October 4, 2016

SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

NOTICE TO THE PROFESSION

SUMMARY OF PROPOSED AMENDMENTS TO FAMILY LAW RULES

As part of the Rules of Court Project, the Family Law Working Group has developed a proposed rule amendment which would repeal rules 56A and 56C, the rules currently governing family proceedings, and replace them with the *Trial Division Family Rules*, which will form Part V of the existing rules. The proposed amendments are subject to final approval by the Rules Committee of the Trial Division.

Prior to submitting these rules for final approval, the Rules Committee has asked that the draft rules be circulated to the members of the Law Society for comment. Further to this, please see the draft rules attached. **Comments on the draft are welcome until October 31, 2016.** Comments should be submitted to the Family Division's Legal Research Officer, Adrienne Ding, at the following email address: adriennеding@supreme.court.nl.ca.

To assist in the review of these rules, this memo provides a brief overview of the more significant policy changes found within the proposed *Trial Division Family Rules*, including:

(1) the ability to vary interim orders before trial;

(2) the expanded case management powers (in particular the substantive orders now possible);

(3) the summary judgment rule;

(4) the new binding settlement conference process;

(5) the informal trial rule; and

(6) the new rule allowing anything filed in the court file to be considered at trial.

Comments on those particular policy changes, in particular the proposed addition of a binding settlement conference rule, are welcome and will be taken under advisement. For convenience, an appendix containing a side-by-side version of the current and draft rules is attached.

(1) Variation of interim orders before trial (Appendix A, page 8)

The *Rules of Supreme Court, 1986* do not specifically address applications to vary interim orders in family matters. However, there is case law from this province and other jurisdictions that have found the Court has inherent jurisdiction to vary interim orders. The rules of Court in other jurisdictions, including New Brunswick, Ontario, and Prince Edward Island, provide specific procedures for variation of interim orders.

Concern has been voiced that the lack of statutory authority in relation to the variation of interim orders is problematic for judges, counsel, registry staff, and self-represented litigants as there is no guidance as to whether such an application may be made and consequently, no procedure to govern such applications. Thus, it was recommended that the rules should allow applications for the variation of interim orders.

Rule F19 of the *Trial Division Family Rules* outlines the procedure for applying to vary interim orders. The rule requires that a party must request a judge's permission to proceed with an interim application to vary an existing interim order. The rule is prescriptive and provides that a judge may only grant a party permission to apply to vary an interim order if: there has been a compelling change of circumstances since the date the order was made; there is an urgent or immediate need to hear the application as irreparable harm will likely occur before the matter can proceed to a final hearing; and either, the party has taken steps to advance the matter to a hearing or otherwise resolve the issues in dispute, or there is a valid reason why the matter has not advanced to a hearing or final resolution.

(2) Expanded case management powers (Appendix A, page 12)

(a) general

Rule 56A.21 of the *Rules of Supreme Court, 1986* outlines the powers a judge may exercise at case management. In the *Trial Division Family Rules*, these powers have been expanded significantly to allow a judge to make a wider variety of procedural orders to ensure proportionality of proceedings.

A "focused hearing" is a trial or hearing that focusses on the real issues in dispute through the use of procedural orders. There has been extensive work undertaken in Ontario in relation to focused hearings and rules have recently been implemented in the Ontario *Family Law Rules* explicitly allowing a judge to make a wider array of procedural orders for the purpose of promoting the primary objective of the rule. The recommended procedural orders relate largely to the type, length, and scope of evidence that may be admitted at a hearing and the form and length of the hearing itself. For example, orders may relate to the number and length of affidavits, the use of previously filed affidavits, limits on the number of witnesses and length and scope of testimony, time limits on the length of trial etc.

It has been suggested that focused hearings may be particularly useful in cases in which: variation of an existing order is sought; only a discreet issue or minor incidents of parenting

remain to be decided; there are few material facts in dispute; imputation of income is the only issue; cases in which there is a significant difference in the financial ability of parties to conduct a full length trial; or, in cases requiring a quick decision.

The case management rule and the trial readiness inquiry rule have been expanded so that the presiding judge has the power to make any procedural order which would advance the objects of the rules (namely, ensuring that matters are conducted in a manner that is just, speedy and cost effective). Rule F14.07 (1) of the *Trial Division Family Rules* outlines the procedural orders a judge may make at a case management hearing. Rule F30.03 outlines the powers of a trial readiness conference judge and provides that a judge may make any order under rule F14.07.

(b) interim orders without consent (child support or parenting)

Rule 56A.21 (5) of the *Rules of Supreme Court, 1986* sets out what a judge may do at a case management hearing. Rule 56A.21 (5) (j) provides that a judge may "make any unopposed order or order on consent." Rule 56A.21 (5) (k) provides that a judge may "if notice has been served, make an interim order with consent of the parties or a final order." The rule as it is currently set out does not permit a judge to make a substantive order, including an interim order, without the consent of the parties: see *Chafe v Henley*, 2003 NLCA 57.

