

## **Part 8 - Counsel, Parties, and Claims**

### **Rule 33 - Counsel**

#### **Scope of Rule 33**

- 33.01 (1)** A lawyer may become counsel of record, and be removed as counsel of record, in accordance with this Rule.
- (2) A party who replaces counsel, or discharges counsel and acts on their own, must comply with this Rule.

#### **Counsel of record**

- 33.02 (1)** A lawyer becomes counsel of record for a person by signing and filing one of the following:
- (a) the notice by which the party starts, defends, contests, or responds to a proceeding, or seeks to become a party;
  - (b) a notice of new counsel;
  - (c) a court document after a party who had been acting on their own retains the counsel.
- (2) Counsel may authorize another lawyer entitled to represent parties before the court to substitute for counsel.
- (3) One counsel may start a proceeding on behalf of more than one person.
- (4) Two or more counsel may start a proceeding on behalf of different parties by each signing the originating document, the statement of claim in the case of an action, and a statement showing the party on whose behalf each counsel is signing.

### **Ceasing to be counsel of record**

**33.03** A lawyer ceases to be counsel of record when one of the following events occurs:

- (a) the proceeding concludes;
- (b) the lawyer is discharged and new counsel files a notice of new counsel under Rule 33.06;
- (c) the lawyer is discharged, the party files a notice of intention to act on one's own under Rule 33.07, and no trial or hearing is scheduled;
- (d) the lawyer is discharged when a trial or hearing is scheduled, no notice of new counsel is filed, and a judge removes the lawyer as counsel of record under Rule 33.10;
- (e) the lawyer finds it necessary to withdraw from being counsel, and a judge removes the lawyer under Rule 33.11.

### **Counsel for a non-party**

**33.04** Counsel who represents a person who is not a party but is entitled, or is seeking to become entitled, to be heard in a proceeding must notify the parties and the court of the representation as soon as is possible.

### **Discharge of counsel**

- 33.05** (1) A party who discharges counsel and retains new counsel must, through the new counsel, immediately file a notice of new counsel.
- (2) A party who discharges counsel and acts on their own must file a notice of intention to act on one's own.
  - (3) The designated address for delivery of documents to a party does not change until the notice of change of solicitor, or the notice of intention to act on one's own, is filed.

### **Change of counsel**

- 33.06** (1) Counsel replacing the counsel of record, or taking over for a party who was acting on their own, must file a notice of new counsel immediately.
- (2) A notice of new counsel must contain the standard heading, be entitled "Notice of New Counsel", be signed by the new counsel, and include all of the following:
    - (a) the name of the party represented;

- (b) the name of the former counsel, if counsel is replaced;
  - (c) the name of the new counsel;
  - (d) a designation of a new address for delivery of documents to the party;
  - (e) an acknowledgement of the effect of delivery to the designated address and a statement that further contact information is available from the prothonotary.
- (3) The new counsel must also provide the prothonotary with information for communicating with the new counsel, such as a telephone number, fax number and e-mail address.
- (4) The notice of new counsel may be in Form 33.06.
- (5) New counsel must deliver a copy of the notice to the former counsel, and to each party entitled to notice in the proceeding.

**Party acting on own after discharging counsel**

- 33.07 (1)** A party who discharges counsel and wishes to act on their own must attend the prothonotary's office to file a notice of intention to act on one's own, unless the prothonotary directs in writing that a personal attendance is not required.
- (2) The notice of intention to act on one's own must contain the standard heading, be entitled "Notice of Intention to Act on One's Own", be signed by the party, and include all of the following:
- (a) a statement indicating that the former counsel has been discharged;
  - (b) the date of the discharge;
  - (c) a statement that the party has decided to act on their own;
  - (d) an acknowledgement that the party must personally deliver the notice to the prothonotary;
  - (e) a designation of a new address for delivery of documents for the party;
  - (f) an acknowledgement of the effect of delivery to the designated address and a statement that further contact information is available from the prothonotary.

- (3) The party must also provide the prothonotary with information for communicating with the party, such as a telephone number, fax number, and e-mail address.
- (4) The notice of intention to act on one's own may be in Form 33.07.
- (5) The party must immediately deliver a copy of the notice to the former counsel, and to each party entitled to notice in the proceeding.

#### **Information provided by prothonotary**

**33.08** The prothonotary must, before accepting for filing a notice of intention to act on one's own, provide the information required to be provided by the prothonotary under Rule 34.06, of Rule 34 - Acting on One's Own.

#### **Counsel for a limited purpose**

- 33.09** (1) A judge may permit a lawyer to act as counsel for a limited purpose on behalf of a party who otherwise acts on their own.
- (2) A judge may require a party who acts on their own to retain counsel for a limited purpose, such as for discovery or cross-examination of a witness who may suffer serious emotional harm if required to communicate directly with the party.

#### **Duty of discharged counsel**

- 33.10** (1) A lawyer who is discharged by a party the lawyer represented as counsel must complete all tasks the lawyer undertook to perform for the court, or was directed to perform for the court, such as to draft and submit a form of order.
- (2) A lawyer who is discharged after a time and date have been appointed for the trial of an action or the hearing of an application, proceeding for judicial review, appeal, or motion must personally appear before the judge assigned to preside at the trial or hearing to be removed as counsel of record, unless a notice of new counsel is filed or the judge permits otherwise.
- (3) If a judge has not been assigned, or the assigned judge is unavailable, the lawyer may appear before any judge.

