

Part 4 - Alternate Resolution or Determination

Rule 10 - Settlement

Scope of Rule 10

- 10.01 (1)** This Rule applies to a settlement of a proceeding or a claim in a proceeding, and includes both of the following:
- (a) a formal way to make an offer that may affect how costs are awarded;
 - (b) judge-assisted alternative dispute resolution that is voluntary and flexible.
- (2)** This Rule does not cover approval of a settlement by a judge such as that provided for in Rule 36 - Representative Party.
- (3)** Nothing in this Rule makes a judge a compellable witness, or diminishes judicial immunity from civil claims.

Release-bar and third party beneficiary rules

- 10.02 (1)** A settlement with one party of a claim in a proceeding does not release any other party against whom the claim is made, unless the party making the claim expressly agrees to release the other party.
- (2)** An express agreement to release another party may be enforced by that other party although the other party is not a party to the agreement.

Settlement offers and costs

- 10.03** A judge who determines costs may take into consideration a written offer of settlement made formally under this Rule or otherwise, unless the offer was made at a settlement conference or under an agreement that the offer would not be admissible in relation to costs.

Disputes about settlement agreements

- 10.04 (1)** A party who alleges that, after a proceeding was started, the parties reached agreement for settlement of the proceeding, or a claim in a proceeding, may make a motion for an order giving effect to the agreement.
- (2)** The judge who hears the motion may do any of the following:
- (a)** declare that an agreement was, or was not, made and is, or is not, enforceable;
 - (b)** declare the terms of an agreement;
 - (c)** grant an order enforcing an agreement according to its terms;
 - (d)** order a trial under Rule 4 - Action or a hearing under Rule 5 - Application and give directions about the issues to be determined.
- (3)** If it is alleged that an agreement was reached during a settlement conference and in the presence of a settlement conference judge, a motion under this Rule 10.04 must be made to the settlement conference judge, unless the judge directs otherwise.
- (4)** The settlement conference judge may take into account the judge's own knowledge of what took place at the conference, as well as the evidence presented by the parties.
- (5)** A judge may grant an order enforcing an arbitration award or a mediated agreement disposing of a claim in a proceeding if both of the following apply:
- (a)** after the proceeding was started, the parties agreed to submit the claim to arbitration or mediation;
 - (b)** either the award or mediated agreement disposes of all claims in the proceeding or the claim is severed under Rule 37- Consolidation and Separation and the award or mediated agreement disposes of the claim.

Formal offer to settle an action

- 10.05 (1)** A party who makes a formal offer to settle under this Rule 10.05 may take advantage of the applicable provisions for costs in Rules 10.08 and 10.09.
- (2)** A party may make a formal offer to settle an action, or a counterclaim, cross-claim or third party claim within an action, by delivering an offer to settle.

- (3) An offer to settle must include the heading of the action, and the title of the document, "Offer to Settle".
- (4) The offer must include terms that would settle all claims in the proceeding between the party making the offer and the party to whom it is made, and the term that would settle costs must provide for one of the following:
 - (a) payment on acceptance of an amount stated in the offer;
 - (b) payment of an amount for costs to be determined by a judge;
 - (c) an option for the other party to choose between a stated amount or determination by a judge.
- (5) The offer to settle must also contain both of the following terms:
 - (a) it is open for acceptance until it is withdrawn or the trial begins;
 - (b) it may be accepted only by delivery of a written acceptance to the party making the offer.
- (6) A party who claims against another party may deliver an offer to settle in Form 10.05A if all of the claims are monetary, or Form 10.05B if all of the claims are not monetary.
- (7) A party against whom a claim is made may deliver an offer to settle in Form 10.05C if all of the claims are monetary, or Form 10.05D if all of the claims are not monetary.

Withdrawal or expiry of formal offer to settle

- 10.06 (1)** A party who makes a formal offer to settle may withdraw the offer at any time by delivering to the other party a written withdrawal.
- (2) A formal offer to settle remains open for acceptance although the other party makes an offer to settle on other terms.

Remedy for breach

- 10.07 (1)** A party to a settlement agreement resulting from a formal offer to settle may do either of the following, if the other party fails to perform the agreement:
- (a) move for judgment for damages, or any other remedy arising from the breach of the settlement agreement;
 - (b) continue the action as if there had been no settlement agreement.

- (2) The party not in breach of the agreement may also recover judgment against the party in breach for all reasonable expenses of attempting to perform the agreement and seeking performance.