By way of contrast, New Brunswick Family Law Rule 81, under the *Rules of Court* and applicable only to family law proceedings in the judicial district of Saint John, allows for interim orders at a case conference. The purposes of a case conference are outlined in Rule 81.10(1) and specifically include "to deal with matters of interim relief". Rule 81.10 (5) allows a judge to make an interim or final order at a case conference when it is appropriate to do so and subrule (6) allows a case management Master to make an interim order when it is appropriate to do so.

In the Ontario *Family Law Rules*, rule 17(8) sets out what a judge may do at a case conference. Rule 17(8)(b.1) provides that a judge may " if notice has been served, make a final order or any temporary order, including any of the following temporary orders to facilitate the preservation of the rights of the parties until a further agreement or order is made". Cases interpreting this rule have noted the importance of ensuring procedural fairness to the parties through proper notice.

Rule F14.07(2) of the *Trial Division Family Rules* allows a judge to make an temporary child support order at a case management hearing without consent or in the absence of one of the parties where: notice of the case management hearing has been served on the other party; the required financial information has been filed or, the timeline for filing the financial information has expired and the facts pertaining to the child support claim are undisputed; and, the order is in the best interests of the child. The notice to the other party would clearly indicate that such an order may be made in the absence of the party. The rule allows a party against who an order has been and who has complied with the disclosure requirements to, at any time, bring an application to set aside or vary the order. If such an application is made, it must be heard within seven days.

Rule 14.07 (6) allows a judge to make a temporary parenting order without consent at a case management hearing in emergency situations. A judge may only make an interim parenting order without consent or in the absence of one of the parties where: the judge is satisfied that the notice of the case management hearing has been served on the other party; and, the judge is satisfied that a delay in making an order would or may result in serious harm or prejudice to either party or a child and where such an order is in the immediate best interests of the child. The notice to the other party would clearly indicate that such an order may be made in the absence of the party. The rule requires a hearing to be held within seven days of the date the order is made to determine whether the order must be continued, modified, or vacated and that notice of the hearing date be provided to the other party. Also, a judge may consider all evidence already filed in the proceeding and any additional relevant information presented at the case management in determining whether to make such an order.

(3) Summary judgment (Appendix A, page 19)

The current *Rules of Supreme Court, 1986* do not include a rule for summary judgment specific to family proceedings, other than child protection proceedings. Rule F28 of the *Trial Division Family Rules* now outlines the summary judgment procedure applicable in family proceedings, incorporating elements of rule 17A of the *Rules of Supreme Court, 1986* and recent common law developments. Rule F37 provides that the procedure is applicable to child protection proceedings with the necessary modifications.

Notable changes include:

(a) test for summary judgment

Rule F28 now allows a judge to grant summary judgment if the judge is satisfied that there is "no genuine issue requiring a trial" rather than " no genuine issue for trial". The latter is more restrictive and limits the ability of a judge to grant summary judgment whereas the former phrase accords with the proportionality principle outlined by the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7.

(b) expanded fact-finding powers

Rule 20 of the *Ontario Rules of Civil Procedure* governs summary judgment and was amended following the Osborne Report so as to fulfill its objective by permitting the Court to "weigh the evidence, draw inferences and evaluate credibility in appropriate cases".

In *Hryniak*, the Supreme Court of Canada considered the Ontario rule and the "enhanced fact-finding powers" as a means to expand "the number of cases in which there will be no genuine issue requiring a trial". The scope of the rule was interpreted broadly to increase access to justice by providing a process that "is a proportionate, more expeditious and less expensive means to achieve a just trial than going to trial". The Newfoundland and Labrador Court of Appeal has promoted the proportionality principle prior to the decision in *Hryniak.*

In accordance of the principles highlighted by the Supreme Court of Canada, Rule F28 of the *Trial Division Family Rules* includes the ability of the judge to weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence.

(c) the ability to hear oral evidence

Also, in *Hryniak* the Supreme Court of Canada considered the power to hear oral evidence on a motion for summary judgment. Justice Karakatsanis addressed, in detail, the scope of the judge's power under rule 20.04 of the *Ontario Rules of Civil Procedure* to order the presentation of oral evidence:

> 65 … the power to call oral evidence should be used to promote the fair and just resolution of the dispute in light of principles of proportionality, timeliness and affordability. In tailoring the nature and extent of oral evidence that will be heard, the motion judge should be guided by these principles, and remember that the process is not a full trial on the merits but is designed to determine if there is a genuine issue requiring a trial.

Rule F28 of the *Trial Division Family Rules* allows a judge to, for the purpose of determining whether there is an issue requiring trial or deciding an issue under the rule, order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

(4) Binding settlement conference (Appendix A, page 27)

Rule F25 of the *Trial Division Family Rules* outlines a more comprehensive procedure for settlement conferences than is currently provide for in rule 56A.72 of the *Rules of Supreme Court, 1986*. A significant addition to the settlement conference rule is the ability of the parties to request a binding settlement conference on one or more issues.

In the New Brunswick Report of the Access to Family Justice Task Force there was a recommendation for a seven stage model for family law proceedings. It was recommended that, at stage 6, the parties chose one of two routes for a settlement conference: a classic settlement conference; or a binding settlement conference. While this model was not adopted in New Brunswick, it was recommended that the *Trial Division Family Rules* provide for a binding settlement conference.