#### **Withdrawal of counsel**

- 33.11** (1) Counsel who finds it necessary to withdraw must make a motion to be removed as counsel of record.
- (2) Counsel who makes a motion for an order to be removed as counsel of record must deliver the notice of motion to the party counsel represents or represented, unless a judge orders otherwise.

**New designated address for service**

**33.12** A lawyer who is discharged as counsel or withdraws, and whose address is the address designated for delivery to the party the lawyer represented, may make a motion for an order designating a new address for delivery.

## Rule 34 - Acting on One's Own

### Scope of Rule 34

**34.01** A party may act on their own, in accordance with this Rule.

### Party requiring counsel

**34.02** Each of the following kinds of parties must be represented by counsel, unless a judge allows otherwise:

- (a) a person who requires a litigation guardian;
- (b) a party named in a representative capacity, such as a trustee, executor, administrator, or receiver;
- (c) an unascertained party.

### Corporation acting on its own

**34.03 (1)** A corporate party that acts on its own must appoint an agent in writing before filing a document.

**(2)** The agent must be an officer of the corporation, unless a judge orders otherwise.

**(3)** The agent must be authorized to speak for, and bind, the corporation on subjects relating to the proceeding.

**(4)** The corporation must file a copy of the appointment of agent.

**(5)** The appointment of agent must contain the standard heading, be entitled "Appointment of Agent", be signed by an authorized person, and include all of the following:

- (a) the name of the corporate party;
- (b) the appointment, including the name, office, and authority of the agent;
- (c) an acknowledgement that the agent's authority continues until a notice of replacement of agent, or a notice of new counsel, is filed;
- (d) a personal representation by the person who signs the appointment that that person has authority to make the appointment and that the appointment is properly executed.

- (7) The agent must also provide the prothonotary with information for communicating with the agent, such as a telephone number, fax number, and e-mail address.
- (8) The notice of appointment of agent may be in Form 34.03.

### **Replacing agent**

- 34.04** (1) A corporation may replace its agent by filing a replacement of agent.
- (2) The replacement of agent must contain the appointment, the same signature and information as the notice of appointment of agent, the names of the former agent and the replacement agent, and be entitled “Replacement of Agent”.
  - (3) The replacement of agent may be in Form 34.04.

### **Communicate with counsel**

- 34.05** (1) Counsel may direct a party acting on their own to communicate only through counsel, and not directly with the party counsel represents.
- (2) Counsel’s direction may be absolute or limited to subjects or circumstances.
  - (3) A party who is directed by counsel about communicating with the party represented by counsel must comply with the direction.

### **Information for party on their own**

- 34.06** (1) The prothonotary must inform a party acting on their own of how the party, or a person assisting the party, can find these Rules, and instruct the party on all of the following:
- (a) these Rules apply to the party and the proceeding;
  - (b) the party must make best efforts to understand these Rules and to comply with them;
  - (c) it is improper to communicate with a judge outside a trial or hearing, unless the prothonotary or a member of the judge’s office gives permission and every effort is made to include all parties in the communication;
  - (d) the party must communicate with a represented party only through that party’s counsel, unless counsel gives written permission to contact the party directly;

- (e) each party must maintain the designated address so that everything delivered there is received by the party, and the party will be taken to have received the document even if the party fails to get it.
- (2) The prothonotary may refuse to file a document from a party acting on their own until the party has received the required instructions.
- (3) The prothonotary must file a statement that the required instructions were provided to the party acting on their own.

#### **Further information**

**34.07** The prothonotary may provide information to a party acting on their own about the Rules and practices of the court.

#### **Assistant**

- 34.08** (1) A judge may permit a person to assist, and if necessary speak on behalf of, an individual party at a trial or hearing.
- (2) A party on behalf of whom an assistant is permitted to speak must be present when the assistant speaks, unless a judge allows otherwise.

#### **Restrictions on agent or assistant**

- 34.09** (1) A person may not speak for a party at a trial or hearing unless the person is within subsection 16(2) of the *Legal Profession Act*, is the appointed agent of a corporate party, or has the permission of a judge to speak on behalf of a party.
- (2) A judge may require a corporate party to replace its appointed agent.
- (3) The presiding judge may withdraw permission for a person to assist, or speak for, an individual party.

## Rule 35 - Parties

### Scope of Rule 35

**35.01** The following persons may do the following things, in accordance with this Rule:

- (a) persons may join together as plaintiffs, applicants, applicants for judicial review, or appellants to start a proceeding;
- (b) a person who starts a proceeding may make two or more persons defendants or respondents;
- (c) a party may make a motion to be removed, or to remove another party;
- (d) a party may make a motion to add another person as a party;
- (e) a person may make a motion to be added as a party, including as an intervenor.

