.01.
[46] Rule 27.08(2).

crossclaim may prejudice the Plaintiff or cause unnecessary delay.[47] In addition, a Plaintiff may also bring a motion for separate trials of the main Action and the Third Party claim where it appears that the Third Party claim may prejudice the Plaintiff or cause unnecessary delay.[48]

Summary Judgment

A motion for summary judgment may be brought after the delivery of a Statement of Defence by either Defendant or Plaintiff.[49] However, leave must be sought if this motion is to be served along with the Statement of Claim.[50] Counsel should be advised that in a ruling on a motion for summary judgment, the Court will never assess credibility, weigh the evidence, or find the facts. Rather, the Court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial.[51]

Determination of Question of Law

Any party may bring a motion for a determination of a question of law at any time prior to trial where it may dispose of the whole or part of the Action, or where the determination of the question may substantially shorten the trial or result in a substantial saving of costs.[52]

b) The Discovery Stage

Documents

Affidavits of Documents must be exchanged within 10 days after close of pleadings.[53] On a motion, the Court may, at any time, order the production for inspection of documents that are not privileged and which are in the possession, control or power of a party.[54] The Court may also, on a motion, inspect a document over which privilege has been claimed for the purpose of determining the validity of the claim of privilege.[55]

In addition, where a document may become relevant only after the determination of an issue in the Action and disclosure or production for inspection of the document before the issue is determined would seriously prejudice a party, the Court may grant leave to withhold disclosure or production until after the issue has been determined.[56]

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[47] Rule 28.10.
[48] Rule 29.09..
[49] Rules 20.01(1),(3).
[50] Rule 20.01(2).
[51] *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (Ont. C.A.).
[52] Rule 21. Under Rule 22.03 (special case), parties can bring a motion for leave for a determination of a question of law by the Court of Appeal.
[53] Rule 30.03(1).
[54] Rule 30.04(5).
[55] Rule 30.04(6).
[56] Rule 30.04(8).

Further, where the Court is satisfied by evidence that a relevant document in a party's possession, control or power may have been omitted from the party's Affidavit of Documents, or that a claim of privilege may have been improperly made, the Court may order a cross-examination of a party on an Affidavit of Documents, or order a better and further Affidavit of Documents.[57] Counsel should note that a motion for a further and better Affidavit of Documents could be brought before Examination for Discovery. However, arguing that a document "ought to exist" is not a sufficient basis to order its production.[58]

Upon failure by a party to serve an Affidavit of Documents, an opposite party may bring a motion for an order to revoke or suspend the party's right, if any, to initiate or continue an Examination for Discovery, or to dismiss the Action, if the opposite party is the Plaintiff, or strike out the Statement of Defence, if the opposite party is a Defendant.[59]

A party may also bring a motion requesting that the Court order production for inspection of a document that is in the possession, control or power of a non-party to the Action.[60] Accordingly, a Court may also, on a motion, order that a relevant document be deposited for safe keeping with the registrar.[61]

The next step in an Action on the regular track (non-simplified procedure) is to serve a Notice of Examination for Discovery on parties adverse in interest. There are numerous motions that may flow from Examinations for Discovery, including, but not limited to, forms of examination (written and/or oral),[62] parties to be examined,[63] scope of the examination,[64] failure to answer questions,[65] information subsequently obtained,[66] compelling re-attendance[67] and/or other sanctions,[68] Discovery of non-parties with leave,[69] as well as the usual refusals and undertakings motions[70].

A party may bring a motion for an order for the inspection of real or personal property where it appears to be necessary for the proper determination of an issue in the proceedings.[71]

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[57] Rule 30.06.
[58] *Bow Helicopters v. Textron Can. Ltd.* (1981), 23 C.P.C. 212 (Ont. Master).
[59] Rule 30.08(2).
[60] Rule 30.10(1).
[61] Rule 30.11.
[62] Rule 31.02(1).
[63] Rule 31.03.
[64] Rule 31.06.
[65] Rule 31.07.
[66] Rule 31.09.
[67] Rule 34.15(1)(a).
[68] Rules 31.07 and 34.15.
[69] Rule 31.10(1); see test for granting leave: Rule 31.10(2).
[70] Rule 34.10.
[71] Rule 32.01.