Rule F25.04 of the *Trial Division Family Rules* outlines the procedure for a binding settlement conference and requires a joint request from the parties. A binding settlement conference must be requested at a case management hearing and may be requested in relation to one or more issues. Parties have the option of requesting a particular judge; the request will be considered and parties will be advised in advance of the settlement conference as to which judge has been assigned to conduct the binding settlement conference. Parties may withdraw, individually or jointly, consent to participate in a binding settlement conference any time prior to the settlement conference. The rule also outlines the judge's powers at a binding settlements conference.

(5) Informal trial (Appendix A, page 29)

Various jurisdictions throughout the United States have implemented rules allowing parties the option of participating in an informal trial in certain family law proceedings based on the less adversarial trial model in Australia. An informal trial was described in "Informal Custody Trial: A Child-Focused Alternative" by the Honourable Benjamin R. Simpson, as a "voluntary alternative trial process which can only be used with the consent of the parties, counsel, and the court… conducted where the parties have waived the application of the rules of evidence and the normal question and answer manner of trial".

The primary advantages of informal trial processes have been identified as:

- Decrease in the amount of Court time required to resolve cases
- More cost effective process
- Potential to reduce conflict between parties
- Potential for litigants to openly share their story thus potentially increasing litigant satisfaction with the process

The primary disadvantages of informal trial processes have been identified as:

- Not suitable for complex cases
- Limited scope of appeal
- Risk of judges relying on incomplete or improper evidence

Rule F31 of the *Trial Division Family Rules* provides for the option of an informal trial as a method of enhancing access to justice by providing parties with the option of a simplified process. The process is only available when both parties consent and complete the applicable waiver. The determination as to the type of trial the parties prefer will be addressed at a case management hearing. At an informal trial, the judge may take a more active role and admit any evidence that is relevant, material, and reliable, despite the fact that the evidence might be inadmissible under strict rules of evidence. A party can withdraw consent to participate in an informal trial at any time prior to the beginning of a trial. If consent is withdrawn, a judge must schedule a date for a regular trial or a regular trial must proceed on the date already scheduled and the judge may make any other order the judge considers appropriate.

(6) Evidence (Appendix A, page 34)

Rule 56A.22 of the *Rules of Supreme Court, 1986* provides limited direction as to the evidence that may be considered in family proceedings.

Access to justice initiatives frequently identify the need for less stringent procedural and evidentiary requirements in family law proceedings. There is increasing recognition that the best interests of the child principle should apply not only to substantive issues in child related

proceedings but to procedure itself. Upon consideration of the procedure applicable in child protection proceedings in this jurisdiction, the approach to child-related proceedings in Australia, and the newly adopted rules in the Ontario *Family Law Rules* that allow for focused hearings, the evidentiary rules applicable to family proceedings have been revised.

Rule F32.01of the *Trial Division Family Rules* provides that documents, properly in a Court file and of which the other party has notice, will presumptively be considered by the trial judge, subject to an objection from a party. Documents submitted as part of a denied application for a procedural order or a denied application for emergency temporary relief should not be presumptively considered unless a hearing with notice to the parties was held in relation to the application.

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APPENDIX A: Side-By-Side Comparison of Select Rules

Variation of Interim Orders before Trial

Rules of the Supreme Court, 1986	***Trial Division Family Rules*** **Rule F19 - Varying an Interim Order before Trial**
(no equivalent)	**Scope of rule** F19.01 This rule sets out (a) when a party may make an interim application to vary an existing interim order in a proceeding; (b) the forms to complete and the documents to file to make an interim application to vary; (c) what a judge may do upon review of the interim application to vary; and (d) what happens after a judge has granted permission to proceed to a hearing on the interim application to vary. **Getting permission to make an interim application to vary** F19.02 (1) A party must request a judge's permission to proceed with an interim application to vary an existing interim order. (2) To request a judge's permission to proceed with an interim application to vary, a party must file an application in Form F19.02A. (3) A judge may grant permission to proceed with an interim application to vary where (a) there has been a compelling change of circumstances since the date the interim order was made;

	(b) there is an urgent or immediate need to hear the application as irreparable harm will likely occur before the matter can proceed to a final hearing; and (c) either (i) the party has taken steps to advance the matter to a hearing or otherwise resolve the issues in dispute, or (ii) there is a valid reason why the matter has not advanced to a hearing or final resolution. (4) In granting permission to proceed with the interim application to vary, a judge may do one or more of the following; (a) impose such terms and conditions as the judge considers appropriate; (b) order that the hearing be held at a specified time; (c) make an order relating to the manner or timing of service. (5) Where permission to proceed with the interim application to vary is granted by a judge, a registry clerk must issue the application and set a date for the hearing. (6) A party permitted to make an application under this rule, must, in accordance with rule F8 ("Providing Notice and Serving Documents on Other Parties or Persons"), serve a copy of the issued application on the other parties at least 10 days before the scheduled hearing date, unless the parties agree or a judge has directed otherwise. (7) Where a judge denies permission to proceed with the interim application to vary, the judge may provide directions respecting the next steps to be taken in the proceeding.

