TYPES OF MOTIONS

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A motion provides the mechanism for a party in litigation to obtain the court's direction on a limited issue prior to trial. Motions can be used to resolve procedural disputes that arise between parties as they prepare for trial, and can also be used to obtain preliminary orders restricting or limiting the scope of the issues which will ultimately proceed to trial. In certain circumstances, the disposition of a motion may have the effect of substantially or entirely resolving the dispute between the parties. Properly used, motions can expedite and help to control the cost and duration of litigation.

By definition, a motion is an interim hearing during the process of litigation. A motion is not an originating process. A party initiates a motion for the purpose of obtaining an order directing that some act be done in favour of the applicant, or otherwise ruling on some matter at the request of the applicant. Prior to 1985, motions were referred to as "interlocutory motions", and when the revisions to the *Rules of Civil Procedure* occurred, they were simply referred to as motions.[1]

There are some extenuating circumstances in which a motion may be brought where there has yet to be an originating process initiated. Rule 37.17 provides a mechanism in which a party may make a motion before commencement of a proceeding in an "urgent" situation, and only on the basis that the party bringing the motion undertake to commence the proceeding as soon as practicable. Similarly, where leave to commence a proceeding is required, that leave is obtained on a motion (see Rule 14.01(1)).

Before discussing the most common types of motions that are argued, it is important to address the different forms that motions may take. Most motions are "on notice". This means that the moving party advises the responding party that they will be making a motion for some relief. Motions on notice can either be "on consent", which means that all parties have consented to the motion being heard; "unopposed", which means that a party does not specifically consent to the motion but does not oppose it either; and "contested", which means that the responding party opposes the motion in its entirety. There are some situations in which a motion may be made *"ex parte"*, that is, without notice to the opposing party. This may be because the responding party has been noted in default, and as such, is not entitled to notice about the proceedings, as per Rule 19.02(3). There may be an instance where an *ex parte* motion is made to ensure that a

[1] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

responding party does not destroy evidence required. There may be a concern that if a party was given notice about a motion, that they make take steps to prohibit the exact remedy that is being sought. In a motion that is *ex parte*, the court will go to great lengths to ensure that there is "full and frank disclosure of all material facts" (Rule 39.01(6)). A failure to make such a disclosure may result in the court setting aside the order obtained on the motion.

Motions that are brought on consent, unopposed or brought without notice are generally dealt with "over the counter" in writing, unless the court orders otherwise (Rule 37.12.1(1). Motions that are opposed are generally heard in person, although Rule 37.12.1(4) contains a provision permitting a motion to be made in writing where "the issues of fact and law are not complex."

A judge has jurisdiction to hear any motion in a proceeding. Different regions have different practices determining whether judges will hear certain motions falling within the jurisdiction of a master.

A master's jurisdiction to hear motions is more limited than a judge's and does not extend to the following types of motions (Rule 37.02(2)):

a. a motions where the power to grant the relief sought is conferred expressly on a judge by a statute or rule;
b. a motion to set aside, vary or amend an order of a judge;
c. a motion to abridge or extend a time prescribed by an order that a master could not have made;
d. a motion for judgment on consent in favour or against a person under a
e. disability;
f. a motion relating to the liberty of the subject;
g. a motion under section 4 or 5 of the *Judicial Review Procedure Act*; or
h. a motion in an appeal.

The registrar is directed to make orders granting relief on certain kinds of motions pertaining to administrative matters, provided the motions are on consent, and provided that no party affected by the order is under a disability.

There are a number of common motions that typically arise in the course of an action. I will discuss a few of these, and detail what they are intended to accomplish, as well as the basic components of each.

The first common type of motion is the motion to compel undertakings. Once an examination for discovery has been completed, there are typically a number of undertakings given during the examination that each side promises to produce. Within the scope of oral examination, the person being examined must agree to answer, to the best of his or her knowledge, information and belief, any proper question relating to any matter in issue in the action (*Rule 31.06(1)).* If a person fails to answer undertakings given in an examination, a motion is commonly brought to compel that person to answer undertakings by a certain date. This type is motion is usually brought along with a motion regarding refusals during the examination. If an undertaking or refusal is not answered within 60 days of being given, it is deemed not to have been answered according to Rule 31.07. Sanctions for failing to provide proper disclosure in the context of discovery include the requirement that a party reattend to be examined. The court also has the ability to dismiss a party's action or strike the defence of a party who is in default (Rule 34.15). It is unlikely that the court will resort to these severe sanctions without first making an order to compel the unco-operative party to comply with disclosure requirements under the *Rules*.