A motion for a mental or physical examination of an adverse party can also be brought, but the Court may determine the scope of such an examination.[72] Failure to comply may result in sanctions.[73] Further, a report obtained under this rule must be served forthwith on every other party.[74] In addition, the party to be examined must, unless ordered otherwise, provide to the opposite party (at least seven days before the examination) a copy of any report made by a health practitioner who has treated or examined the party to be examined, unless the report was made in contemplation of litigation and the party to be examined undertakes not to call the author of the report at trial.[75] Failure to comply may result in the proceeding being dismissed or defence being struck.[76]

Oral Discovery

Counsel may bring a motion to challenge the time, place or person being discovered,[77] but the moving party on such a motion may face costs against it on substantial indemnity basis if it loses the motion, unless it can show it was reasonable to bring the motion in the first place.[78]

In addition, an examination shall take place in the county where the person being examined resides, unless counsel brings a motion and is successful in having the Court order that examination take place elsewhere.[79] In one case, the Plaintiff maintained an apartment in one county for business needs, but was ordered to re-attend for Discovery in the county where his family resided and where he was frequently present.[80]

A motion can also be brought for various relief in circumstances where the party to be examined does not reside in Ontario.[81]

Further, a party may bring a motion for the Court's determination on the propriety of a question that is objected to and not answered.[82]

In cases of improper conduct at an examination, the examination may be adjourned so that the parties may seek directions from the Court,[83] and the Court may order sanctions for improper conduct or improper adjournment of the examination.[84] In addition, the Court may also order sanctions for default or misconduct by the person to be

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[72] Rule 33.03.
[73] Rule 33.07.
[74] Rule 33.06(2). Note: expert opinions obtained by parties may not be disclosed under certain circumstances: Rule 31.06(3).
[75] Rule 33.04(2)(a).
[76] Rule 33.07.
[77] Rule 34.02(2).
[78] Rule 34.02(3).
[79] Rule 34.03.
[80] *Davis v. Howse* (1982), 27 C.P.C. 319 (Ont. H.C.).
[81] Rule 34.07(1).
[82] Rule 34.12(3).
[83] Rule 34.14(1).
[84] Rule 34.14(2).

examined.[85] Parties may also bring a motion to the Court for an order that the examination be videotaped, or recorded by other means.[86] In one instance, the Court held that an order for videotaping an Examination for Discovery should be granted only in rare cases and was refused where the Plaintiff complained that Defendant's counsel was conducting himself improperly though making unnecessary objections.[87]

Written Discovery

Where a party being examined refuses or fails to answer a proper question, or where the answer to a question is insufficient, a motion may be brought for an order compelling the person being examined to answer or give a further answer to the question, or to answer any other question either by affidavit or on oral examination.[88] The Court may also order further sanctions in such circumsntaces.[89] In cases of an imporper examination, such as improper questions or bad faith, a party being examined may move for an order terminating or limiting the scope of the written examination.[90]

Taking Evidence Before Trial

A party who intends to introduce the evidence of a person at trial, such as an expert, may bring a motion to examine that person before trial for the purpose of having that person's testimony available to be tendered as evidence at the trial.[91] However, where counsel undertakes to produce his or her client at trial, a Court may refuse to permit an examination of the client before trial under this rule.[92] In one instance, the Court ordered the examination before trial of a Defendant who was in poor health. However, use of the evidence at trial was in the discretion of the trial judge.[93]

c) Preservation of Rights in Pending Litigation

Interlocutory Injunction & Mandatory Order

A party to a pending or intended proceeding may bring a motion for an interlocutory injunction or mandatory order under Sections 101 or 102 of the *Courts of Justice Act*.[94] Posing security in such circumstances may be required (see case law under this rule). Factums are required on such a motion.[95]

Appointment of a Receiver

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[85] Rule 34.15(1).
[86] Rule 34.19(1).
[87] *Kay v. Posluns* (1989), 71 O.R. (2d) 238 (Ont. H.C.).
[88] Rules 35.04(2), (3).
[89] Rule 35.04(4).
[90] Rule 35.05.
[91] Rules 36.01(1), (3).
[92] *Aviaco International Leasing Inc. v. Boeing Canada Inc.* (2000), 48 C.P.C. (4th) 44 (Ont. S.C.J.).
[93] *Ostrom v. McKinnon* (1999), 46 C.P.C. (4th) 120 (Ont. S.C.J.).
[94] Rule 40.01.
[95] Rule 40.04(1).