### Joining parties who claim together

**35.02 (1)** Two or more persons may start an action or application together as plaintiffs or applicants if the parties make claims that give rise to a common question of law or fact or that arise out of a single occurrence, transaction, or series of occurrences or transactions.

- (2) Two or more persons may start a proceeding for judicial review or an appeal together as applicants for judicial review or appellants in one of the following circumstances:
  - (a) legislation allows them to do so;
  - (b) each was a party to a process that led to the decision under judicial review or appeal;
  - (c) the decision under judicial review or appeal affects the interests of each;
  - (d) a judge permits, in accordance with Rule 35.08.

- (3) Two or more defendants may make a counterclaim, crossclaim, or third party claim together if they make claims that give rise to a common question of law or fact or that arise out of a single occurrence, transaction, or series of occurrences or transactions.

### **Joining parties claimed against in an action or application**

**35.03 (1)** A party who starts an action or application or makes a third party claim may, in one of the following circumstances, name two or more defendants, respondents, or third parties:

- (a) there is a common question of fact or law relating a claim against one party to a claim against another;
  - (b) a claim against one party arises out of the same occurrence, transaction, or series of occurrences or transactions as the claim against another;
  - (c) there is doubt about which party is liable to the party, whether a remedy should be awarded against one party or several parties, or whether an apportionment should be made.
- (2) Persons may not join together as plaintiffs, applicants, or third party claimants under Rule 35.02, unless they agree on which defendants, respondents, or third parties are to be joined.
  - (3) If a defendant or respondent is jointly liable to more than one person and one of those persons refuses to be joined as a plaintiff or applicant, the plaintiff or applicant must join that person as a defendant or respondent although no claim is made against the person.
  - (4) A plaintiff, applicant, or defendant making a third party claim must join each of the following persons as an opposite party:
    - (a) a person who is jointly, but not severally, entitled to relief with the plaintiff, applicant, or defendant making a third party claim;
    - (b) an assignor of a debt or other chose in action under an assignment that is not absolute, unless notice in writing of the assignment is given to the defendant, respondent, or third party against whom judgment is claimed on the debt or other chose in action;
    - (c) a person who must be bound by a judgment in the action, application, or third party claim in order for the proceeding to be effectively determined.

### **Parties in a judicial review or an appeal**

- 35.04** (1) A party who starts a proceeding for judicial review or an appeal must, unless a judge orders otherwise, name as respondents the decision-making authority, each person who is a party to the process under review or appeal or the process that led to the decision under review or appeal, and any other person required by legislation to be a respondent.
- (2) An arm of a decision-making authority that is not legally separate from the authority and that prosecuted a complaint, opposed an application, or otherwise sought or opposed a decision by the authority must be included as an applicant for judicial review, an appellant, or a respondent to a judicial review or appeal of the decision.
- (3) The arm must be named in such a way as to distinguish it from the decision-making authority, such as in one of the following ways:
- (a) placing the words “Staff of” before the name of the authority;
  - (b) naming a department, division, or office of the authority;
  - (c) naming the authority followed by the words “in its capacity as” then describing the function of the arm, such as “prosecutor” or “complainant”.

### **How a party joins further parties**

- 35.05** A party who starts a proceeding may join a further party by amending the originating document, or notice of claim against third party, as provided in Rule 83 - Amendment.

### **Error in joining party**

- 35.06** (1) No proceeding is defeated by reason of a wrong person having been joined as a party or a right person having not been joined, unless an order removing or adding a party would cause serious prejudice that cannot be compensated in costs or an abrogation of an enforceable limitation period.
- (2) A judge may make an order removing or adding a party to prevent the defeat of a proceeding, unless doing so would cause serious prejudice that cannot be compensated in costs or an abrogation of an enforceable limitation period.
- (3) No proceeding is defeated by reason of a party having been wrongly named, unless both of the following apply:
- (a) because of the misnaming, the misnamed party was unaware of the proceeding;

- (b) the correction will cause serious prejudice that cannot be compensated in costs, and would not have been suffered if the party had been properly named originally.
- (4) A judge may correct the name of a party to prevent the defeat of a proceeding.
- (5) A corrected proceeding continues as if the correction had been made originally.
- (6) A proceeding may be stayed if a judge is satisfied that one of the following deficiencies applies, and the stay ends when the deficiency is rectified:
  - (a) a party was joined by mistake;
  - (b) a person who is a necessary party is not a party;
  - (c) a person was misnamed when the person was joined as a party.

#### **Judge removing party**

- 35.07 (1)** A judge who is satisfied on any of the following may remove a party:
- (a) the party was joined in circumstances that do not conform with Rules 35.02 and 35.03;
  - (b) a respondent in a judicial review or an appeal should cease to be a party;
  - (c) a third party proceeding was taken in circumstances outside those in Rule 4.11, of Rule 4 - Action;
  - (d) the person has ceased to be in circumstances that justify being joined as a party;
  - (e) an injustice would result if the person continues to be a party.
- (2) Instead of removing the party, the judge may make an order, under Rule 37 - Consolidation and Separation, separating the claim by or against the party.