	Responding to an interim application to vary F19.03 Any person served with an interim application to vary who intends to oppose a claim made in the application must (a) file one affidavit in response, in a form that complies with rule F32 ("Evidence and Affidavits"), setting out that party's position and the relief sought; and (b) serve, in accordance with Rule F8 ("Providing Notice and Serving Documents on Other Parties or Persons"), a copy of the affidavit in response on every other party to the application at least four days before the hearing of the application. **How to reply to a response to an interim application to vary** F19.04 Any person served with an affidavit in response may file (a) file one affidavit in reply, in a form that complies with rule F32 ("Evidence and Affidavits"), responding to any new matters raised in the affidavit in response; and (b) deliver, in accordance with Rule F8 ("Providing Notice and Serving Documents on Other Parties or Persons"), a copy of the affidavit in response on every other party to the application at least two days before the hearing of the application. **Requirement to attend** F19.05 The parties and their lawyers must attend a hearing under this rule in person, unless a judge (a) has allowed a party to appear remotely pursuant to rule 47A ("Electronic

	Conferencing") in Part I; or (b) excuses party or lawyer from attending. **What a judge can do** F19.06 Upon hearing an interim application, the judge: (a) may disregard an affidavit that is not filed and served in time or that does not comply with rule F32("Evidence and Affidavits"), and may award costs against the party filing it; (b) must make a decision on an interim application made under this rule after reviewing the interim application and affidavits filed and hearing the arguments of the parties unless a judge before or at the hearing does one or more of the following: (i) gives permission to one or more parties to cross-examine the person(s) who signed affidavits, (ii) orders that the parties or witnesses give oral evidence, (iii) gives other directions relating to the conduct of the application.

Case Management

Rules of Supreme Court, 1986 **Rule 56A.21- How Case Management Works**	***Trial Division Family Rules*** **Rule F14 - Case Management**
	Powers of case management judge
56A.21 (5) At a case management meeting the judge may (a) make an order for document disclosure; (b) make an order for an appraisal of the value of property; (c) set the times for events in the case or give directions for the next step including follow-up case management meetings; (d) refer any issue for alternate dispute resolution; (e) direct an interview of a child; (f) order psychiatric and psychological assessments; (g) order home assessments; (h) order an accounting by a person approved by the Court; (i) order that the evidence of a witness at trial be given by affidavit; (j) make any unopposed order or an order on consent; (k) if notice has been served, make an interim order with the consent of the parties or a final order; (l) make an order amending pleadings or other documents; (m) make an order limiting the number	F14.07 (1) At a case management hearing the judge may do one or more of the following: (a) order that a proceeding be transferred to another judicial centre; (b) make an order suspending or waiving a requirement to file a document; (c) make any order in relation to document disclosure or production; (d) order a party to file updated pleadings where the judge deems it necessary; (e) make an order amending pleadings or other documents; (f) order that a person be questioned in person under rule F11.04(1)(c) (“When you can ask questions in person before trial”); (g) make an order for an inspection of property; (h) make an order for an appraisal of the value of property; (i) order an accounting by a person approved by the judge; (j) make an order to have a child interviewed which may

of expert witnesses and determining how they may give their evidence; (n) make an order requiring the parties to make arrangements for expert witnesses to meet, on a without prejudice basis, to determine those matters on which they agree and to identify those matters on which they do not agree; (o) make an order for directions as to the manner of conducting lengthy and complex trials; (p) order that a pre-trial or settlement conference be held; (q) order that examination for discovery be held under rule 56A.35(4); and (r) make an order that will promote a fair and expeditious resolution of the case.	specify how the interview is to be conducted, the purpose of the interview, and how the interview will be paid for; (k) provide directions on Court-ordered reviews of parenting or support claims; (l) order a testing, assessment, or investigation be conducted, or report be prepared, as a judge deems necessary for the resolution of the issues, and specify how these are to be conducted or prepared, their purpose, and who is required to pay for them; (m) make an order to refer any issue to dispute resolution; (n) approve a dispute resolution program or process; (o) waive the requirement to attend a dispute resolution program or process in accordance with rule F20.03 ("Waiver of responsibility"); (p) order that a settlement conference be held and direct parties to advise if a binding opinion is requested under rule F25.04 ("Binding settlement conference"); (q) set dates for events in the proceeding or provide directions regarding the next steps to be taken in a proceeding, including setting follow-up case management hearings; (r) permit a party to apply for a

	preliminary determination of a question of fact or law under rule F27 ("Pre-Trial Determination of Question of Fact or Law"); (s) permit a party to apply for summary judgment in accordance under rule F28 ("Summary Judgment"); (t) order that a trial readiness conference be held; (u) order that a trial date be set; (v) make an order for an informal trial in accordance with Rule F31 ("Informal Trial"); (w) make an order regarding admissions of fact at trial; (x) make an order regarding the admission of documents at a trial, including (i) agreements as to the purposes for which documents may be admitted, (ii) the preparation of joint books of documents and document agreements, and (iii) admission of documents properly in a Court file of which the other party has notice; (y) make an order imposing time limits on the questioning of

