

NEW BRUNSWICK RULE 79 ~ SIMPLIFIED PROCEDURE

A BRIEF OVERVIEW

SEPTEMBER 22, 2006

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A. BACKGROUND – THE NEED TO REDUCE COST AND DELAY

At the recent annual meeting of the Canadian Bar Association Chief Justice McLachlin of the Supreme Court of Canada was quoted by the Canadian Press as follows:

Legal fees are so high that up to 40 per cent of litigants are now representing themselves at trial, armed with a weak or non-existent grasp of the law.

At the same meeting, the Minister of Justice for Canada, Vic Toews, is reported to have said:

--- that access to the justice system is becoming too costly for many Canadians, particularly in civil cases.

“Whereas the numbers of civil trials are dropping rapidly, the overall length, complexity and cost of such trials is growing exponentially so that only the very rich have genuine access”.

This problem is not new, however. In the 1990's the Canadian Bar Association, in response to the same concerns, commissioned a Task Force on Systems of Civil Justice. Some of that group's recommendations are:

14. Every jurisdiction establish expedited and simplified proceedings that are
 - (a) mandatory, save as the court may otherwise direct, for all cases where \$50,000 or less is at issue; and
 - (b) available at the option of the parties and with leave of the court in other cases where more than \$50,000 is at issue and where the subject-matter of the case warrants.
15. The CBA works with selected jurisdictions to establish pilot projects using 'will-say' procedures, so as to determine whether it is useful and fair to require will-say documents in civil cases to compel early disclosure of

anticipated evidence, and to assess the impact of such a requirement on delay, costs and discovery.

17. Every jurisdiction amend its rules of procedure concerning experts to
 - (a) require early disclosure of expert reports,
 - (b) provide for the exchange of expert critique reports in a timely fashion before trial or hearing, and
 - (c) impose a continuing obligation to disclose expert reports as they become available.

20. Every jurisdiction provide for, and promote the use of, summary trial procedures.

These conclusions led to, among others, Manitoba's "Expedited Actions" rule (Rule 20A) and Ontario's Simplified Procedure Rule (Rule 76). Saskatchewan then developed their Part Forty described thusly:

This Part is new in 1998. It is modeled after Rule 76 of the Ontario Rules of Civil Procedure. These rules attempt to reduce the cost of litigating claims for amounts less than \$50,000 by reducing the amount of procedure available: e.g. no examinations for discovery or cross-examination on affidavits (see rule 484), no pre-trial conference (see rules 191(1) and 485(1)), the use of summary trial (see rule 485 and see Practice Directive No. 8: Simplified Procedure re summary trial procedure) and a broader test for summary judgment (see rule 488).

How did we get to this point? Many of us – or at least some of us – will remember doing civil actions in the New Brunswick County Court prior to its demise in 1979. That court's civil jurisdiction was \$5000.00. Discoveries, if they were held at all, were perfunctory affairs that lasted a few hours. Trials, sometimes conducted in the Judges' chambers (at least in Saint John), seldom lasted a day.

Even in the New Brunswick Supreme Court, litigation was a more modest endeavour than now. One of the reasons, of course, was the Rules of Court

we used. They were a direct descendant of the 1909 English Rules of Court and pre-trial procedures were fairly strictly proscribed. It was not uncommon to do several examinations for discovery a day in personal injury cases. Of course, affidavits of documents while available, were not compulsory and were seldom used except in commercial litigation.

In the late 1970s (and I say this anecdotally) there developed a generally-accepted position, throughout much of the common law world, that complete pre-trial disclosure on all fronts would reduce the number of trials and thereby reduce the cost of litigation. Do away with “trial by ambush” was the buzz phrase of the day. As a result, new Rules of Court were created in several Canadian provinces. Ours came in force in 1982. They were a substantial departure from the Old Order. The new pre-trial motto was, “Leave no stone unturned”. Oral discoveries now sometimes take on lives of their own. In personal injury actions the patient’s complete medical history is often sought. There are more interlocutory procedures, such as motions, than there were previously. All take time and money. Much of the material unearthed by all the “turned stones” is completely useless to the trial judge – and often the Court never knows about much of it. There were and are other societal factors at play leading to the added complexity, but the new rules have created a forum for total disclosure which has often led to unnecessary expense and delay.

That has, then, brought us full circle. An Ontario ruling about the rationale for a simplified procedure rule is worth repeating. In *Roche v. Pijawka* (1997), 33 O. R. (3d) 700 the Court said:

Actions under the simplified rules are intended to be very short, inexpensive, summary trial proceedings, in which the trial, the material that may be relied on, and the evidence that may be tendered are circumscribed and confined by the rules. The entire procedure is intended to give fast and inexpensive access to the courts.

B. RULE 79 – AN OVERVIEW OF KEY FEATURES

a. Procedural Summary & Analysis

In order to alert the Clerks' offices that an action is proceeding by way of simplified procedure the Statement of Claim must say so (see: Rule 79.05(5)). This type of action is mandatory for three specified types of actions having values less than \$50,000.00. It is optional in other actions – usually by consent – provided it is not a Family Division matter, a class action or started under an Act other than the *Judicature Act*. The *Mechanics Lien Act* comes to mind. If the plaintiff should have started the action under Rule 79 (as determined by the value and type of claim at judgment) and at the commencement of trial it was proceeding as an ordinary action – there may be serious cost consequences.

If the action is one of those referred to in Rule 79.05(1)(a) and (b) and the defendant does not have a counterclaim or cross-claim the action must proceed under Rule 79. If, however, the defendant objects via the Statement of Defence on the basis the claim or part of it falls outside the above mandatory sections, the action will continue as an ordinary action unless the plaintiff abandons those portions of the claim that do not conform. In this case the plaintiff must file a Notice to that effect. See: Form 79A. If the Plaintiff does discard the non-compliant portions of the claim the action continues under Rule 79. Those abandoned elements cannot be the subject of a subsequent action – much the same as in a Small Claims action when a portion of the claim is abandoned to bring it down to \$6000.00.