#### **Judge joining party**

- 35.08 (1)** A judge may join a person as a party in a proceeding at any stage of the proceeding.
- (2) It is presumed that the effective administration of justice requires each person who has an interest in the issues to be before the court in one hearing.
  - (3) The presumption is rebutted if a judge is satisfied on each of the following:

- (a) joining a person as a party would cause serious prejudice to that person, or a party;
  - (b) the prejudice cannot be compensated in costs;
  - (c) the prejudice would not have been suffered had the party been joined originally, or would have been suffered in any case.
- (4) Despite Rule 35.08(1), a judge may not join a person as a plaintiff, applicant, applicant for judicial review, or appellant, unless the person consents.
- (5) Despite Rule 35.08(1), a judge may not join a party if a limitation period, or an extended limitation period, has expired on the claim that would be advanced by or against the party, the expiry precludes the claim, and the person protected by the limitation period is entitled to enforce it.
- (6) A judge who joins a person as a party to a proceeding may give directions for the party's participation in the proceeding, including any of the following:
- (a) an amendment to the heading;
  - (b) a process by which the party may give notice of a claim, defence, or ground;
  - (c) a process by which each other party may respond to the notice;
  - (d) requirements for the new party to make disclosure and be discovered.

**Provisions for peripheral defendant or respondent**

**35.09** A judge may do any of the following for a defendant or respondent who has been joined in a proceeding that includes claims in which the party has no interest:

- (a) limit the party's duties to make disclosure;
- (b) limit discovery or provide for separate discovery on a subject of interest to the defendant or respondent;
- (c) excuse the party from attending parts of a trial or hearing;
- (d) consider the circumstance of the party when awarding or fixing costs.

### **Person intervening**

- 35.10 (1)** A person who is not a party to an action or application and wishes to be joined may move for an order joining the person as an intervenor.
- (2) A judge who is satisfied that the intervention will not unduly delay the proceeding, or cause other serious prejudice to a party, may grant the order in one of the following circumstances:
- (a) the person has an interest in the subject of the proceeding;
  - (b) the person may be adversely affected by the outcome of the proceeding;
  - (c) the person ought to be bound by a finding on the determination of a question of law or fact in the proceedings;
  - (d) intervention by the person is in the public interest.
- (3) Unless a judge orders otherwise, an intervenor must comply with all Rules applicable to a defendant, including the Rules in Part 5 - Disclosure and Discovery.
- (4) Unless a judge orders otherwise, an intervenor is entitled to all of the procedural rights of a party.
- (5) The judge may make an order restricting an intervenor's procedural duties and rights, and generally, regulating the intervenor's participation in an action or application.

### **Stay when death, bankruptcy, assignment, or mistake occurs**

- 35.11 (1)** A proceeding is stayed from when a party dies until an executor, administrator, or other personal representative of the estate of the deceased becomes a party, or a judge appoints a representative under Rule 36 - Representative Party.
- (2) A judge may stay a proceeding started by a party who becomes bankrupt until the trustee in bankruptcy becomes a party or assigns or abandons the claim, (a stay of a proceeding against the bankrupt is provided in the *Bankruptcy and Insolvency Act*).
- (3) A proceeding in which a plaintiff or applicant assigns the claim to another person is stayed from the date when the defendant is notified of the assignment until the assignee becomes a party.

- (4) A proceeding by or against a person who is not capable of managing their affairs and who does not have a litigation guardian, or a child who does not have a litigation guardian, is stayed from when another party becomes aware the party is a person who is not capable of managing their affairs, or a child, until a litigation guardian's statement is filed or a litigation guardian is appointed.
- (5) A judge may order a stay of any other proceeding in which a party is mistakenly joined, a necessary party is mistakenly not joined, or a party is misnamed.

### **Subsequent encumbrancer**

- 35.12 (1)** A subsequent encumbrancer need not be named as a defendant or respondent in a proceeding for foreclosure, sale, and possession, a proceeding for receivership to enforce a charge, or another proceeding to foreclose the equity of redemption in property.
- (2) A party may make a motion for an order binding subsequent encumbrancers to an order that provides for foreclosure, and the order must contain all of the following kinds of terms:
- (a) the party is required to deliver a notice to subsequent encumbrancers in a time and manner provided in the order;
  - (b) a subsequent encumbrancer is bound by the provisions of an order for foreclosure when delivery is made as provided;
  - (c) the subsequent encumbrancer may defend or contest the claim in the manner provided in the order.
- (3) The notice to subsequent encumbrancer must contain the standard heading, be entitled "Notice to Subsequent Encumbrancer", be dated and signed, and include all of the following:
- (a) a statement that the action or application was started for foreclosure of the equity in the property described as approved by the judge;
  - (b) a statement that the person has been identified as having a subsequent interest in the equity, such as a mortgage, judgment, other charge, right of way, or tenancy;
  - (c) notice that the subsequent encumbrancer's interest will be foreclosed, unless the person defends or contests the proceeding as provided in these Rules and within the time provided in the order;

- (d) a statement that the only claim against the subsequent encumbrancer is for foreclosure;
  - (e) the address of the prothonotary;
  - (f) the address for delivery of the plaintiff or applicant.
- (4) The notice to subsequent encumbrancer may be in Form 35.12.