	witnesses, opening statements, and final submissions; (z) order that evidence be tendered by affidavit; (aa) order that a party provide summaries of a witness' evidence; (bb) make an order limiting the number of expert witnesses, setting timelines for the exchange of expert reports, and determining how expert witnesses may give their evidence; (cc) make an order requiring the parties to make arrangements for expert witnesses to meet, on a without prejudice basis, to determine those matters on which they agree and to identify those matters on which they do not agree; (dd) make an order setting out a plan for how the trial must be conducted; (ee) make an order excusing a party or lawyer from attending a case management hearing, trial readiness conference, a dispute resolution process, or a settlement conference, in person or otherwise; (ff) grant a party permission to apply for a contempt order; (gg) make an order under subrule (2) or (6); (hh) make any order on

	consent; (ii) make any other order that may assist in just, timely, and cost-effective resolution of the proceeding. (2) At a case management hearing the judge may make a temporary order for child support without the consent of a party or in the unexcused absence of a party where (a) notice of the case management hearing has been served on the other party in accordance with rule F8 ("Providing Notice and Serving Documents on Other Parties or Persons"); (b) the required financial information has been filed or, the timeline for filing the financial information has expired and the facts pertaining to the child support claim are undisputed; and (c) the order is in the best interests of the child. (3) Where a judge makes a temporary order under subrule (2) in the absence of a party, the party who requested the order must, in accordance with rule F8 ("Providing Notice and Serving Documents on Other Parties or Persons"), serve a copy of the order on the party against whom the order was made within ten days of the date the order was made. (4) Despite rule F19.02 ("Getting permission to make an interim application to vary"), a party against

	whom an order has been made under subrule (2), and who has complied with the disclosure requirements under rule F10 ("Disclosure Requirements"), may, at any time, bring an application to set aside or vary the order and, where filed, the application must be heard within seven days. (5) A temporary order made under subrule (2) must not be sent to the Support Enforcement Agency until seven days have passed from the date notice is sent to the party against whom the order was made, and where the temporary order has not been otherwise varied pursuant to subrule (4). (6) At a case management hearing, a judge may make a temporary parenting order without consent of one or more parties or in the unexcused absence of a party where (a) the judge is satisfied that the notice of the case management hearing has been served on the other party in accordance with rule F8 ("Providing Notice and Serving Documents on Other Parties or Persons"); and (b) the judge is satisfied that a delay in making an order would or may result in serious harm or prejudice to either party or a child and where such an order is in the immediate best interests of the child. (7) In determining whether to make an order under subrule (6), a judge may consider all evidence already filed in the proceeding and any additional relevant information presented at the case management hearing.

	(8) Where a judge makes an order under subrule (6), the judge must schedule a date for a hearing to be held within seven days of making the order to determine whether the order must be continued, modified, or vacated. (9) Where the judge sets a hearing date under subrule (8), the applicant must, immediately or as directed by a judge, serve the order and notice of the hearing on all parties and persons affected by or interested in the order who were not present at the time the order was made, in accordance with rule F8 ("Providing Notice and Serving Documents on Other Parties or Persons"), or as otherwise directed by a judge. (10) Where a hearing is scheduled under subrule (4) or (8), each party may file one affidavit setting out that party's position and the relief sought. (11) Any affidavit filed under subrule (10) must be filed and served on the other party, in accordance with rule F8 ("Providing Notice and Serving Documents on Other Parties or Persons") at least two days prior to the hearing. (12) At a hearing scheduled in accordance with subrule (4) or (8), the party benefitting from the order has the burden of satisfying the Court that that the order should be continued. (13) At the hearing scheduled in accordance with subrule (4) or (8), a judge may, at the judge's discretion, continue, modify, or vacate an order made under (2) or (6).

Summary Judgment

Rules of Supreme Court, 1986 **Rule 17A- Summary Trial**	*Trial Division Family Rules* **Rule F28 – Summary Judgment**
Summary Trial **17A.01.** (1) A plaintiff or defendant may, after defence has been filed and at any time prior to the proceeding being placed on a trial list, apply to the Court with supporting affidavit material or other evidence for summary trial seeking judgment on or dismissal of all or part of the claim in the statement of claim, as the case may be. (2) A plaintiff may apply, without notice, for leave to serve an application for judgment under this rule, together with the statement of claim, and leave may be given where special urgency is shown subject to such directions as are just. (3) Rule 17A applies with the necessary modifications to counterclaims and third party claims. (4) Unless otherwise ordered, an application for summary trial shall be served on all affected parties at least twenty clear days before a hearing. **Evidence on Application** **17A.02.** (1) On an application under this rule, a party may adduce evidence by any or all of (a) affidavit; (b) an answer, or part of an answer, to interrogatories that may have previously been	**Scope of rule** F28.01 (1) A party may, in accordance with this rule, request an application for summary judgment of one or more issues or claims raised in a proceeding. (2) This rule sets out (a) when a party may make an application for summary judgment; (b) the procedure governing applications for summary judgment; and (c) the powers of a judge on the hearing of an application for summary judgment. **When a request may be made** F28.02 (1) Unless a judge orders otherwise, a party seeking summary judgment on one or more issues or claims must do so at a case management hearing scheduled in accordance with Rule F14 and must (a) file a Request for a Summary Judgment Hearing, in Form F28.02A; (b) deliver the Request for a Summary Judgment Hearing to the other party, in accordance with rule F8 (“Providing Notice and Serving Documents on Other Parties or Persons”), as soon as practicable and no later