Determining costs if formal offer accepted

- 10.08 (1)** A judge who determines costs under an accepted, formal offer to settle that was delivered by the party who started a proceeding must award costs to that party.
- (2) A judge who determines costs under an accepted formal offer to settle that was delivered by the party against whom the proceeding was started must award costs as follows, unless an injustice would result:
 - (a) to the party who started the proceeding, recoverable disbursements incurred and a contribution towards the cost of work done until the offer was delivered; and
 - (b) to the party who made the offer, recoverable disbursements incurred and a contribution towards the cost of work done between the delivery of the offer and the delivery of the acceptance.

Costs if formal offer not accepted

- 10.09 (1)** A party obtains a “favourable judgment” when each of the following have occurred:
- (a) the party delivers a formal offer to settle an action, or a counterclaim, cross-claim or third party claim within an action, at least one week before a trial;
 - (b) the offer is not withdrawn or accepted;
 - (c) a judgment is given providing the other party with a result no better than that party would have received by accepting the offer.
- (2) A judge may award costs to a party who starts, or who successfully defends, a proceeding and obtains a favourable judgment, in an amount based on the tariffs increased by one of the following percentages:
 - (a) one hundred percent, if the offer is made less than thirty days after pleadings close;
 - (b) seventy-five percent, if the offer is made more than thirty days after pleadings close and before setting down;

- (c) fifty percent, if the offer is made after setting down and before the finish date;
 - (d) twenty-five percent, if the offer is made after the finish date.
- (3) A judge may award costs in one of the following amounts to a party who defends a proceeding, does not fully succeed, and obtains a favourable judgment:
- (a) the amount that the tariffs would provide had the party been successful, if the offer is made less than thirty days after pleadings close;
 - (b) seventy-five percent of that amount, if the offer is made more than thirty days after pleadings close and before setting down;
 - (c) sixty percent of the amount, if the offer is made after setting down and before the finish date;
 - (d) nothing, if the offer is made after the finish date

Formal offer of contribution

- 10.10 (1)** A party may deliver a formal offer of contribution in an action, or a counterclaim, cross-claim, or third party claim within an action.
- (2) A formal offer of contribution must refer to this Rule 10.10.
- (3) A judge may take a formal offer of contribution into account when determining costs.

Settlement Conference

- 10.11 (1)** A settlement conference may be organized at any stage of a proceeding, if the party making a claim and the party against whom the claim is made agree to participate.
- (2) The court may provide either of the following kinds of settlement conference:
- (a) an ordinary settlement conference, at which the parties may request a judge to express opinions on the issues in dispute, after reading excerpts from discoveries, other documentary evidence and briefs, and hearing submissions;
 - (b) a trial-like settlement conference, at which the parties request a judge to express opinions after hearing some witnesses being questioned, in addition to reading materials and hearing submissions.

Procedures for settlement conference generally

- 10.12 (1)** A judge may adopt any procedure for a settlement conference, and the adopted procedure prevails over procedures provided by this Rule 10.
- (2)** A party may propose a procedure for a settlement conference to a judge scheduling the settlement conference or the settlement conference judge in any of the following ways:
- (a)** at the conference for scheduling the settlement conference;
 - (b)** at an organizing conference requested by a party or required by the settlement conference judge;
 - (c)** by correspondence, if all parties agree to the proposed procedure;
 - (d)** at a conference called to organize a trial-like settlement conference;
 - (e)** at the settlement conference.
- (3)** A party who participates in a settlement conference must do each of the following:
- (a)** submit a brief, book of authorities, and book of evidence on time;
 - (b)** prepare adequately for the conference;
 - (c)** disclose the party's case or defence in written submissions and discussions;
 - (d)** attend the conference personally if the party is an individual or, if the party is an individual who cannot attend or a corporation, authorize an agent to bind the party to terms of settlement;
 - (e)** if the party authorizes an agent, arrange for the agent to attend the conference or, if the settlement conference judge permits, to be in communication with counsel and able to authorize counsel to bind the party to terms of settlement.
- (4)** The judge may order a party who participates in a settlement conference and does not comply with Rule 10.12(3) and, as a result, causes the settlement conference to be cancelled, to indemnify the other parties for the expenses of the conference.
- (5)** A judge may order a party who cancels a settlement conference after another party incurs expenses for the conference to indemnify the party for the expenses.