### **Proprietorship**

**35.13** A claim brought by or against a proprietorship may be brought in the name of the proprietor, such as “Mary MacDonald”, or in the name of the proprietor and the firm, such as “Mary MacDonald, carrying on business as ACME”.

### **Partnership**

- 35.14 (1)** Members of a partnership may be named as parties individually by name, unless the partnership is a limited partnership.
- (2) Common members of two or more partnerships individually named in a proceeding between the partnerships must be named as a partner of each partnership, such as “John Smith as a partner of ACME”, as a plaintiff, and “John Smith as a partner of WHYCO”, as a defendant.
  - (3) Partners of an unlimited partnership may be named by the firm name, if the firm is not dissolved and the partners are not named individually.
  - (4) A judge may order that a firm name replace individual member names, or members’ names replace the firm name of an unlimited partnership.
  - (5) A partnership named by firm name must do all of the following, unless the partnership does not defend an action, respond to an application, or participate in a proceeding for judicial review or an appeal:
    - (a) appoint one counsel, if it chooses to be represented;
    - (b) appoint one member to speak for and bind the partnership in the proceeding, if it chooses to act on its own;
    - (c) file a pleading in the partnership name, not on behalf of any member individually;

- (d) on demand made to a partnership that is not limited, deliver to each other party a list of the members of the firm including those who were partners on the earliest material date, all who became partners afterward, the date each became a partner, the date of retirement of those who retired after the earliest material date, the present address of each member, and information known to the partnership about the present address of a former member who retired after the earliest material date;
  - (e) assist in providing notice to each member if a claim is made against an unlimited partnership and the party making the claim delivers a notice of possible enforcement against members under Rule 79 - Enforcement by Execution Order.
- (6) A party may not name, as another party, a member of a limited partnership or partnership named by firm name, unless one of the following exceptions applies:
- (a) the member is a party claiming against the partnership;
  - (b) the member is a party claimed against by the partnership;
  - (c) a judge permits.

### **Consequential provisions**

**35.15 (1)** A party who successfully moves to be joined in a proceeding must do all of the following, unless a judge orders otherwise:

- (a) obtain copies of all pleadings, affidavits, and notices in the proceeding;
  - (b) become informed of an outstanding motion and dates set for a motion, the status of the proceeding, including dates set for discovery, motion, conference, trial, hearing, or other steps;
  - (c) deliver to each other party a certified copy of the order joining the party.
- (2) A party who successfully moves to join a person as a party must do all of the following, unless a judge orders otherwise:
- (a) deliver copies of all pleadings and notices, documents effecting disclosure, and discovery transcripts to the new party;
  - (b) inform the new party of the status of the proceeding, including dates set for discovery, motion, conference, trial, hearing, or other steps;

- (c) deliver a certified copy of the order to each other party.
- (3)** A new party joined by amendment or order must be notified in accordance with Rule 31.11, of Rule 31 - Notice.

## Rule 36 - Representative Party

### Scope of Rule 36

- 36.01 (1)** This Rule allows for a party to represent the interests of another person in a proceeding, in one of the following ways:
- (a) as a public official, in an official capacity;
  - (b) as litigation guardian for a child, or person who is not capable of managing their affairs;
  - (c) as guardian under the *Guardianship Act* or the *Incompetent Persons Act*;
  - (d) under a private instrument giving the party management of the property or affairs of the other person or appointing the party as representative, such as an executor under a will, a trustee under a trust that includes powers to sell or manage, or an attorney under a power of attorney;
  - (e) under a public instrument, such as a trustee in bankruptcy, a receiver under an order, an administrator of a deceased's estate, or an authority appointed by a tribunal or by a public authority under legislation;
  - (f) by appointment under this Rule.
- (2)** This Rule does not apply to a class proceeding or the appointment of a person to represent a group under Rule 68 - Class Proceeding.
- (3)** Rule 35 - Parties applies to a representative party, unless a provision is inconsistent with this Rule.

### Describing representative

- 36.02 (1)** A public official may be named as a party to a proceeding in the party's official capacity and be described, in the standard heading, by name, the name of the office, or both.
- (2)** In a relator proceeding, the public official on behalf of whom the relator acts must be described by the name of the office and that description must be followed by the words "by a relator" and the name of the relator, unless the public official refuses permission to bring the relator proceeding and is named as a defendant or respondent.

- (3) All other representatives must be described by name, followed by the title given to them by the authority under which they are acting, followed by the name of the person they represent or estate they manage, such as “John Smith as trustee in bankruptcy of the estate of Jane MacDonald”, or “Jane MacDonald as litigation guardian of John Smith”, or “Jane MacDonald as receiver of Acme Limited”.

### **Authority, approval, and directions**

- 36.03 (1)** A representative party who is a defendant or respondent may decide not to defend an action, contest an application, or participate in a judicial review or appeal, and a judge or the court may make the same order against the representative party or the represented person as would be made against an ordinary party who does not defend, contest, or participate in the proceeding.
- (2) A representative party must obtain the permission of a judge to do any of the following, unless the representative party has the authority to do so under a private instrument or legislation:
    - (a) consent to judgment;
    - (b) settle a claim or proceeding;
    - (c) refrain from participating in a hearing for the assessment of damages or to determine another remedy;
    - (d) pay counsel’s or the representative’s fees or expenses.
  - (3) A representative party may request directions of a judge on any subject.