A party to a pending or intended proceeding may also bring a motion under Section 101 of the *Courts of Justice Act* for the appointment of a receiver,[96] and directions regarding same can be obtained from the Court.[97]

Certificate of Pending Litigation

A party may bring a motion for a certificate of pending litigation (Form 42A) pursuant to Section 103 of the *Courts of Justice Act*, which may be issued by a registrar under an Order of the Court.[98] It is important to note that a discharge of such a certificate may only be obtained by motion to the Court[99] and a factum is required in such circumstances.[100]

Interpleader

Pursuant to Rule 43, a stakeholder claiming no beneficial interest in a property, or a creditor or claimant who is involved in a dispute of ownership of property, which was seized by a sheriff, may bring a motion for an interpleader order[101], seeking a variety of relief from the Court.[102]

Interim Recovery of Personal Property

A motion can also be brought for recovery of possession of personal property pursuant to Section 104 of the *Courts of Justice Act*.[103] However, in such circumstances, the Court may order the party bringing the motion, if successful, to pose security for the property sought to be recovered.[104]

Interim Preservation of Personal Property

In addition, a motion can be brought for the interim preservation of property.[105] The Court's power in this regard extends not only to the property in question in the proceeding, but also to any property that is relevant to an issue in the proceeding.

In one case, where an Order had been made to preserve evidence and such evidence examined by the Defendant's expert went missing, the Court ordered that the Defendant could not rely on the expert reports regarding the missing evidence.[106]

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[96] Rule 41.02.
[97] Rule 41.05.
[98] Rule 42.01(1).
[99] Rule 42.02(1).
[100] Rule 42.02(2).
[101] Rule 43.03.
[102] Rules 43.04(1), (2).
[103] Rule 44.01(1).
[104] Rules 44.03(1), (2).
[105] Rule 45.01(1).
[106] *Cheung (Litigation Guardian of) v. Toyota Canada Inc.*, [2003] O.J. No. 411 (Ont. S.C.J.).

d) Setting the Action Down for Trial

Counsel should note that the consequences of setting a matter down for trial means that the parties shall not initiate or continue any motion without leave of the Court.[107] This does not, however, relieve a party from complying with obligations under the *Rules*, such as providing answers to undertakings, disclosure of documents or errors subsequently discovered, abandonment of a claim for privilege, disclosure of information subsequently obtained, service of a report of an expert witness, and the duty to respond to requests to admit.[108]

Place of Trial

The place of trial may be the subject of a motion, although usually it would be held where the proceeding was commenced or where it had been transferred to.[109] The case law in this regard indicates that the test in such circumstances is "balance of convenience".

Jury Notice

Section 108(2) of the *Courts of Justice Act* lists circumstances where a jury trial is not appropriate.[110] Where a jury notice is delivered, a motion can be brought before a Court to strike it.[111] Cases where a jury notice has been struck out include, but are not limited to, non-compliance with statute,[112] inappropriateness of a jury trial,[113] where jury notice had not been delivered within the prescribed time,[114] as well as where the case is too complex for a jury.[115] However, counsel should note that juries now routinely hear professional malpractice claims, such as medical malpractice, which have traditionally been tried by judges only.[116]

Admissions

Counsel should note that an admission may be withdrawn on consent, or with leave of the Court.[117] In addition, where an admission is made regarding a particular fact or authenticity of a document, any party to the proceeding may bring a motion (i.e. summary judgment motion) to a judge for such Order as the party may be entitled to on

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[107] Rule 48.04(1).
[108] Rule 48.04(2).
[109] Rule 46.01.
[110] Rule 47.01.
[111] Rule 47.02.
[112] Rule 47.02(1)(a).
[113] Rule 47.02(2).
[114] Rules 47.01 and 47.02(1)(b).
[115] *Wheater v. Walters* (1992), 7 C.P.C. (3d) 197 (Ont. Gen. Div.).
[116] For example: *Etienne v. McKellar General Hospital*, [1998] O.J. No. 624 (Ont. C.A.).
[117] Rule 51.05.

the admission without waiting for the determination of any other questions between the parties.[118]