administered; (c) any part of the evidence taken upon an examination for discovery. (2) In response to affidavit material or other evidence supporting any application for summary trial, a responding party may not rest on the mere allegations or denials in the party's pleadings, but shall set out, in affidavit material or otherwise, specific facts showing that there is a genuine issue for trial. Affidavits and other material to be relied on by the responding party shall be filed and served on the other party at least five days before the hearing. (3) Deponents in affidavits may be cross-examined and re-examined, provided at least three days notice is given to the party submitting the affidavit to produce the deponent for cross-examination. (4) An affidavit for use on an application under this rule may be made on information and belief as provided in rule 48.02.(1), but on the hearing of the application, an adverse inference may be drawn, if appropriate, from the failure of a party to provide the evidence of persons having personal knowledge of contested facts. (5) The Court may draw an adverse inference from the failure of a party to cross-examine on, or file affidavit evidence in reply to, an affidavit used on an application under this rule. (6) On an application under	than seven days before the case management hearing; and (c) be prepared to discuss the matters set out in the Request at the case management meeting. (2) A party who receives a Request for a Summary Judgment Hearing must (a) complete and file a Request for a Summary Judgment Hearing in Form F28.02A at least two days prior to the date set for the case management meeting; (b) deliver the form to the other party, in accordance with rule F8 ("Providing Notice and Serving Documents on Other Parties or Persons"), as soon as practicable and no later than two days before the case management meeting; and (c) be prepared to discuss the matters set out in the Request at the case management meeting. **Procedure at case management** F28.03 At a case management meeting where a party requests a summary judgment hearing, a judge may, in addition to the powers at rule F14.07 ("Powers of case management judge"), do one or more of the following (a) grant the request and set a date for the hearing; (b) provide directions as to the

this rule each party shall serve on every other party to the application a memorandum consisting of a concise statement of the facts and law relied on by the party and file it with the Court not later than forty-eight hours before the day set for the hearing.

Disposition of Application

17A.03. (1) Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

(2) Where the Court decides that there is a genuine issue with respect to a claim or defence, a judge may nevertheless grant judgment in favour of any party, either upon an issue or generally, unless

(a) the judge is unable on the whole of the evidence before the Court on the application to find the facts necessary to decide the questions of fact or law; or

(b) it would be unjust to decide the issues on the application.

(3) Where the Court is satisfied that the only genuine issue is the amount to which a party is entitled, the Court may order a trial of that issue or grant judgment with a reference to determine the amount.

(4) Where the Court is satisfied that the only genuine issue is a question of law, the Court may determine the question and grant judgment accordingly.

conduct of the hearing, including the documents each party must file and the timing of the filing of documents;

(c) order that oral evidence be presented by one or more parties at the hearing, with or without time limits on its presentation;

(d) dismiss the request.

Evidence on a summary judgment hearing

F28.04 (1) On a hearing under this rule, a party may adduce evidence by one or more of the following:

(a) affidavit;

(b) an answer, or part of an answer, to written questions previously provided under rule F11.03("When you can ask questions in writing"); and

(c) any part of the evidence taken during an appointment for questioning under rule F11.04 ("When you can ask questions in person before trial").

(2) A deponent may be cross-examined and re-examined at the hearing of the application, provided permission was granted by the case management judge and at least three days' notice is given to the party submitting the affidavit to produce the deponent for cross-examination.

(3) An affidavit for use on the application may be made on personal knowledge but on the hearing of the application, an adverse inference may

(5) Where a party claims an accounting and the responding party fails to satisfy the Court that there is a preliminary issue to be tried, the Court may grant judgment on the claim with a reference to take accounts.

Granting of Judgment

17A.04. (1) A plaintiff who obtains judgment under this rule may proceed against the same defendant for any other relief and against any other defendant for the same or any other relief.

(2) Where it appears that the enforcement of a summary judgment granted under this rule ought to be stayed pending the determination of any other issue in the proceeding or in a counterclaim or third party claim, the Court may so order on such terms as are just.

Effect of Dismissal of Application

17A.05. (1) Where an application for summary trial is dismissed, the applying party may not make any further application under this rule without leave of the Court.

(2) Where on an application for summary trial under this rule, the applying party obtains no relief, the Court shall fix the opposite party's costs of the application on a solicitor and client basis and order the applying party to pay them forthwith unless the Court is satisfied that the bringing of the application, although unsuccessful, was nevertheless reasonable, in which case the costs may be assessed on a party and party or some other lesser basis, or not at

be drawn, if appropriate, from the failure of a party to provide the evidence of persons having personal knowledge of contested facts.

(4) A judge may draw an adverse inference from the failure of a party to cross-examine on, or file affidavit evidence in reply to, an affidavit used on an application made under this rule.