With both undertakings and refusals motions, when submitting the materials to be used on the motion, the moving party must also submit an Undertaking and Refusals chart, as specified in Rule 37.10. This chart must be served on every party to the motion and filed at least three days prior to the date of the motion. The chart (Form 37C) sets out the specifics of the refusal or undertaking, the question number and the page that the question appears on, and the exact words of the question asked. The responding party must serve and file, at least two days prior to the hearing of the motion, a copy of the undertakings and refusals chart served by the moving party that indicates the answer provided, or the reason for the refusal to answer or provide the undertaking.

Another very common type of motion is the motion to compel a non-party to produce documents. This is most often referred to as a "30.10 Motion", as it refers to the rule number of the *Rules of Civil Procedure* that governs this type of production. Rule 30.10 permits a court to order production of documents from a party who is not a party to a proceeding when a number of factors are present. First, the document must not be privileged. Second, the document must be relevant to the proceeding. Third, a court may order the production of documents from a non-party if it would be unfair for the moving party to proceed without documentary discovery (*Ballard Estate)*[2]. The order is made on a motion, with notice to all parties, including the non-party. The document does not need to be vital or crucial to the moving party's case, but it must be determined to be unfair for

[2] Ontario (A.G.) v. *Ballard Estate*, [1995] O.J. No. 3136 (C.A.)

them to proceed without it[3]. The *Ballard* case indicates that there is a general presumption against production from non-parties. The court will consider a number of factors in considering a motion under Rule 30.10, as per *Ballard*. The court will consider the importance of the documents to the litigation, as well as the question of whether production at discovery, rather than at trial, is necessary to avoid unfairness. The court will also consider whether discovery of the opposing party on the issues relating to the third party documents was adequate, and if not, who should be faulted for the inadequacy. The court will also look at the position of each party with regards to nonproduction. Additionally, the court looks at the availability of the documents from other sources accessible to the moving party. Finally, the court will look at whether the third parties are truly strangers to the litigation, or if they have some interest, and if so, whether there is an interest that is adverse to that of the moving party. Often, to address these questions, the motions judge will need to examine the documents in question.

Summary Judgment is another common form of motion brought under Rule 20. I understand that another speaker will be speaking in depth on this issue, so I will leave it to them to provide detailed information about that form of motion. I will state, that summary judgment is available to both the plaintiff in an action, as well as a defendant. Where the court is satisfied that there is no genuine issue for trial, a summary judgment motion will dispense with the need for a trial, thus streamlining the litigation considerably.

Another common form of motion is a motion under Rule 37.14 to set aside, vary, or amend an order. Under this rule, a party who may have had an order issued against them without notice, or had failed to appear on a motion through accident or insufficient notice, may make a motion to have the order set aside. Three types of orders are contemplated by this rule. First, in respect of orders of the registrar, motions may be made to either a judge or a master (Rule 37.14(3)). An order made by a judge may be the subject of a motion made to the judge who made it, or any other judge (Rule 37.14(4)). An order made by a master may be the subject of a motion made to either the master who made it, or to any other master or judge.

Finally, a motion to note a party into default is also common. Under Rule 19, where a defendant fails to provide a statement of defence within the time set out in the Rules, the plaintiff may have the defendant noted into default. It should be noted that a defendant who has not been noted in default, can deliver a statement of defence at any time (Rule 19.01(5)). Noting in default has a number of consequences. A defendant who is noted in

[3] *Supra*

default is deemed to admit the truth of all allegations of fact made in the statement of claim, and is not permitted, under Rule 19.02(1)(b) to deliver a statement of defence or take any other step in the action, other than the step of attempting to have the noting in default set aside, except with leave of the court or the consent of the plaintiff. Also quite importantly, a defendant noted in default may not be entitled to notice of any further step in the action, and is not required to be served with any documents, except where the court orders otherwise. There are remedies available for setting aside the noting in default, and for setting aside default judgments. These are beyond the scope of this presentation.

These are but a few of the many types of motions that are commonly used. Knowledge about the different types of motions available under the *Rules* will help you as you draft routine correspondence within the context of ongoing or contemplated litigation, and will help you to prepare a record of evidence to put before the court in the event that a motion is needed later. Once a motion is required, careful attention to drafting and constructing your motion record will help to communicate your client's position to the court in an effective and persuasive manner.