Trial List

Where an Action is struck off the trial list, counsel may seek leave to have the Action placed back on the trial list.[119] Further, where an Action has been dismissed by the registrar, counsel may bring a motion to set aside the registrar's dismissal. [120]

However, in cases involving a Plaintiff under disability, defence counsel should be advised that the Action may be dismissed only if notice is given to the Children's Lawyer, or if the Public Guardian and Trustee is a litigation guardian of the Plaintiff, to the Public Guardian and Trustee, subject to another Order made by a judge.[121]

Trial Procedure

While counsel may bring a motion for the adjournment or postponement of a trial,[122] there are a plethora of motions that could be brought during trial. Some of the more common motions are for an order excluding witnesses,[123] evidentiary motions relating to admissibility,[124] as well as compelling attendance at trial.[125] Further, counsel should note that they could also bring a motion for the Court to appoint an independent expert to inquire into and report on any question of fact or opinion relevant to an issue in the Action.[126]

Security for Costs

Counsel for the Defendant or Respondent in a proceeding may bring a motion for security for costs in certain circumstances,[127] but only after a Statement of Defence has been delivered.[128] If security for costs is ordered and the Plaintiff or Applicant fails to comply with the Order, the Defendant or Respondent can bring a motion to dismiss the proceeding, and any stay imposed by Rule 56.05 no longer applies unless another Defendant or Respondent has obtained an Order for security for costs.[129]

In one instance, the Court refused to order security for costs where delay in bringing the motion for security was unexplained and lulled the Plaintiff into a false sense

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[118] Rule 51.06.
[119] Rule 48.11.
[120] Rules 48.14(11) and 37.14.
[121] Rule 48.14(9).
[122] Rule 52.02.
[123] Rule 52.06.
[124] Rule 53.08 as well as the *Evidence Act*, R.S.O. 1990, c. E.23 and the *Canada Evidence Act*, R.S. 1985, c. C-5.
[125] Rule 53.04.
[126] Rule 52.03(1).
[127] Rule 56.01(1).
[128] Rule 56.03(1).
[129] Rule 56.06.

of security. The Court further held that, generally, the appropriate time for such a motion is after discovery of the Plaintiff.[130]

e) Settlement Offers

Any settlement involving a party under disability must be approved by a judge.[131] Failure to comply with an accepted offer entitles the wronged party to bring a motion for judgment according to the terms of the accepted offer.[132]

f) Orders

A party may bring a motion to amend, set aside or vary an Order.[133] Counsel should note that in circumstances where an Order has not yet been issued, it is possible to re-open the hearing for the purpose of allowing new evidence, but the courts have ruled that this is subject to the Court's discretion and should only be exercised in the clearest of cases and only to prevent a miscarriage of justice.[134] Further, a registrar may, on consent, allow alterations, which he or she believes would be sanctioned by the Court if mentioned to the Court, and such alterations are binding on the parties.[135]

Motions relating to enforcement of Orders are governed by Rule 60. In particular, a party may bring a motion to obtain a contempt Order (from a Judge) against another party's failure to comply with a previous Court Order requiring him or her to perform a certain act, or abstain from performing an act.[136] However, a contempt Order cannot be sought to enforce an Order for the payment of money.[137] A contempt Order can also be sought against non-parties who knowingly fail to obey an Order of the Court.[138]

In addition, where a question arises in relation to the measures to be taken by a sheriff in carrying out an Order, write of execution or notice of garnishment, the sheriff or any interested person may bring a motion for directions.[139]

g) Appeals

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[130] *423322 Ontario Ltd. v. Bank of Montreal* (1988), 65 O.R. (2d) 136 (Master); affirmed 66 O.R. (2d) 123 (Ont. H.C.).
[131] Rules 7.08 and 49.08.
[132] Rule 49.09(a).
[133] Rule 59.06.
[134] *Matzelle Estate v. Father Bernard Price Society of the Precious Blood* (1996), 7 C.P.C. (4th) 142 (Ont. Gen. Div.).
[135] *Re Permanent Invt. Corp. Ltd. and Township of Ops and Graham*, [1976] 2 O.R. 13, 62 D.L.R. (2d) 258 (Ont. C.A.).
[136] 0.11.
[137] Rule 60.11(1) and *Forrest v. Lacroix Estate* (2000), 48 O.R. (3d) 619 (Ont. C.A.)
[138] *Can. Metal Co. v. C.B.C. (No. 2)* (1975), 4 O.R. (2d) 585 (Ont. H.C.); affirmed 11 O.R. (2d) 167 (Ont. C.A.).
[139] Rule 60.17.