Ordinary settlement conference

- 10.13 (1)** Each party who participates in an ordinary settlement conference must submit all of the following to the settlement conference judge at least five days before the conference, unless the judge directs otherwise:
- (a) a brief that complies with Rule 40 - Brief and this Rule 10.13;
 - (b) a book of authorities that complies with Rule 40 - Brief;
 - (c) a book of evidence containing excerpts from discovery examinations, documentary productions, plans and expert's reports only to the extent necessary for the party to make whatever points the party wishes to make at the settlement conference.
- (2)** A brief must include the party's position on the issues to be decided and on any proposals for settlement that have been made.
- (3)** The book of evidence must conform with all of the following standards:
- (a) reproduction must be as legible as possible;
 - (b) the book must contain an index that describes each document and refers to its tab or page number;
 - (c) the material must be edited to ensure the judge reads evidence essential to the points being made, and no more.
- (4)** The following agenda applies at an ordinary settlement conference, unless the parties agree, or the settlement conference judge directs, otherwise:
- (a) meet in a conference room or courtroom, not on record and not open to the public;
 - (b) each party refers to any further evidence in response to the other party's book of evidence;
 - (c) each party gives concise submissions on the issues in dispute and the party's position on settlement;
 - (d) the judge has the opportunity to ask questions and may require an adjournment to reflect on the submissions;
 - (e) the judge meets with the parties or counsel, together or in caucus;

- (f) at an appropriate time, the judge expresses opinions on the issues in dispute, or explains why the judge is unable to formulate an opinion.

Trial-like settlement conference

10.14 (1) Unless the judge directs otherwise, each party who participates in a trial-like settlement conference must, at least fourteen days before the conference, submit to the settlement conference judge the same materials required for an ordinary settlement conference and the brief must include all of the following additional information:

- (a) a list of witnesses the party would call at trial;
 - (b) a concise summary of the testimony each is expected to give at trial;
 - (c) the name of any person the party intends to produce for questioning at the conference;
 - (d) a proposal for limits on the time to be allowed for questioning of each person at the conference.
- (2)** The settlement conference judge may convene a conference to organize the trial-like settlement conference.
- (3)** The parties may agree on, or the judge at an organizing conference may direct, any procedure for a trial-like settlement conference, including any of the following:
- (a) the time allotted for questioning;
 - (b) the time allotted for questioning each person;
 - (c) the times allotted for questioning by the party presenting the person, and by the other party;
 - (d) a will-say statement, instead of direct questioning;
 - (e) limits on subjects for questioning.
- (4)** The following agenda applies at a trial-like settlement conference, unless the parties agree, or the judge directs, otherwise:
- (a) meet in a courtroom, not on record and not open to the public;
 - (b) the judge deals with any preliminary issues;

- (c) the parties briefly describe the evidence each would present at trial;
 - (d) persons are questioned, without oath or affirmation, by the party presenting them, then the other party;
 - (e) each party gives concise submissions;
 - (f) the judge has the opportunity to ask questions and may require an adjournment to reflect on the submissions;
 - (g) the judge meets with the parties or counsel, together or in caucus;
 - (h) at an appropriate time, the judge expresses opinions on the issues in dispute, or explains why the judge is unable to formulate an opinion.
- (5) The questioning of a person at a trial-like settlement conference is only for the settlement conference judge to better assess the chances a party's position will be accepted.

Record of settlement

10.15 A judge who conducts a settlement conference at which the parties reach agreement must do all of the following, as soon as possible:

- (a) cause the provisions of the agreement to be recorded in writing or electronically;
- (b) assign responsibility to prepare an order that gives effect to the agreement;
- (c) advise the prothonotary of the affect the agreement may have on requirements for trial or hearing dates.

Confidentiality

- 10.16 (1)** The privilege attached to settlement discussions applies to all communications for or at a settlement conference.
- (2)** A judge who conducts a settlement conference may cause all or part of the conference to be recorded, and the recording must be kept confidential in the manner provided in Rule 84 - Court Records.
- (3)** Documents or correspondence for a settlement conference must not be filed with the records of the proceeding, or shown to anyone not involved with the conference.

- (4) The settlement conference judge must keep custody of the documents and correspondence and destroy them, or return them to the parties, when the judge no longer requires them.

Rule 11- Reference

Scope of Rule 11

- 11.01 (1)** This Rule provides for inquiry into a question in a proceeding by a person who is not a judge of the Supreme Court of Nova Scotia but who reports findings to the court.
- (2)** A question may be referred and the reference may be conducted, in accordance with this Rule.