If the action is a “mandatory” action and, nevertheless, the plaintiff commences the trial using the ordinary procedure he/she will not receive any costs even though successful. This is so even though the plaintiff may have made an offer to settle under Rule 49 (offer to settle less than the judgment under \$50,000.00). As well, under Rule 79.12(6) the plaintiff may have to, “pay all or part of the defendant’s costs”. The equivalent Ontario rule (Rule 76) says, “all or part of the defendant’s costs, *including substantial indemnity costs*”.

One of the matters that has engendered litigation is whether a matter should proceed as a simplified action when the defendant has a substantial counterclaim or crossclaim. In *Heard v. Saskatoon Prairieland Park Corp.* [2004] S.J. No. 93 Allbright J. by motion dealt with this problem. The Saskatchewan rule is the same as New Brunswick's and the equivalent of our Rules 79.05(1)(a)(i) and 79.05(6)(b) were in issue. The plaintiff, by motion, sought to have the action proceed as a simplified action because her claim for debt was \$30,000.00. Allbright J. wrote:

¶5 The defendants, more particularly, Saskatoon Prairieland Park Corporation, take the position that in light of the crossclaim brought by that defendant, that the process is not available to the plaintiff to have the matter transferred from the general procedure into the simplified procedure as set forth in Part 40 of the Rules of Practice and Procedure.

¶6 On the occasion of the hearing of the motions, counsel for the plaintiff indicated that the plaintiff was seeking approximately \$30,000 in general and special damages from the defendants.

¶9 In this instance the monetary amount being sought by the plaintiff falls within the parameters set forth in Rule 478(1). The amount of \$30,000 is substantially less than the amount of \$50,000 referenced in Rule 478(1)(a). No disqualifying criterion exists in this matter such as those designated in Rule 477. Therefore the question to be determined is the effect of the limited relief referenced in the crossclaim.

¶10 I am of the view that this relief, while important to defendants, is an incidental matter as it relates to the plaintiff's claim against the defendants. It is a matter which in my opinion can be adequately and completely dealt with under the umbrella of the simplified procedure. There is nothing inherently unique to this specific item of relief which would be inconsistent with the framework contained in Part 40. The primary issue to be considered by the plaintiff and the defendants is the issue of liability as sought by the plaintiff and in the event that liability is established, the determination of an appropriate award of damages. If the plaintiff is unsuccessful, no damages would be awarded. If the plaintiff is on the other hand

successful, counsel have indicated that the quantum of damages sought is in the range of \$30,000.

¶11 Accordingly, I am of the view that all of the matters in issue between the parties may be dealt with under the provisions of Part 40 of the Rules of Practice and Procedure as those rules relate to simplified procedure. Accordingly, pursuant to Rule 481(1), the plaintiff is given leave to amend her statement of claim to continue the action under Part 40, and all further steps will be taken under Part 40. Examinations for discovery have been completed in this matter and the parties are entitled to use these discoveries appropriately in conjunction with the Part 40 procedure. Any parties may read into evidence any relevant portions of these examinations for discovery as part of the trial.

I cite this case to show how a court in this province might deal with a similar issue. If the principal problem in the litigation is a dispute under \$50,000.00 even if there is a counterclaim/crossclaim for more than that it is entirely possible a motions judge would come to the same conclusion as Allbright J. in *Heard*.

b. Cost Consequences for Failure to Proceed Under Rule 79

I should say I am indebted to Paul M. Perell for the articles he wrote in Volume 25, Number 3, page 378 and Volume 27, Number 3, page 328 of *The Advocates' Quarterly* (Canada Law Book Inc.) titled, "Ontario Rule 76 – The Simplified Procedure: Questions and Answers" and "Rule 76 and Its Cost Consequences".

One should have careful regard to Rule 79.05(1), (6) and (8). These sections about commencing and moving in and out of a simplified procedure action are critical to whether a party will be exposed to cost consequences under Rule 79.12. In the above mentioned article in Vol. 25 (2002) of the *Advocates Quarterly* Paul Perell wrote at page 387:

- Q. What are the policy reasons for these cost consequences:
- A. The heavy costs consequences are necessary because, absent some penalty, parties might simply ignore the rule

about controlling the costs and delays of litigation to the detriment of everyone concerned. Practically speaking, absent some penalty for not proceeding under the rule in appropriate cases, it would be impossible for lawyers to resist taking instructions to use all of the procedures available under the Rules of Civil Procedure.

The cost consequences of Rule 79.11 can apply to an ordinary lawsuit if that action ought to have been started under Rule 79 (judgment less than \$50,000.00). Thus, if there has been extensive discovery and other pre-trial procedures but a judgment of less than \$50,000 is the result there **may** be no costs awarded to the plaintiff. (See: Rule 79.12(3).) There may be a similar result for a defendant who persists in maintaining his position that a counterclaim has value in excess of \$50,000 and that the action should be an ordinary action. (See: Rule 79.13.)

If an action has been commenced under the ordinary procedure then a serious review of each litigation file that might conclude with a judgment under \$50,000 with a view to continuing the proceedings under Rule 79 should be conducted as soon as possible. That is so, because in Mr. Perell's words:

The hammer of these costs consequences is designed to deter plaintiffs from proceeding under the ordinary procedure ... when the action is appropriate for the simplified procedure. The costs consequences of Rule 76 implement the underlying operative policy of Rule 76, which is that there should be a proportionate relationship between the magnitude of the claim and the procedures available to pursue or defend it. Rule 76.13 is strictly enforced and, if the outcome of the action is within the jurisdictional criteria of the simplified procedure, then costs consequences will be imposed unless the plaintiff satisfies the court not only that it was reasonable to commence the action as an ordinary action but also that it was reasonable to continue the action as an ordinary action. This means that the plaintiff must monitor the action and, if it appears that the judgment will be less than \$50,000, he or she should exercise the rights under Rule 76.03(5), discussed below, to amend the claim and proceed under the simplified procedure.