### **Representative must have counsel**

**36.04** A representative party must act by counsel, unless a judge permits otherwise.

### **Public officials**

- 36.05 (1)** A proceeding by or against a public official in that person’s official capacity does not terminate when the person ceases to hold the office.
- (2) After a public official is replaced in office, a party may make a motion to amend the name of the public official in the heading and pleadings.

### **When litigation guardian required**

**36.06 (1)** A child, or a person who is not capable of managing their affairs, must start, defend, contest, or respond to a proceeding by a named litigation guardian, or a guardian under the *Guardianship Act* or the *Incompetent Persons Act*.

- (2) A person must start a proceeding against a child who has a guardian under the *Guardianship Act*, or person who is not capable of managing their affairs and has a guardian under the *Incompetent Person's Act*, by naming both the person and the guardian in the manner shown in this example: “Mary MacDonald, by her Guardian John Doe”.
- (3) A person may start a proceeding against a child who does not have a guardian under the *Guardianship Act*, or against a person who is not capable of managing their affairs and who does not have a guardian under the *Incompetent Person's Act*, in either of the following ways:
  - (a) if a copy of a litigation guardian's statement under Rule 36.07 is delivered to the person, in the names of the child, or the person who is not capable of managing their affairs, and the litigation guardian in the manner shown in this example: “John Smith by his litigation guardian, Mary Smith”;
  - (b) otherwise, in the name of the child, or the person who is not capable of managing their affairs, alone.
- (4) A party who starts a proceeding, without a named guardian, against a child or a person who is not capable of managing their affairs and who is, or becomes, aware of the age or incapacity of the other party may only take the following further steps in the proceeding until a litigation guardian's statement is filed or a judge appoints a litigation guardian:
  - (a) taking steps necessary to start the proceeding;
  - (b) giving notice of the proceeding in accordance with Rule 31 - Notice;
  - (c) making a motion for the appointment of a litigation guardian.
- (5) The heading of a proceeding started in the name of a child, or a person who is not capable of managing their affairs, without a guardian must refer to the litigation guardian after a litigation guardian's statement is filed or an order is made appointing a litigation guardian.

### **Becoming litigation guardian**

- 36.07 (1)** A guardian of a child under the *Guardianship Act* must start, defend, contest, or respond to a proceeding involving the child, in the name of the child and by the guardian, unless a judge orders that another person act as litigation guardian.

- (2) For the purpose of subsection 10(3) of the *Incompetent Persons Act*, a guardian under that legislation must start, defend, contest, or respond to a proceeding involving the person who is the subject of a guardianship order, in the name of the person and by the guardian, unless a judge orders that another person act as litigation guardian.
- (3) In all other instances, a person may become the litigation guardian by filing a litigation guardian's statement.
- (4) The litigation guardian's statement must include one of the following kinds of headings:
  - (a) a standard heading with the words "Intended Proceeding in the Supreme Court of Nova Scotia" instead of "Supreme Court of Nova Scotia", if the statement is signed before a proceeding is started;
  - (b) the standard heading of the proceeding, modified if necessary to add the litigation guardian's name and title.
- (5) The litigation guardian's statement must be entitled "Litigation Guardian's Statement", be signed personally by the litigation guardian, and include all of the following:
  - (a) the guardian's consent to be litigation guardian for the party;
  - (b) a description of the litigation guardian's relationship to the party;
  - (c) confirmation the litigation guardian has appointed counsel for the party;
  - (d) a representation that the litigation guardian has no interest in the proceeding adverse to that of the party;
  - (e) an acknowledgment that costs are normally awarded for or against a party rather than the party's litigation guardian, but that a litigation guardian may be liable for costs if the guardian abuses the court's processes.
- (6) The litigation guardian's statement may be in Form 36.07.

**Replacing or discharging litigation guardian**

**36.08 (1)** A judge may appoint, discharge, or replace a litigation guardian.

- (2) A litigation guardian for a child ceases to have authority when the party ceases to be a child, and the party must make a motion to amend the heading to remove the reference to the guardian.

### **Duties of litigation guardian**

- 36.09** (1) A litigation guardian may make any decision a party could make in a proceeding except the litigation guardian must make decisions according to what, in like circumstances, a reasonable person would do in the person's own interests.
- (2) The litigation guardian of a child sixteen or more years of age must keep the child informed of the proceeding, consult the child before making decisions that affect the child, and encourage the child to consult directly with counsel.
  - (3) A litigation guardian who, despite the litigation guardian's statement, has an interest in the proceeding adverse to that of the represented party must obtain the appointment of a replacement guardian or make a motion for directions.
  - (4) All duties of a party in a proceeding must be discharged by the litigation guardian on behalf of the party.
  - (5) A litigation guardian for a child must advise each other party of the child's date of birth.
  - (6) A litigation guardian for a person who is not capable of managing their affairs must advise each other party of the details of the disability and any orders or decisions of a judge, court, or tribunal regarding the party and the incapacity.