Rule 61 governs appeals. Counsel should be advised of the practice direction concerning civil appeals in the Court of Appeal, specifically with respect to motions to the Court of Appeal in civil matters.[140]

Counsel should be mindful of the requirements for motions seeking leave to appeal, such as timing and contents of the motion record, as well as factum.[141] In addition, counsel should be aware that the granting of leave from the Division Court to one party does not entitle the opposite party to cross-appeal without leave.[142] Moreover, leave to appeal from the Divisional Court to the Court of Appeal will usually be granted only if: (1) there is an arguable issue involving the interpretation of a statue of regulation of Canada or Ontario including its constitutionality; (2) the interpretation, clarification or propounding of some general rule or principle of law; (3) the interpretation of a municipal by-law where the point in issue is a question of public importance; or (4) the interpretation of an agreement where the point in issue involves a question of public importance.[143]

A motion for leave to appeal to the Court of Appeal shall be heard in writing.[144] Counsel should note that a party may appeal only from an Order, not from the related reasons for the decision.[145] Furthermore, the time for appeal usually runs from the date of pronouncement of a judgment, but where a substantial matter remains to be determined on the settlement of the judgment, the time runs from the date of entry.[146]

A Respondent may move by motion for dismissal for delay under certain circumstances.[147]

Motions in an appellate Court are generally governed by Rule 37, but specifically by Rule 61.16. This rule prescribes the type of motions that can be heard by one judge[148] or a panel of judges[149]. In addition, motions for leave to appeal an interlocutory order are governed by Rule 62.02.

h) Mandatory Mediation

Parties may bring a motion for directions for the conduct of a mandatory mediation under subrule 75.1.02(1).[150] Failure to attend may result in a motion for further directions from the Court, and could result in sanctions against the party that failed to

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[140] Pages 1193 – 1195 in the Watson and McGowan Ontario Civil Practice.
[141] Rule 61.03.
[142] *Nicholson v. Haldimand-Norfolk Regional Bd. Of Commissioners of Police* (1980), 31 O.R. (2d) 195, 117 D.L.R. (3d) 604 (C.A.); leave to appeal to Supreme Court of Canada refused [1981] 1 S.C.R. 92.
[143] *Sault Dock Co. v. Sault Ste. Marie,* [1973] 2 O.R. 479 (Ont. C.A.).
[144] Rule 61.03.1(1).
[145] *Canadian Express Ltd. v. Blair* (1991), 6 O.R. (3d) 212 (Div. Ct.).
[146] *Re Permanent Invt. Corp. Ltd. and Township of Ops and Graham,* [1967] 2 O.R. 13 (Ont. C.A.).
[147] Rule 61.13(1).
[148] Rule 61.16.1(2.1).
[149] Rule 61.16.1(2.2).
[150] Rule 75.1.05.

attend.[151] Further, if a party to a signed agreement fails to comply with its terms, any other party to the agreement may bring a motion to a judge for judgment in accordance with the terms of the agreement, or continue the proceeding as if there had been no agreement.[152]

i) Simplified Procedure

Motions for simplified rules Actions are governed by Rule 76.05. Counsel should note that cross-examination on affidavits filed in support of such motions are not allowed.[153] However, this rule does not prevent cross-examination on an affidavit filed regarding enforcement procedures under Rule 60.[154]

Further, the test for summary judgment motions for Actions under simplified rules is less onerous than for summary judgment under Rule 20.04.[155]

j) Case Management

Motions in case-managed Actions are governed by Rule 77.12. Such motions can only be made to a case management judge or case management master.[156] The registrar can make an order granting certain relief sought on motions.[157]

Counsel should be advised that case management master (or any master for that matter) do not have the jurisdiction to discontinue an Action by or against a party under disability. Only a judge can make such an order.[158]

II. MOTIONS YOU SHOULD BRING AND WHEN

While motions can be brought any time pursuant to the Rules, counsel should be reminded of Rule 6.03 of the Rules of Professional conduct, which states:

> 6.03 (1) A lawyer shall be Courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.
>
> 6.03 (2) A lawyer shall agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of the client.