In *Helsberg v. Allison* [2000] O.J. No. 3618 Gauthier J. of the Ontario Superior Court of Justice ruled on costs subsequent to the plaintiff successfully winning an award of \$23,616 for breach of contract arising from the failure of the defendant to pay a sales commission to the plaintiff. The plaintiff also pleaded fraud, unjust enrichment and sought, inter alia, punitive damages. The trial judge wrote (judgment affirmed by Ontario Court of Appeal):

¶ 9 Was it reasonable, in all the circumstances, for the Plaintiff to have commenced and continued his action under the ordinary procedure? It is my conclusion that it was not.

¶ 10 The Plaintiff, essentially, has recovered his share of the real estate commission. The evidence established his entitlement to the commission, based on a breach of contract by the Defendant, Sudbury 2000 Realty Inc.

¶ 11 There was no basis for awarding to the Plaintiff anything other than his share of the commission, i.e. punitive damages.

¶ 12 The Plaintiff did not pursue the other claims, and knew in September, 1999, that these other claims would not be pursued.

¶ 13 There was nothing in the evidence called at trial, nor in the Plaintiffs submissions on costs, to show that the allegations of serious wrongful conduct on the part of the Defendants were based on provable facts.

¶ 18 It is my conclusion the Plaintiff should have commenced this action under the simplified rules. At the very least, the Plaintiff should have sought to continue the action under the simplified procedure, in September, 1999, when he advised that he would not pursue the allegations which could have formed the basis for an award of punitive or exemplary damages.

¶ 21 As Speigel J. indicated in *Wondercard Inc. v. Electric Colourfast Printing Corporation* (1999), 43 O.R. (3d) 799 (S.C.J.) at page 801:

" that subrule should be strictly enforced and that

the effect of the rule is that, unless the court is satisfied that it was reasonable for the plaintiff to have commenced and continued the action under the ordinary procedure, the plaintiff shall not recover any costs. THE WORDING OF THE SUBRULE IS MANDATORY. (Emphasis mine). The plaintiff can only achieve relief if it satisfies the court of the reasonableness of the commencement and continuation of the action under the ordinary procedure.”

¶ 22 Therefore, pursuant to Rule 76.10(2), the Plaintiff shall not recover any costs.

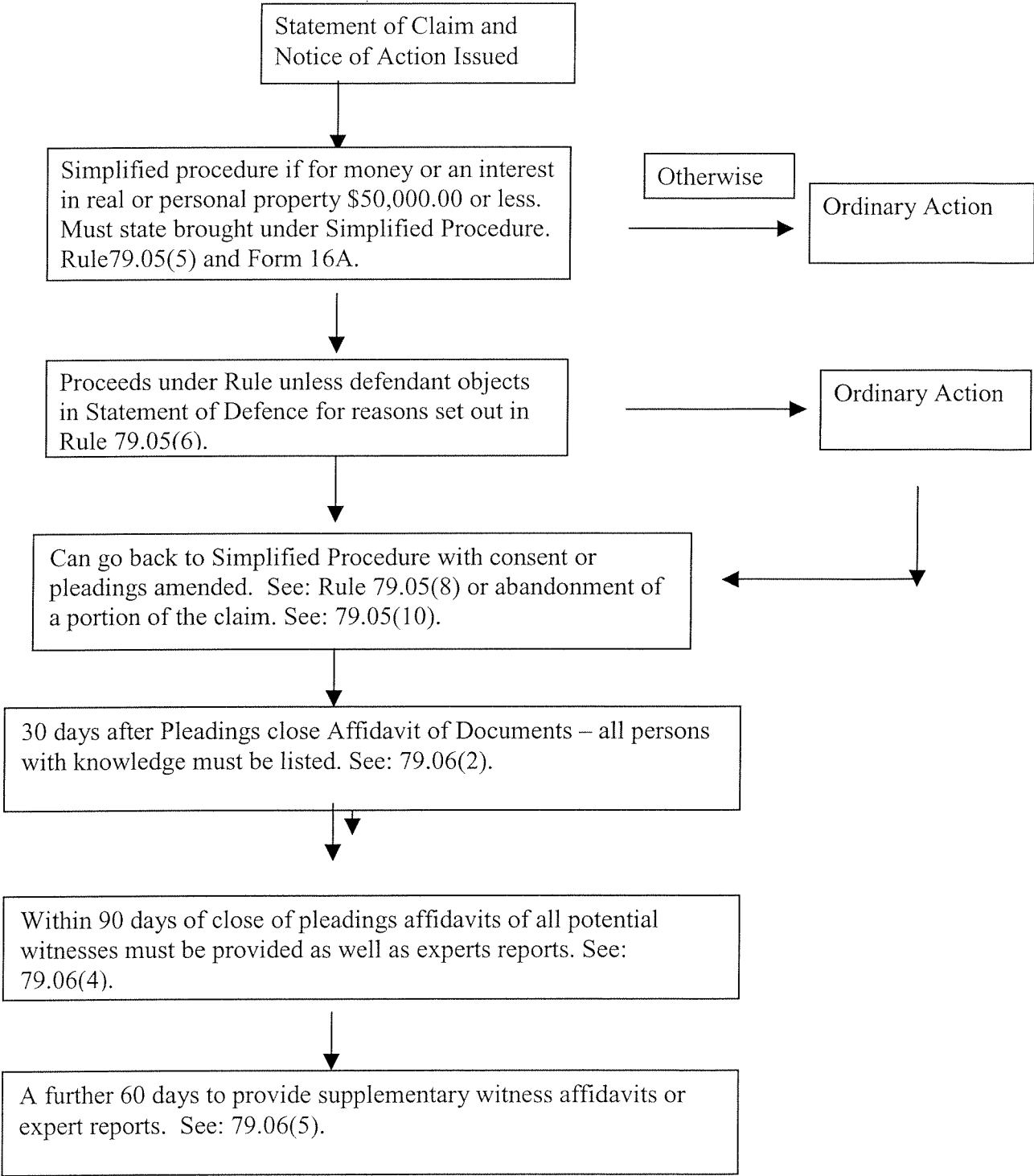
In addition, even if it is the defendant that compelled the plaintiff to continue using the ordinary procedure, the plaintiff may still be exposed to an application of Rule 79.12. For example, the plaintiff may include a claim that does not come within the mandatory requirements for simplified procedure. The defendant may object to proceeding under Rule 79. The plaintiff then may elect to proceed under the ordinary procedure at trial. If the trial’s result is within Rule 79 the plaintiff may suffer the cost consequences in 79.12 even though the defendant in his defence raised the issue initially that the matter was outside the scope of Rule 79. The only black and white relief for the plaintiff appears to be Rule 79.12(7) in which real or personal property is involved and the defendant says the value is greater than \$50,000 – an allegation not established at trial and in Rule 79.12(5) when the defendant compels the plaintiff to use the ordinary procedure because of the counterclaim.