Trial or hearing before a referee

- 11.02 (1)** A judge may refer a question in a proceeding to any person for inquiry and report, unless the question is for a jury in an action in which a party has elected trial by jury.
- (2)** A judge who refers a question must give directions for the payment of the referee.
- (3)** The judge may refer questions in the following kinds of proceeding:
- (a)** a motion to pass accounts by anyone obligated to submit accounts for approval by the court, such as a trustee, executor, administrator, receiver, liquidator, or guardian;
 - (b)** an accounting under Rule 66 - Account;
 - (c)** an assessment under Rule 70 - Assessment of Damages;
 - (d)** an action, application or motion that raises a question within the expertise of a referee.
- (5)** The judge may refer a question to any one of the following referees:
- (a)** a member of one of the financial professions, such as a chartered accountant, certified general accountant, certified management consultant, licensed trustee in bankruptcy, chartered business valuer, or chartered insolvency and restructuring practitioner;
 - (b)** a Nova Scotia Land Surveyor, a land surveyor qualified elsewhere, or a forester;

- (c) a member of one of the health professions such as a medical practitioner, registered nurse or occupational therapist;
- (d) a member of the engineering profession, in any of its disciplines;
- (e) a person who is knowledgeable of machines, ships, buildings, plants and their design, such as a mechanical engineer, architect, builder, electrician, plumber, carpenter, or ship surveyor;
- (f) a psychologist;
- (g) a social worker;
- (h) a lawyer;
- (i) anyone with skills or knowledge to determine the question.

Land Registration Act

11.03 (1) A party may move for the reference of a question to the Registrar General under the *Land Registration Act*, or a person recommended by the Registrar General, if all of the following apply:

- (a) the question arises in an application for a declaratory judgment to determine land title or boundaries;
 - (b) the application is brought by notice of application (in court);
 - (c) the declaratory judgment and claim for costs are the only remedies sought in the application;
 - (d) the Registrar General does not have to answer the same question in making any decision, or taking any action, within the supervisory or appellate jurisdiction of the court;
 - (e) the Registrar General is not a party to a proceeding in which the same question must be decided by the court, or considered by the court on judicial or appellate review.
- (2)** The notice of application (in court) must, in addition to all that is required by Rule 5.03(2) of Rule 5 - Application, provide notice that, on the motion for directions and setting a date, the applicant will move for a reference to the Registrar General or the Registrar General's nominee.

- (3) The affidavit in support of the motion for directions must include evidence for the reference.

Nomination, terms for payment, and consent

- 11.04 (1) A party seeking the appointment of a referee must propose terms for the selection and payment of the referee.
- (2) An order appointing a referee takes effect when the referee files a consent.

Terms of reference

- 11.05 (1) A judge may give directions for the conduct of the inquiry before the referee.
- (2) Each of the following apply, unless a judge gives directions otherwise:
 - (a) a referee conducting an inquiry has the same powers as a judge conducting a hearing, except to issue a contempt order;
 - (b) the referee shall conduct the inquiry with the same impartiality and independence required of a judge;
 - (c) the inquiry must be recorded and the exhibits must be kept by the referee until they are turned over to the court;
 - (d) the referee may direct the place and time of the inquiry, including adjournments.
- (3) These Rules apply on an inquiry, as if the referee were a judge.
- (4) The referee shall report within six months of the conclusion of the inquiry, unless a judge directs otherwise.

Report

- 11.06 (1) The referee shall prepare, file and deliver to all parties a report stating the referee's findings.
- (2) The referee shall state the reasons for the findings, and may make the statement in one of the following ways:
 - (a) giving an opinion orally when the inquiry is finished;
 - (b) giving opinions through the course of the inquiry, if a series of opinions is called for;

- (c) reserving a question and delivering the opinion in writing before or with the report.
- (3) The referee shall cause all exhibits introduced at the inquiry, a list of the exhibits, and a complete recording of the inquiry to be transmitted to the prothonotary.
- (4) Delivery of the report discharges the referee, unless a judge orders otherwise.

Response to report

11.07 (1) A judge may do any of the following, after the referee files a report:

- (a) adopt the report in whole or in part;
 - (b) vary or reverse any finding stated in the report;
 - (c) reinstate the reference, and direct the referee to provide a supplemental report;
 - (d) reinstate the reference, and remit it to the referee, or a new referee, to take further evidence and provide a supplemental report;
 - (e) give directions for the conduct of a reinstated reference;
 - (f) give judgment.
- (2) A judge may receive evidence in contradiction of the referee's findings of fact or the referee's conclusions, if the reception of the evidence would meet the requirements for admission of fresh evidence before the court of appeal under Rule 90 - Civil Appeal.

Various powers of a judge

11.08 (1) A judge may give directions controlling the conduct of a reference at anytime before the referee reports.

- (2) On motion of the referee, a judge may give an opinion on any question of law, or provide guidance to the referee.
- (3) A judge may replace a referee.

Rule 12 - Question of Law

Scope of Rule 12

- 12.01 (1)** A party may, in limited circumstances, seek the determination of a question of law before the rest of the issues in a proceeding are determined, even though the parties disagree about facts relevant to the question.
- (2)** A party may seek to have a question of law determined before the trial of an action or hearing of an application, in accordance with this Rule.