Brief required

F28.05 Each party must, at least two days before the summary judgment hearing

(a) file a brief setting out a concise statement of the facts and law relied on by the party; and

(b) deliver a copy of the brief on every other party to the application, in accordance with rule F8 (“Providing Notice and Serving Documents on Other Parties or Persons”).

Disposition of application

F28.06 (1) Upon hearing an application under this rule, the judge must grant summary judgment if,

(a) the judge is satisfied that there is no genuine issue requiring a trial; or

(b) the parties agree to have all or some of the issues determined by a summary judgment and the judge is satisfied that it is appropriate to grant summary judgment.

all. **Bad Faith** **17A.06.** Where it appears to the Court that a party to an application for summary trial has acted in bad faith or primarily for the purpose of delay, the Court may fix the costs of the application on a solicitor and client basis and order the party to pay them forthwith. **Where Trial is Necessary** **17A.07.** (1) Where an application for summary trial is dismissed, either in whole or in part, the Court may order the proceeding or the issues in the proceeding not disposed of, to proceed to trial in the normal course or upon the request of any party may order an expedited trial under rule 17A.09. (2) Where a proceeding is ordered to proceed to trial, in whole or in part, the court may give such directions or impose such terms as are just, including orders and directions (a) specifying what material facts are in dispute and defining the issues to be tried; (b) for payment into Court of all or part of the claim; (c) for security for costs; (d) that the nature and scope of discovery, if any, be limited to matters not covered by the affidavits filed on the application and any cross-	(2) In determining whether there is a genuine issue requiring a trial, the judge must consider the evidence submitted by the parties, and the judge may do one or more of the following for that purpose, unless it is in the interest of justice for such powers to be exercised only at a trial: (a) weigh the evidence; (b) evaluate the credibility of a deponent; (c) draw any reasonable inference from the evidence. (3) A judge may, for the purpose of determining whether there is an issue requiring trial or deciding an issue under this rule, order that oral evidence be presented by one or more parties, with or without time limits on its presentation. (4) Where the judge decides that there is a genuine issue with respect to an issue or claim, a judge may nevertheless grant judgment in favour of any party, either upon an issue or generally, unless (a) the judge is unable on the whole of the evidence before the Court on the application to find the facts necessary to decide the questions of fact or law; or (b) it would be inappropriate to decide the issues at the hearing. (5)Where a judge does not grant all of the relief requested, a judge may determine any material fact that is not genuinely in dispute.

examination on them, and that the affidavits and cross-examinations may be used at trial in the same manner as an examination for discovery; (e) specifying what additional pre-trial procedures should be undertaken and the manner of their exercise. (3) Where a party fails to comply with an order for payment into Court or for security for costs, the Court on application of the opposite party may dismiss the proceeding, strike out the defence or make such other order as is just. **Judge Not to Preside** **17A.08.** A judge who has heard an application for summary trial under this rule shall not preside at the trial unless all parties of record consent.	**Where the only genuine issue is amount** F28.07 Where the judge is satisfied that the only genuine issue is the amount to which a party is entitled, the judge may order a trial of that issue. **Only genuine issue is question of law** F28.08 Where the judge is satisfied that the only genuine issue is a question of law, the judge may determine the question and grant judgment accordingly. **Granting of judgment** F28.09 (1) A party who obtains judgment under this rule may proceed against the same party for any other relief and against any other party for the same or any other relief. (2) The judge may order a stay on terms the judge considers appropriate in the circumstances where it appears that the enforcement of a summary judgment granted under this rule ought to be stayed pending the determination of any other issue in the proceeding. **Effect of dismissal of application** F28.10 (1) Where an application for summary judgment is dismissed, the party who applied for summary judgment must not make any further applications under this rule without a judge's permission. (2) Where the party who applied for summary judgment obtains no relief on the application, the judge must fix the

	responding party's costs of the application on a substantial recovery basis and order the party who applied for summary judgment to pay the costs as soon as practicable. (3) Despite subrule (2), where the judge is satisfied that making the application, although unsuccessful, was nevertheless reasonable, the judge may fix costs on a partial recovery basis or some other basis, or not at all. **Where trial is necessary** F28.11 (1) Where a summary judgment hearing is dismissed, either in whole or in part, the judge may exercise the powers listed in rule F14.07 ("Powers of case management judge") and may (a) schedule a case management hearing to determine the next steps to be taken in the proceeding; or (b) make any order the judge considers appropriate in the circumstances. (2) Where a proceeding is ordered to proceed to trial, in whole or in part, a judge may give such directions, impose terms, or make an order the judge considers appropriate in the circumstances, including (a) specifying what material facts are in dispute and defining the issues to be tried; (b) specifying what additional pre-trial procedures should be undertaken and the manner in which the procedures will be

	exercised. **Judge not to preside** F28.12 A judge who has presided at a summary judgment hearing under this rule must not preside at the trial or a hearing unless all parties consent.