In the article previously mentioned Mr. Perell wrote at page 335:

Given the serious costs consequences of an action not being under the simplified procedure at the commencement of trial, a plaintiff in an ordinary action who begins to doubt his or her ability to obtain a judgment beyond the reach of the criteria of Rule 76.02(1) is well advised to “opt in” to the simplified procedure. To opt in, the plaintiff must amend his or her pleading to plead a claim within the criteria of Rule 76.02(1) and also deliver a notice (Form 76A). However, there are costs consequences for opting in. Under Rule 76.13(1), a party whose pleadings are amended

shall pay, on a substantial indemnity basis, the costs incurred had the claim originally been brought under Rule 76. These costs consequences apply regardless of the outcome of the action unless the court orders otherwise.

C. FLOW CHART



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30 days after must advise whether a particular deponent will be required personally at trial; otherwise affidavits will be used as evidence. See: 79.06(7) and Form 79B.

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No Discovery normally. See: 79.07.

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Within 5 months after the close of pleadings, by telephone parties shall consider whether all documents have been disclosed; settlement is possible and a Settlement conference is acceptable. See: 79.08.

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7 Months after Pleadings close set down for trial. Settlement Conference request to accompany Notice of Trial. Pretrial Briefs are Settlement Conference Briefs – filed no later than Motions Day. See: 79.08(2) & (3) and 79.09.

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Trial to proceed in ordinary manner except witness affidavits are used unless Rule 79.06(7) has been complied with. Direct examination of witnesses limited to matters covered in the witnesses affidavits.

D. OTHER PROVINCES EXPERIENCE WITH SIMPLIFIED PROCEDURE

Ontario has had a simplified procedure rule (Rule 76) in much the same form as our Rule 79 since March 1996. Then, the limit was \$25,000.00. In January 2002 the limit was changed to \$50,000.00. In an article in the November 5, 2001 Law Times the Chair of Ontario's Simplified Rules subcommittee is reported to have said that with the value change to \$50,000 approximately 38% of all claims in the Ontario Superior Court of Justice were subject to these procedures. Their experience at that point showed:

- 79 per cent of rule 76 cases were resolved within 18 months of the filing of the statement of defence, compared to 39.2 per cent on pre-Rule 76 cases.
- Within two years, 84.1 per cent had been resolved, compared to 45.6 per cent before the introduction of the procedure;
- The trial rate for cases involving less than \$25,000 had been reduced to 6 per cent from 14 per cent;
- Motion activity was dramatically reduced in cases defended under the simplified procedure; ...

Undoubtedly there will be growing pains with this new procedure for the legal profession and the judiciary. Its value has, however, been established in other Canadian provinces where simplified procedure rules are almost identical to our new Rule 79.

David H. Russell
September 13, 2006

SIMPLIFIED PROCEDURE

RULE 79

SIMPLIFIED PROCEDURE

79.01 Application of Rule

This rule does not apply to:

- (a) proceedings in the Family Division;
- (b) class actions; and
- (c) proceedings commenced under any Act other than the *Judicature Act*.

79.02 Application of Other Rules

Unless provided otherwise by this rule, the rules applicable to an ordinary action apply to an action that is proceeding under this rule.

79.03 Variation of Procedure

The court may, by order, vary the procedure set out in this rule, including the procedure set out in any rule applicable under Rule 79.02.

79.04 Definition

In this rule, *affidavit of witness* means the affidavit of a person which contains the evidence that that person would give and be allowed to give orally.

79.05 Availability of Simplified Procedure

When Mandatory

(1) Unless ordered otherwise, the procedure set out in this rule shall be used in an action if the following conditions are satisfied:

- (a) the plaintiff's claim is exclusively for one or more of the following:
 - (i) money;

PROCÉDURE SIMPLIFIÉE

RÈGLE 79

PROCÉDURE SIMPLIFIÉE

79.01 Champ d'application de la règle

La présente règle ne s'applique pas :

- a) aux instances devant la Division de la famille;
- b) aux recours collectifs;
- c) aux instances introduites en application de toute loi sauf la *Loi sur l'organisation judiciaire*.

79.02 Application des autres règles

Sauf disposition contraire de la présente règle, les règles régissant l'action ordinaire s'appliquent à l'action qui est régie par la présente règle.

79.03 Modification de la procédure

La cour peut, par ordonnance, modifier la procédure prévue par la présente règle, y compris la procédure prévue par toute règle qui s'applique en vertu de la règle 79.02.