[151] Rule 75.1.10.
[152] Rule 75.1.12(6).
[153] Rule 76.04(3).
[154] *Canadian Imperial Bank of Commerce v. Glackin* (1999), 36 C.P.C. (4th) 255 (Ont. Gen. Div.).
[155] *NewCourt Credit Group Inc. v. Hummel Pharmacy Ltd.* (1998), 38 O.R. (3d) 82 (Ont. Div. Crt.).
[156] Rule 77.12(1).
[157] Rule 77.12(5).
[158] Rule 7.07.1.

6.03 (3) A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client's rights.

6.03 (6) A lawyer shall answer with reasonable promptness all professional letters and communications from other lawyers that require an answer, and a lawyer shall be punctual in fulfilling all commitments.

6.03 (8) A lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given.

Accordingly, while many motions can be brought, counsel must weigh whether they should in fact be brought, especially in circumstances where it is clear that there is no strategic, tactical or other reason for bringing them. Failure to heed this warning may result in an award of costs being awarded against a party, or even against a solicitor personally, even without a finding of bad faith.[159]

The following chart may be used as a convenient quick reference source for key and common motions (Rules 1.04 and 37 should always be cited):

Type of Motion	**Rule(s) to be relied upon**	**Timing: When should the motion be brought?**	**Test or General Rule**	**Key Cases**
Undertakings and refusals	34.10 34.15 Form 37C	After several requests have been made to opposite party's counsel, and/or no sooner than 2-3 months have elapsed since discoveries.	"Semblance of relevance" is the key test for refusals. However, Court has discretion to decide if question is proper as well. There is no test for undertakings. If they were provided, then best efforts should be used to answer them.	*Republic National Bank of New York (Canada) v. Normart Management Ltd.* (1996), 31 O.R. (3d) 14 (Gen. Div.) – Court must determine if question is relevant and proper

[159] *Belanger v. McGrade Estate* (2003), 65 O.R. (3d) 829 (Ont. S.C.J.).

Production from non-parties	30.10	After at least 3 letters have been sent to the non-party requesting documentation.	Balance of convenience between the necessity of the materials and the non-party's exposure to inconvenience, expense of liability.	*Lowe v. Motolanez* (1996), 30 O.R. (3d) 408 (Ont. C.A.) – balance of convenience
Dismissal for delay	24.01	At least 2-3 years of no activity on the file.	Unexplained passage of years coupled with real evidence of prejudice resulting from the delay.	*Danrus Construction Ltd. v. Underwood McLellan Ltd.* (1997), 17 C.P.C. (4th) 89 (Ont. C.A.) – order dismissing for delay set aside but security for costs ordered *Sussmann v. Ottawa Sun (The)* (1997), 22 O.T.C. 75 (Ont. Gen. Div.) – unexplained passage in years coupled with evidence of real prejudice is necessary for dismissal for delay
Determination of a question of law	21.01	Promptly (failure to move promptly may be taken into account by the Court in awarding costs)	Sufficient evidence must be provided for the Court to make a determination on a question of law. Look to case law under this Rule for	*MacDonald v. Ontario Hydro* (1994), 19 O.R. (3d) 529 (Ont. Div. Crt.) – "plain and obvious test" for Rules 21.04(1)(a) and (b) *Young v. McCreary* (2001), 53 O.R. (3d) 257

			instances when the Court has declined to determine a question of law. The test under Rules 21.01(1)(a) and (b) is "plain and obvious".	(Ont. C.A.) – complete factual basis required *Charlton v. Beamish* (2004), 73 O.R. (3d) 119 (Ont. C.J.) – determination re: limitation periods
Removal of solicitor from record (removing him/herself or being removed)	15.04	Anytime but be mindful of Rule 2 of the *Rules of Professional Conduct* (relationship to clients)	Depending on the circumstances – could be conflict situation, non-payment of fees, deterioration of solicitor-client relationship	*Calanese Canada Inc. v. Murray Demolition Group* (2004), 73 O.R. (3d) 64 (Ontario C.A.) –coming into possession of opposite party's privileged documents *Marinageli v. Marinageli* (2004), 4 C.P.C. (6th) 136 (Ont. C.A.) – same firm acting at one time for one party, later for the other *First Property Holdings Inc. v. Beatty* (2003), 37 C.P.C. (5th) 181 (Supreme Court of Canada) – firm removed where it had previously acted for opposite party on a mechanical task
Summary judgment	20.01	Any party can bring it after service of a defence, or the Plaintiff can	Test is whether there is a "genuine issue for trial" or a "real chance of	*Guarantee Co. of North America v. Gordon Capital Corp.* (1999), 178 D.L.R. (4th) 1