Separation

12.02 A judge may separate a question of law from other issues in a proceeding, and provide for its determination before trial or hearing, if all of the following apply:

- (a)** the facts necessary to determine the question can be found without the trial or hearing;
- (b)** the determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;
- (c)** no facts to be found in order to answer the question will remain in issue after the determination.

Determination

- 12.03 (1)** A judge who orders separation may determine the question of law when separation is ordered or direct another hearing.
- (2)** The judge's directions for another hearing may include any of the following:
- (a)** the time, date, and place of the hearing;
 - (b)** whether it will be held in chambers or court;
 - (c)** the wording of the question to be determined;
 - (d)** dates for filing a further affidavit, statement of agreed facts, or brief;
 - (e)** cross-examination on an affidavit.

Rule 13 - Summary Judgment

Scope of Rule 13

- 13.01 (1)** This Rule allows a party to move for summary judgment on the pleadings that are clearly unsustainable and to move for summary judgment on evidence establishing that there is no genuine issue for trial.
- (2)** A frivolous, vexatious, scandalous, or otherwise abusive pleading may be dealt with under Rule 88 - Abuse of Process.

Interpretation

13.02 In this Rule 13,

“action” includes application, except the phrase “cause of action” has its ordinary meaning as a basis for an action or application;

“defendant” means a party against whom a claim is made and who defends the claim by defence, defence to counterclaim, defence to crossclaim, defence to third party statement of claim, or notice of contest;

“plaintiff” means a party who makes a claim by a statement of claim, counterclaim, crossclaim, third party statement of claim, or notice of application;

“statement of claim” means all or part of a statement of claim and includes all or part of a third party statement of claim, counterclaim, crossclaim, and the grounds in a notice of application;

“statement of defence” means all or part of a statement of defence and includes all or part of a statement of defence in answer to a statement of claim, counterclaim, crossclaim, or third party statement of claim, and the grounds in a notice of contest;

“trial” includes hearing of an application.

Summary judgment on pleadings

- 13.03 (1)** A judge must set aside a statement of claim, or a statement of defence, that discloses no cause of action or basis for a defence or contest, makes a claim based on a cause of action in the exclusive jurisdiction of another court, or otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

- (2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:
 - (a) judgment for the plaintiff, when the statement of defence is set aside wholly;
 - (b) dismissal of the proceeding, when the statement of claim is set aside wholly;
 - (c) allowance of a claim, when all parts of the statement of defence pertaining to the claim are set aside;
 - (d) dismissal of a claim, when all parts of the statement of claim that pertain to the claim are set aside.
- (3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of, or opposition to, the motion.
- (4) A judge who hears a motion for summary judgment on pleadings may adjourn the motion until after the judge hears a motion for an amendment to the pleadings.
- (5) A judge who hears a motion for summary judgment on pleadings and who is satisfied on both of the following may determine a question of law:
 - (a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination;
 - (b) the outcome of the motion depends entirely on the answer to the question.

Summary judgment on evidence

- 13.04 (1)** A judge must grant summary judgment if evidence, or the lack of evidence, shows that a statement of claim or defence, or part of either statement, fails to raise a genuine issue for trial.
- (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
 - (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.

- (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the respondent, affidavit filed by another party, or cross-examination.
- (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
- (6) The motion may be made after pleadings close.

Damages may be determined

- 13.05** (1) A judge hearing a motion for summary judgment on evidence must grant judgment for an amount to be determined, if the only genuine issue for trial is the amount to be paid on the claim.
- (2) The judge may determine the amount, or order an assessment, accounting or reference.

Order for summary judgment

- 13.06** (1) A judge making an order for summary judgment on evidence may grant any order the court may grant on trial or hearing.
- (2) The judge may stay an order for summary judgment pending the outcome of a related proceeding.

Conference or hearing after dismissal

- 13.07** (1) A judge who dismisses a motion for summary judgment on evidence brought in an action must, as soon as is practical after the dismissal, arrange to give directions, unless all parties waive this requirement.
- (2) The judge may provide directions for the conduct of the proceeding, including directions that do any of the following:
 - (a) restrict discovery in view of disclosure made through an affidavit or cross-examination on an affidavit;
 - (b) narrow the issues to be tried by identifying facts not in dispute;
 - (c) regulate disclosure or production of documents, electronic information, or other evidence;
 - (d) permit any evidence on the motion for summary judgment to stand as evidence at trial;
 - (e) provide for a speedy trial;

- (f) provide for a hearing, rather than a trial, under Rule 6 - Choosing between Action and Application.