### **Representative of unknown persons**

- 36.10** (1) In a proceeding concerning the administration of an estate of a deceased, property subject to a trust, or the interpretation of an instrument or legislation, a judge may appoint a person to be a party to represent any of the following persons:
- (a) unborn and other unascertained persons;
  - (b) the members of a class who may have a future, contingent, or unascertained interest in a subject of the proceeding;
  - (c) persons who may be affected by the proceeding but cannot reasonably be identified or found.
- (2) An order in a proceeding in which a person is represented under this Rule 34.10 binds the represented person.

### **Executor, administrator, or trustee**

- 36.11 (1)** An executor, administrator, or trustee may bring a proceeding for the benefit of an estate without joining a beneficiary as a party, and a person may bring a proceeding against an executor, administrator, or trustee without joining a beneficiary, except a beneficiary is required to be a party in each of the following kinds of proceedings:
- (a) proof of a will in solemn form;
  - (b) a proceeding in which a will or trust instrument is to be interpreted, if the interpretation may affect the interests of the beneficiary;
  - (c) a proceeding in which the executor, administrator, or trustee claims against the beneficiary, or the beneficiary claims against the executor, administrator, or trustee;
  - (d) an application to remove an executor, administrator, or trustee;
  - (e) an application for the court to appoint a new executor, administrator, or trustee, or for court administration of an estate, or for the execution of a trust.
- (2)** Two or more executors of the estate of the same deceased may join as plaintiffs, applicants, applicants for judicial review, or appellants, or one must join the other as a defendant or respondent.
- (3)** A proceeding is properly commenced against an executor or administrator before the grant of probate or administration, if the grant is subsequently obtained.

### **Representative of deceased person's estate**

- 36.12 (1)** A judge may appoint a person to be a party representing the estate of a deceased person whose estate has no executor, administrator, or other personal representative.
- (2)** An order in the proceeding binds the estate to the same extent as it would do so had an executor, administrator or other personal representative been a party.
- (3)** A judge may replace a representative party with an executor, administrator, or other personal representative who is appointed, or whose appointment becomes known, after the representative party is appointed.
- (4)** A failure to name a representative of an estate, or a failure to secure the appointment of a representative and name that party, may be corrected under Rule 35.08, of Rule 35 - Parties.

### **Settlement by representative**

- 36.13 (1)** A person who requires the approval of a judge for a settlement on behalf of, or for the benefit of, another person may seek the approval by making a motion in a proceeding or, if there is no proceeding, by starting one under Rule 5 - Application.
- (2)** All of the following are necessary parties to an application for an order approving a settlement:
- (a)** as applicant, the personal representative or, if there is no personal representative, a litigation guardian and the child or person who is not capable of managing their affairs;
  - (b)** as respondent, the other party to the settlement.
- (3)** The motion or application must be supported by an affidavit providing all of the following evidence, unless a judge directs otherwise:
- (a)** the material facts and expert opinions, both of which may be sworn to or affirmed on information and belief;
  - (b)** the proposed terms of settlement;
  - (c)** counsel's opinion or, a lawyer's opinion provided to a representative who is permitted to act on their own, that the settlement is in the best interests of the represented party;
  - (d)** the grounds for the opinion expressed by counsel, or another lawyer, in detail;
  - (e)** the guardian's or litigation guardian's position on the settlement.
- (4)** The affidavit evidence in a proceeding in which a child is a party must include all of the following additional information, unless a judge directs otherwise:
- (a)** proof of the child's date of birth by birth certificate, or by other means if a birth certificate cannot be obtained;
  - (b)** the consent of a child who is sixteen years of age or more, or the reason consent is not given and the reason for not leaving the proceeding in abeyance until the child is nineteen years of age.

- (5) The affidavit evidence in a proceeding for personal injuries suffered by a represented party must include all of the following information, unless a judge directs otherwise:
- (a) a report containing a medical opinion, grounds, and all other information necessary to determine the status of the injuries and prognosis for recovery;
  - (b) a report updating the report containing the medical opinion, if further relevant information comes to light;
  - (c) the opinion of counsel, or the opinion of a lawyer provided to a representative who is permitted to act on their own, on the amount a court would likely award under each head of damages put forward on behalf of the represented party, including, if applicable, pain and suffering and loss of amenities of life, loss of past income, loss of future income earning capacity, loss of ability to do valuable but unpaid work, actual and future medical expenses, actual care expenses, future cost of care, out of pocket expenses, and prejudgment interest.
  - (d) counsel's assessment of the risk in proceeding to trial or hearing, or the assessment of a lawyer provided to a representative who is permitted to act on their own.
- (6) A judge may approve a settlement, including a structured settlement, if the judge is satisfied the settlement is in the best interests of the represented party, and any fund or property for the represented party is adequately protected by the terms of a trust.