		serve it together with the Statement of Claim with leave	success" by the moving party	(Supreme Court of Canada) – "real chance of success" test *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 26 C.P.C. (4th) 1 (Ont. C.A.) – "genuine issue for trial" test
Transfer Action to another avenue	13.1.02	Any time before trial but the sooner the better	Test factors are enumerated under subrule 13.1.02(2) General rule is "balance of convenience"	*Freeman v. Gabriel* (1981), 33 O.R. (2d) 846 (H.C.) – improper to name place of trial which has no connection with parties or cause of Action
Further better Affidavit of Documents	30.06(b)	Any time before trial but the sooner the better	This is case specific but usually where the Court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's Affidavit of Documents	*Bow Helicopters v. Textron Can. Ltd.* (1981), 23 C.P.C. 212 (Ont. Master) – such motion can be brought *before* an Examination for Discovery *Business Depot Ltd. v. Genesis Media Inc.* (2000), 48 O.R. (3d) 402 (Ont. S.C.J.) – Court required a party asserting a weak claim to pay most of opposite party's costs of preparing further and better affidavit documents, which would require over 1,000 hours of work

Striking out a jury notice	47.02	Anytime but maybe premature if brought prior to Examination for Discovery	This is case specific but usually a jury notice will be struck because a statute requires a trial without a jury (i.e. Action against municipality), or the notice was delivered out of time, or where a jury trial in appropriate (i.e. complex proceeding)	*Abou-Marie (Litigation Guardian of) v. Baskey* (2001), 56 O.R. (3d) 360 (Ont. S.C.J.) – jury notice struck where claim was against municipality *Calvin Forest Products Ltd. v. Tembec Inc.* (2004), 5 C.P.C. (6th) 89 (Ont. S.C.J.) – jury notice struck were claim was for equitable relief *Wheater v. Walters* (1992), 7 C.P.C. (3d) 197 (Ont. Gen. Div.) – jury notice struck where case was too complex – four separate MVAs
Amending pleadings	26.01	Any stage of the proceeding, unless prejudice would result that could not be compensated for by costs or an adjournment	As long as there is no prejudice which could not be compensated for by costs or an adjournment, the Court shall grant leave to amend a pleading	
Consolidation of hearings	6.01	As promptly as possible	Hearings should be consolidated if they have a question of law or fact in common, or if relief claimed	*Bain v. Schudel* (1988), 67 O.R. (2d) 221 (Ont. H.C.) – two separate accidents tried together so that damages be

			them arises out of the same transAction or occurrence or series of transActions or occurrences	assessed globally *Flitney v. Howard* [1958] O.R. 701 (Ont. C.A.) – motion for consolidation should be made as soon as possible *Rauscher v. Roltford Developments Ltd.* (1989), 69 O.R. (2d) 749 (Ont. H.C.) – Court can order motions to be heard together – "proceedings" under Rule 6.01 includes motions
Compelling re-attendance at Discovery	34.15(1)(a)	As soon as after an Examination for Discovery	Where party fails to attend at a time and place fixed for examination in the notice of examination or summons to witness, refuses to take an oath or make an affirmation, refuses to answer proper questions, refused to produce a document or thing that he or she is required to produce – under such circumstances, re-attendance can be ordered	*Skelton v. Police* (2000), 13 C.P.C. (5th) 151 (Ont. Master) – party refused to attend an examination because of pending criminal charge – Court ordered him to attend *S.E. Lyons & Son Ltd. v. Nawoc Holdings Ltd.* (1978), 20 O.R. (2d) 234 (Ont. H.C.) – party can insist that an undertaking be fulfilled by re-attendance rather than correspondence