79.04 Définition

Dans la présente règle, *affidavit de témoin* s'entend de l'affidavit d'une personne recueillant le témoignage qu'elle donnerait et serait permise de donner oralement.

79.05 Applicabilité de la procédure simplifiée

Cas où la procédure simplifiée est obligatoire

(1) Sauf ordonnance contraire, la procédure prévue par la présente règle doit être suivie dans le cas d'une action si les conditions suivantes sont remplies :

- a) la demande du demandeur porte exclusivement sur un ou plusieurs des éléments suivants :
 - (i) une somme d'argent,

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(ii) an interest in real property;

(ii) un intérêt sur biens réels,

(iii) an interest in personal property; and

(iii) un intérêt sur biens personnels;

(b) the total of the following amounts is \$50,000 or less, exclusive of interest and costs:

b) la valeur totale des sommes suivantes est de 50 000 \$ ou moins, sans compter les intérêts et les dépens :

(i) the amount of money claimed, if any;

(i) la somme d'argent demandée, le cas échéant,

(ii) the fair market value of any interest in real property and personal property, as at the date the action is commenced.

(ii) la juste valeur marchande de tout intérêt sur biens réels et biens personnels à la date où l'action est introduite.

(2) Unless ordered otherwise, if there are two or more plaintiffs, the procedure set out in this rule shall be used if each claim, considered separately, meets the requirements of paragraph (1).

(2) Sauf ordonnance contraire, s'il y a deux demandeurs ou plus, la procédure prévue par la présente règle doit être suivie si chaque demande, considérée séparément, répond aux critères du paragraphe (1).

(3) Unless ordered otherwise, if there are two or more defendants, the procedure set out in this rule shall be used if the claim against each defendant, considered separately, meets the requirements of paragraph (1).

(3) Sauf ordonnance contraire, s'il y a deux défendeurs ou plus, la procédure prévue par la présente règle doit être suivie si la demande contre chaque défendeur, considérée séparément, répond aux critères du paragraphe (1).

When Optional

Cas où la procédure simplifiée est facultative

(4) Subject to paragraphs (5) to (10) and to Rule 79.01, the procedure set out in this rule may be used in any other action at the option of the plaintiff.

(4) Sous réserve des paragraphes (5) à (10) et de la règle 79.01, la procédure prévue par la présente règle peut être suivie dans le cas de toute autre action, au choix du demandeur.

Originating Process

Acte introductif d'instance

(5) The Notice of Action With Statement of Claim Attached (Form 16A) or the Notice of Action (Form 16B) and the Statement of Claim (Form 16C) shall indicate that the action is being brought under this rule.

(5) L'avis de poursuite accompagné d'un exposé de la demande (formule 16A) ou l'avis de poursuite (formule 16B) et l'exposé de la demande (formule 16C) doivent indiquer que l'action est introduite dans le cadre de la présente règle.

Action Continues to Proceed Under Rule

Action continue d'être régie par la présente règle

(6) An action commenced under this rule continues to proceed under this rule unless

(6) L'action introduite dans le cadre de la présente règle continue d'être régie par celle-ci sauf si, selon le cas :

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(a) the defendant objects in the statement of defence to the action proceeding under this rule because the plaintiff's claim does not comply with paragraph (1), and the plaintiff does not abandon in the reply the claims or parts of claims that do not comply,

(b) a defendant by counterclaim, cross-claim or third or subsequent party claim objects, in the statement of defence to the counterclaim, cross-claim or third or subsequent party claim, to proceeding under this rule because the counterclaim, cross-claim or third or subsequent party claim does not comply with paragraph (1), and the defendant in the main action does not abandon in the reply to the defence to the counterclaim, cross-claim or third or subsequent party claim the claims or parts of claims that do not comply, or

(c) the defendant makes a counterclaim, cross-claim or third or subsequent party claim that does not comply with paragraph (1) and states in the defendant's pleading that the counterclaim, cross-claim or third or subsequent party claim is to proceed under the ordinary procedure.

Continuance Under Ordinary Procedure - Where Notice Required

(7) If an action commenced under this rule may no longer proceed under this rule because of an amendment to the pleadings or as a result of the operation of paragraph (6),

(a) the action is continued under the ordinary procedure, and

(b) immediately after all the pleadings have been served or at the time of amending the pleadings, as the case may be, the plaintiff shall file with the clerk and serve on every other party a Notice Whether Action Under Rule 79 (Form 79A) stating that the action and any related proceedings are continued as an ordinary action.

a) le défendeur s'oppose, dans l'exposé de sa défense, au déroulement de l'action dans le cadre de la présente règle parce que la demande du demandeur n'est pas conforme au paragraphe (1), et que le demandeur ne renonce pas, dans sa réplique, à la totalité ou à une partie des demandes qui ne sont pas conformes;

b) un défendeur dans une demande reconventionnelle, une demande entre défendeurs, une mise en cause ou une mise en cause subséquente s'oppose, dans l'exposé de sa défense, au déroulement de la demande ou de la mise en cause dans le cadre de la présente règle parce que la demande ou la mise en cause n'est pas conforme au paragraphe (1), et que le défendeur principal ne renonce pas, dans sa réplique à la demande ou à la mise en cause, à la totalité ou à une partie des demandes qui ne sont pas conformes;

c) le défendeur présente une demande reconventionnelle, une demande entre défendeurs, une mise en cause ou une mise en cause subséquente qui n'est pas conforme au paragraphe (1) et indique dans ses plaidoiries que la demande ou la mise en cause est régie par la procédure ordinaire.

Continuation de l'action selon la procédure ordinaire - avis requis

(7) Si une action introduite dans le cadre de la présente règle ne peut plus se dérouler dans le cadre de celle-ci en raison d'une modification des plaidoiries ou de l'application du paragraphe (6) :

a) d'une part, l'action est continuée dans le cadre de la procédure ordinaire;

b) d'autre part, le demandeur doit, immédiatement après que toutes les plaidoiries ont été signifiées ou au moment où les plaidoiries sont modifiées, selon le cas, déposer auprès du greffier et signifier à chaque autre partie un avis de continuation ou non de l'action dans le cadre de la règle 79 (formule 79A) indiquant que l'action et les instances afférentes sont continuées en tant qu'action ordinaire.