### **Trust for represented party**

- 36.14 (1)** A judge who approves a settlement that produces a fund or other property for the represented party must order that the fund or property be held in trust, and appoint a trustee.
- (2) The person who seeks approval of the settlement must file each of the following documents:
- (a) a draft order that includes all the proposed terms of the trust;
  - (b) the proposed trustee's undertaking to account to the court and to the represented party, including by filing and delivering a statement of receipts and disbursements when a judge directs, when the trust terminates, and, if the represented party is a child, no more than six months after the represented party's nineteenth birthday;

- (c) a certificate signed by a lawyer, who may be counsel, that the lawyer explained to the proposed trustee the duties the trustee would have under the order and the undertaking.
- (3) The trust must include terms for all of the following:
- (a) appointment of the litigation guardian, or some other fit person, as trustee;
  - (b) payment of the trustee's fees and expenses;
  - (c) payments for the benefit of the represented party, including a specific description of the kinds of payments that may be made;
  - (d) safe investment of trust funds, or provisions for the safekeeping of other property;
  - (e) variation of the trust on motion of an interested person;
  - (f) termination of the trust and distribution to the represented party if a represented child turns nineteen, or a represented person who was not capable of managing their affairs becomes capable and the guardian is discharged;
  - (g) compliance with the undertaking to account to the court and the represented party.
- (4) The terms of trust must require a bond in an amount one and one quarter times the amount of the trust fund, or the value of the trust property, provided either by a recognized surety company or by the trustee and one or more sureties who justify by affidavits showing total net worth in the amount of the bond.
- (5) A judge who is satisfied on either of the following may waive the requirement for a bond or sureties:
- (a) the trustee has put up alternate security of sufficient value;
  - (b) the amount involved is such that the trustee's personal liability is sufficient.

#### **Approval of counsel's accounts**

- 36.15 (1)** Counsel who is to be paid by a represented party from a fund owned directly or beneficially by a represented party, or from funds of an estate, must make a motion for a judge to allow counsel's account, unless the instrument or other authority under which the representative was appointed provides otherwise.

- (2) The motion must be supported by an affidavit providing evidence of all of the following:
  - (a) the terms of retention and, if the terms included payment on a contingency, a copy of the contingency agreement;
  - (b) a description of the services rendered by counsel, including, unless a judge permits a summary, the date, amount of time, and description of each service;
  - (c) details of the disbursements;
  - (d) counsel's usual hourly rate, if counsel has established an hourly rate;
  - (e) the hourly rate charged on the account, if counsel charges the representative party by the hour;
  - (f) an explanation of the risks undertaken by counsel, if the retention was on a contingency;
  - (g) a copy of the account, which may include an amount required to conclude counsel's work.
- (3) The affidavit may provide other relevant information, such as information for evaluating counsel's charges based on results achieved, skill, experience, and timeliness.
- (4) A representative may make a motion for directions about an account submitted by counsel.

#### **Approval of representative's accounts**

- 36.16** (1) A representative who wishes to be paid for services from a fund owned directly or beneficially by the represented party must make a motion for permission to make the payment.
- (2) A representative who has expended the represented party's funds, proposes to expend the funds, or wishes to be reimbursed from the funds may make a motion to approve the representative's receipts and disbursements.
  - (3) A representative who does not have authority to pay themselves, or to make expenditures without court approval, must make a motion for allowance of an account for services and approval of an account for receipts and disbursements.

## **Rule 37 - Consolidation and Separation**

### **Scope of Rule 37**

**37.01** A judge may consolidate proceedings, trials, or hearings or may separate or sever parts of a proceeding, in accordance with this Rule.

### **Consolidation of proceedings**

**37.02** A judge may order consolidation of proceedings if the proceedings to be consolidated are of the same kind, that is to say, actions, applications, applications for judicial review, or appeals, and one of the following conditions is met:

- (a) a common question of law or fact arises in the proceedings;
- (b) a same ground of judicial review or appeal is advanced in the applications for judicial review or appeals and the ground involves the same or similar decision-makers;
- (c) claims, grounds, or defences in the actions or applications involve the same transaction, occurrence, or series of transactions or occurrences;
- (d) consolidation is, otherwise, in the interests of the parties.

### **Proceedings to be tried or heard together**

**37.03** A judge may order that proceedings be tried or heard together, or in sequence.

### **Issues to be tried or heard together**

**37.04 (1)** A judge may order common issues in two or more proceedings be tried, or heard, together.

- (2) The judge who orders the trial, or hearing, together of common issues may provide times for the trial, or hearing, of the separate issues.

### **Separating parts of a proceeding**

**37.05** A judge may separate parts of a proceeding for any of the following reasons:

- (a) a party joined a party or claim inappropriately;
- (b) although appropriately joined in the first place, it is no longer appropriate for the party or claim to be joined with the rest of the parties and claims in the proceeding;

- (c) the benefit of separating the party or claim from another party or claim outweighs the advantage of leaving them joined.

**Directions**

**37.06**

A judge who orders consolidation of proceedings, trials, or hearings or separates parts of a proceeding may give directions for the course of a proceeding in which the order is made, including directions on any of the following subjects:

- (a) in an action, the status of each party as plaintiff, defendant, third party or intervenor;
- (b) in an action, the status of each claim as main claim, counterclaim, crossclaim or third party claim;
- (c) amendments;
- (d) place of the proceeding, trial, or hearing.