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Continuance Under Simplified Procedure - Where Notice Required

(8) An action that was not commenced under this rule, or that was commenced under this rule but continued under the ordinary procedure, is continued under this rule if

- (a) the consent of all of the parties is filed; or
- (b) no consent is filed but
 - (i) the plaintiff's pleading is amended to comply with paragraph (1), and
 - (ii) all other claims, counterclaims, cross-claims and third or subsequent party claims comply with this rule.

(9) Where an action is continued under paragraph (8), the plaintiff shall immediately file with the clerk and serve on every other party a Notice Whether Action Under Rule 79 stating that the action and any related proceedings are continued under this rule.

Effect of Abandonment

(10) A party who abandons a claim or part of a claim or amends a pleading so that the claim, counterclaim, cross-claim or third or subsequent party claim complies with paragraph (1) may not bring the claim or part so abandoned in any other proceeding.

Continuation de l'action selon la procédure simplifiée - avis requis

(8) L'action qui n'a pas été introduite dans le cadre de la présente règle, ou qui a été introduite dans le cadre de la présente règle mais qui a continué selon la procédure ordinaire, est continuée dans le cadre de la présente règle si l'une ou l'autre des conditions suivantes se réalise :

- a) le consentement de toutes les parties est déposé;
- b) aucun consentement n'est déposé mais :
 - (i) d'une part, la plaidoirie du demandeur est modifiée pour être conforme au paragraphe (1),
 - (ii) d'autre part, les autres demandes, demandes reconventionnelles, demandes entre défendeurs, mises en cause ou mises en cause subséquentes sont conformes à la présente règle.

(9) Lorsqu'une action est continuée en application du paragraphe (8), le demandeur doit immédiatement déposer auprès du greffier et signifier à chaque autre partie un avis de continuation ou non de l'action dans le cadre de la règle 79 indiquant que l'action et les instances afférentes sont continuées dans le cadre de la présente règle.

Effet du renoncement

(10) La partie qui renonce à une demande ou à une partie de celle-ci ou qui modifie sa plaidoirie de sorte que la demande, la demande reconventionnelle, la demande entre défendeurs, la mise en cause ou la mise en cause subséquente soit conforme au paragraphe (1) ne peut présenter la demande ou la partie de la demande ainsi renoncée dans le cadre d'une autre instance.

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79.06 Affidavit of Documents, Affidavits of Witnesses and Expert Reports

Copies of Documents

(1) Unless the court orders otherwise, a party to an action under this rule shall, within 30 days after the close of pleadings and at the party's own expense, serve on every other party

(a) an Affidavit of Documents as provided for under Rule 31, and

(b) copies of the documents listed in Schedule A of the Affidavit of Documents.

(2) An Affidavit of Documents shall include a list of the names and addresses of any person who might reasonably be expected to have knowledge of matters in issue in the action unless the court orders otherwise.

(3) The solicitor's certificate under Rule 31.03(6) shall include a statement that the solicitor has explained to the deponent the necessity for complying with paragraphs (1) and (2).

Affidavits of Witnesses and Expert Reports

(4) A party to an action under this rule shall, within 90 days after the close of pleadings and at the party's own expense, serve on every other party an affidavit of witness from each person who may be called to testify as a witness at trial on behalf of the party submitting the affidavit and a report from any expert who may be called to testify as an expert witness at trial on behalf of the party submitting the report.

(5) A party may, within 60 days after the expiration of the period referred to in paragraph (4) and at the party's own expense, serve on every other party supplementary affidavits of witnesses or expert reports.

Effect of Failure to Disclose

(6) Unless ordered otherwise, at the trial of the action, a party may not call as a witness a person

79.06 Affidavit des documents, affidavits des témoins et rapports d'experts

Copies des documents

(1) Sauf ordonnance contraire de la cour, une partie à une action régie par la présente règle doit, dans les 30 jours qui suivent la clôture des plaidoiries et à ses propres frais, signifier à chaque autre partie :

a) un affidavit des documents conformément à la règle 31;

b) des copies des documents énumérés à l'annexe A de l'affidavit des documents.

(2) Sauf ordonnance contraire de la cour, l'affidavit des documents doit contenir la liste des noms et adresses des personnes dont on pourrait raisonnablement s'attendre qu'elles aient connaissance des questions en litige dans l'action.

(3) Le certificat de l'avocat prévu à la règle 31.03(6) doit contenir une déclaration selon laquelle l'avocat a expliqué au déposant l'obligation de se conformer aux paragraphes (1) et (2).

Affidavits des témoins et rapports d'experts

(4) Une partie à une action régie par la présente règle doit, dans les 90 jours qui suivent la clôture des plaidoiries et à ses propres frais, signifier à chaque autre partie un affidavit de témoin de chacune des personnes pouvant être appelée à témoigner au procès pour la partie qui présente l'affidavit et un rapport de tout expert pouvant être appelé à témoigner au procès pour la partie qui présente le rapport.

(5) Une partie peut, dans les 60 jours après l'expiration du délai visé au paragraphe (4) et à ses propres frais, signifier à chaque autre partie des affidavits de témoins ou rapports d'experts supplémentaires.

Effet du défaut de divulguer

(6) Sauf ordonnance contraire, lors de l'instruction de l'action, une partie ne peut appeler à té-

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whose affidavit of witness or expert report has not been served in accordance with paragraph (4) or (5).

Use of Affidavits of Witnesses and Expert Reports at Trial

(7) A party who requires the attendance at trial of the deponent of an affidavit of witness or an expert shall, within 30 days after the expiration of the period referred to in paragraph (5), serve on every other party a Notice Requiring Attendance (Form 79B). Any such attendance shall be at the expense of the party requiring such attendance. If no Notice Requiring Attendance is served, the admissible parts of the affidavit of witness or expert report, as the case may be, shall be received in evidence at the trial without the need to call the deponent or the expert and without proof of signature or qualifications of the expert.

79.07 No Discovery

Unless ordered otherwise, no examination for discovery under Rule 32, 33 or 34 is permitted in an action proceeding under this rule.

79.08 Settlement Discussion, Documentary Disclosure and Settlement Conference

Settlement Discussions

(1) Within 5 months after the close of pleadings, the parties shall, in a meeting or telephone call, consider whether

- (a) all documents relating to any matter at issue have been disclosed,
- (b) settlement of any or all issues is possible, and
- (c) the parties agree to a settlement conference under Rule 50.

moigner une personne dont l'affidavit de témoin ou le rapport d'expert n'a pas été signifié conformément au paragraphe (4) ou (5).

Utilisation des affidavits des témoins et rapports d'experts au procès

(7) La partie qui exige la comparution au procès du déposant d'un affidavit de témoin ou d'un expert doit, dans les 30 jours qui suivent l'expiration du délai visé au paragraphe (5), signifier à chaque autre partie un avis de comparution (formule 79B). Les frais relatifs à la comparution du déposant ou de l'expert sont à la charge de la partie qui demande la comparution. Dans le cas où un avis de comparution n'a pas été signifié, tout extrait admissible de l'affidavit de témoin ou du rapport d'expert, selon le cas, est recevable en preuve au procès sans pour cela appeler à témoigner le déposant ou l'expert et sans qu'il soit nécessaire de prouver l'authenticité de la signature ou la qualification professionnelle de l'expert.

79.07 Enquête préalable

Sauf ordonnance contraire, l'interrogatoire préalable en application de la règle 32, 33 ou 34 n'est pas permise dans une action qui est régie par la présente règle.

79.08 Discussion en vue d'un règlement amiable, divulgation des documents et conférence de règlement amiable

Discussion en vue d'un règlement amiable

(1) Dans les 5 mois qui suivent la clôture des plaidoiries, les parties doivent, au cours d'une réunion ou d'un appel téléphonique, examiner si :

- a) tous les documents se rapportant à une question en litige ont été divulgués;
- b) il y a possibilité d'un règlement amiable d'une partie ou de la totalité des questions en litige;
- c) les parties consentent à une conférence de règlement amiable en application de la règle 50.

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Settlement Conference

(2) Where the parties agree to a settlement conference under Rule 50, the request for a settlement conference shall accompany the Notice of Trial and trial record filed under Rule 47.

(3) The pre-trial briefs filed in accordance with Rule 79.09 shall constitute the settlement conference brief required under Rule 50.

(4) Each party shall file with the judge conducting the settlement conference a copy of the affidavits of witnesses and expert reports that the party served on the other parties in accordance with Rule 79.06.

79.09 Setting Down for Trial

At the first Motions Day following 7 months after the close of pleadings, the plaintiff shall set the action down for trial in accordance with the procedure set out in Rule 47, except that all parties shall file and serve their pre-trial briefs no later than that Motions Day.

79.10 Trial

(1) Subject to paragraph (2), the trial of an action brought under this rule shall proceed in the ordinary manner.

(2) Affidavits of witnesses and expert reports served in accordance with Rule 79.06 may, at the discretion of any party, be used at trial without the need to call the deponent or the expert unless a party has served a Notice Requiring Attendance under Rule 79.06(7) and without proof of signature or qualifications of the expert.

(3) Except with leave of the court, direct examination at trial shall be confined to matters covered in the affidavits of witnesses and expert reports.

Conférence de règlement amiable

(2) Lorsque les parties consentent à une conférence de règlement amiable en application de la règle 50, la demande de conférence de règlement amiable doit accompagner l'avis de procès et le dossier déposés en application de la règle 47.

(3) Les mémoires préparatoires déposés conformément à la règle 79.09 constituent les mémoires de conférence de règlement amiable exigés en application de la règle 50.

(4) Chaque partie doit déposer auprès du juge président la conférence de règlement amiable une copie des affidavits de témoins et rapports d'experts que la partie a signifiés aux autres parties conformément à la règle 79.06.

79.09 Mise au rôle

Le demandeur doit à la première séance des motions qui a lieu 7 mois après la clôture des plaidoiries, mettre l'action au rôle conformément à la procédure prévue par la règle 47, excepté que toutes les parties doivent déposer et signifier leur mémoire préparatoire au plus tard à cette séance de motions.

79.10 Procès

(1) Sous réserve du paragraphe (2), lorsqu'une action est introduite dans le cadre de la présente règle, le procès se déroule selon la procédure ordinaire.

(2) Les affidavits de témoins et les rapports d'experts qui ont été signifiés conformément à la règle 79.06 peuvent, à la discrétion de toute partie, être utilisés au procès sans pour cela appeler à témoigner le déposant ou l'expert à moins qu'une partie ait signifié un avis de comparution en application de la règle 79.06(7) et sans qu'il soit nécessaire de prouver l'authenticité de la signature ou la qualification professionnelle de l'expert.

(3) Sauf permission de la cour, l'interrogatoire principal au procès doit se limiter aux questions qui ont été traitées dans les affidavits des témoins et les rapports d'experts.

79.11 Costs

(1) Scales 2 to 5 of Tariff 'A' of Rule 59 do not apply to the fixing of costs of an action that proceeded under this rule.

(2) For greater certainty, Rule 59.08(8) applies to the disbursements incurred by a party under Rule 79.06(1), (4), (5) or (7).

79.12 Costs Consequences for Failure to Use the Simplified Procedure

(1) Regardless of the outcome of the action, if this rule applies as the result of amendment of the pleadings under Rule 79.05(8), the party whose pleadings are amended shall pay the costs incurred by the opposite party up to the date of the amendment that would not have been incurred had the claim originally complied with Rule 79.05(1), unless the court orders otherwise.

(2) Paragraphs (3) to (8) apply to a plaintiff who obtains a judgment that satisfies the following conditions:

(a) the judgment awards exclusively one or more of the following:

- (i) money;
- (ii) an interest in real property;
- (iii) an interest in personal property; and

(b) the total of the following amounts is \$50,000 or less, exclusive of interest and costs:

- (i) the amount of money awarded, if any;
- (ii) the fair market value of any interest in real property and personal property awarded, as at the date the action is commenced.

79.11 Dépens

(1) Les échelles 2 à 5 du tarif 'A' de la règle 59 ne s'appliquent pas dans la fixation des dépens afférents à une action qui a été régie par la présente règle.

(2) Il demeure entendu que la règle 59.08(8) s'applique aux débours occasionnés par une partie en application de la règle 79.06(1), (4), (5) ou (7).

79.12 Dépens dans le cas où la procédure simplifiée n'a pas été utilisée

(1) Quelle que soit l'issue de l'action, si la présente règle s'applique par suite de la modification des plaidoiries prévue à la règle 79.05(8) et sauf ordonnance contraire de la cour, la partie dont les plaidoiries sont modifiées paie les dépens engagés par la partie adverse jusqu'à la date de la modification, qui n'auraient pas été engagés si la demande avait été initialement conforme à la règle 79.05(1).

(2) Les paragraphes (3) à (8) s'appliquent au demandeur qui obtient un jugement qui satisfait aux conditions suivantes :

a) le jugement adjuge uniquement un ou plusieurs des éléments suivants :

- (i) une somme d'argent,
- (ii) un intérêt sur biens réels,
- (iii) un intérêt sur biens personnels;

b) la valeur totale des sommes suivantes est de 50 000 \$ ou moins, sans compter les intérêts et les dépens :

- (i) la somme d'argent adjugée, le cas échéant,
- (ii) la juste valeur marchande de tout intérêt sur biens réels et biens personnels adjugé, à la date où l'action est introduite.

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(3) The plaintiff shall not recover any costs unless

(a) the action was proceeding under this rule at the commencement of the trial, or

(b) the court is satisfied that it was reasonable for the plaintiff

(i) to have commenced and continued the action under the ordinary procedure, or

(ii) to have allowed the action to be continued under the ordinary procedure by not abandoning claims or parts of claims that do not comply with Rule 79.05(1), (2) or (3).

(4) Paragraph (3) applies despite the fact that the plaintiff may have made an offer to settle under Rule 49.

(5) Paragraph (3) does not apply if this rule was unavailable because of a claim, counterclaim, cross-claim or third or subsequent party claim of another party.

(6) The plaintiff may, in the trial judge's discretion, be ordered to pay all or part of the defendant's costs in addition to any costs the plaintiff is required to pay under Rule 49.09(2).

(7) In an action that includes a claim for an interest in real property or personal property, if the defendant objected to proceeding under this rule on the ground that the fair market value of the interest exceeded \$50,000 at the date of commencement of the action and the court finds the value did not exceed that amount at that date, the defendant shall pay such additional costs as the court may order.

(8) The burden of proving that the fair market value of the interest in real property or personal property at the date of commencement of the action was \$50,000 or less is on the plaintiff.

(3) Le demandeur ne peut recouvrer aucuns dépens, sauf si, selon le cas :

a) l'action était régie par la présente règle au début du procès;

b) la cour est convaincue qu'il était raisonnable que le demandeur :

(i) soit introduise et continue l'action dans le cadre de la procédure ordinaire,

(ii) soit permette que l'action se continue dans le cadre de la procédure ordinaire en ne renonçant pas à la totalité ou à une partie des demandes qui ne sont pas conformes à la règle 79.05(1), (2) ou (3).

(4) Le paragraphe (3) s'applique malgré que le demandeur peut avoir fait une offre de règlement amiable en application de la règle 49.

(5) Le paragraphe (3) ne s'applique pas si la présente règle n'était pas applicable en raison d'une demande, d'une demande reconventionnelle, d'une demande entre défendeurs, d'une mise en cause ou d'une mise en cause subséquente présentée par une autre partie.

(6) Le juge du procès peut, à sa discrétion, ordonner au demandeur de payer tout ou partie des dépens du défendeur en sus des dépens que le demandeur est tenu de payer aux termes de la règle 49.09(2).

(7) Dans le cas d'une action qui comprend une demande d'un intérêt sur biens réels ou sur biens personnels, si le défendeur s'est opposé au recours à la présente règle pour le motif que la juste valeur marchande de l'intérêt était supérieure à 50 000 \$ à la date où l'action a été introduite et que la cour conclut que la valeur n'était pas supérieure à cette somme à cette date, la cour peut mettre des dépens additionnels à charge du défendeur.

(8) Le fardeau de prouver que la juste valeur marchande de l'intérêt sur biens réels ou sur biens personnels à la date où l'action a été introduite était de 50 000 \$ ou moins revient au demandeur.

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79.13 Application to Counterclaims, Cross-Claims and Third or Subsequent Party Claims

Subject to Rules 28, 29 and 30, this rule applies, with any necessary modification, to a counterclaim, a cross-claim or a third or subsequent party claim.

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79.13 Application aux demandes reconventionnelles, aux demandes entre défendeurs, aux mises en cause et aux mises en cause subséquentes

Sous réserve des règles 28, 29 et 30, la présente règle s'applique, avec les adaptations nécessaires, à une demande reconventionnelle, à une demande entre défendeurs, à une mise en cause et à une mise en cause subséquente.

Règle 79 : 2006-45