Binding Settlement Conference

Rules of the Supreme Court, 1986	***Trial Division Family Rules*** **Rule F25- Settlement Conferences**
(no equivalent)	**Binding settlement conference** F25.04 (1) The parties may, when requesting a settlement conference, jointly request that the settlement conference be binding with respect to one or more issues or claims. (2) Parties requesting a binding settlement conference may, if they have a preference for a particular judge, indicate their preference to a registry clerk. (3) Where a request under subrule (2) has been made in Family Division in St. John's, the registry clerk must consult with the senior administrative judge. (4) The registry clerk must, to the extent practical, inform the parties as to which judge has been assigned to conduct the settlement conference 30 days prior to the date scheduled for the settlement conference. (5) A party may withdraw consent to be bound by the opinion of the settlement conference judge on an issue submitted in accordance with this rule at any time prior to the start of the settlement conference provided the Court and the other party are notified. (6) Where consent is withdrawn in accordance with subrule (5), the settlement conference must proceed in accordance with rule F25.03 and F25.05. (7) The judge assigned to conduct a binding settlement conference may request additional information from the parties prior to the commencement of the binding settlement conference. (8) Where parties have requested a binding

	settlement conference, a judge may, at the settlement conference, do one or more of the following (a) if all the required documentation has been filed, give a decision on one or more issues submitted by the parties for consideration, which becomes a final order of the court binding on both parties; (b) if all of the required documentation or sufficient documentation has not been filed, delay giving a decision until the parties provide the necessary documentation; (c) determine it is not appropriate to give a decision; or (d) make an order under rule F25.05(2).

Informal Trial

Rules of Supreme Court, 1986	***Trial Division Family Rules*** **Rule F31- Informal Trial**
(No equivalent)	**Scope of rule** F31.01 (1) This rule sets out the procedure for informal trials. (2) An informal trial is an alternative trial procedure in which the judge may (a) take a more active role; (b) admit any evidence that is relevant, material, and reliable, despite the fact that the evidence might be inadmissible under strict rules of evidence. (3) The judge hearing the matter must give such weight to the evidence presented as the judge determines is appropriate. (4)An informal trial may only be held with the written consent of the parties and the permission of a judge. **When a request may be made** F31.02 (1) Unless a judge orders otherwise, a party seeking an Informal Trial date must do so at a case management hearing scheduled in accordance with Rule F14 and must (a) file a Request for an Informal Trial in Form F31.02A; (b) deliver the Request for an Informal Trial to the other party, in accordance with rule F8 ("Providing Notice and Serving Documents on Other Parties or Persons"), as soon as practicable and no later than seven days before the case management hearing; and (c) be prepared to discuss the matters set out in the Request for an Informal Trial at the case

	management hearing. (2) A party who receives a Request for an Informal Trial must (a) complete and file a Request for an Informal Trial in Form F31.02A at least two days prior to the date set for the case management hearing; (b) deliver the form to the other party, in accordance with rule F8 ("Providing Notice and Serving Documents on Other Parties or Persons"), as soon as practicable and no later than two days before the case management hearing; and (c) be prepared to discuss the matters set out in the Request for an Informal Trial at the case management hearing. (3) Prior to granting a request for an informal trial, a judge must (a) determine whether the issues in dispute can be appropriately determined at an informal trial; (b) confirm the parties have elected an informal trial with a knowledge and understanding of the provisions in this rule; and (c) confirm that parties have not been threatened to agree to an informal trial process or have not been promised anything in exchange for agreeing to an informal trial. (4) Where a judge grants an informal trial, the judge must provide timelines for the disclosure of any relevant documents or information which have not yet been exchanged. **Procedure** F31.03 The informal trial will be conducted as follows:

	(a) at the beginning of an informal trial the parties will be asked to confirm that (i) they have elected an informal trial with a knowledge and understanding of the provisions in this rule, and (ii) they have not been threatened to agree to an informal trial process or have not been promised anything in exchange for agreeing to an informal trial; (b) the judge may ask the parties or their lawyers for a brief summary of the issues to be decided; (c) the applicant will be allowed to speak to the judge under oath concerning all issues in dispute. The party is not questioned by the party's lawyer, the other party or the other party's lawyer, but may be questioned by the judge to determine any issue; (d) the judge will ask the respondent or the respondent's lawyer whether there are any other areas about which the party wishes the judge to make inquiries of the applicant. The judge will inquire into these areas if requested; (e) the process in rules F31.03 (c) and (d) is then repeated for the other party; (f) the judge may require the attendance of witnesses other than the parties; (g) expert reports will be entered into evidence as the Court's exhibit. If either party requests, the expert will testify and be subjected to questioning by lawyers, the parties, or the judge; (h) the parties may offer any documents they wish the judge to consider and must provide a copy of such documents to the other

	party. The judge will determine what weight, if any, to give each document. The judge may order the parties to provide other relevant documents. Letters or other documents by the parties' children that are intended to suggest parenting preferences are not permitted; (i) upon the conclusion of questioning and entry of documents into evidence, the applicant or applicant's lawyer will be offered the opportunity to make submissions; (j) the respondent or respondent's lawyer will be offered the opportunity to make brief submissions and to respond briefly to the applicant's submissions; (k) the applicant or applicant's lawyer will be offered the opportunity to respond briefly to any new issues raised by the respondent; (l) the parties or their lawyers will then be offered the opportunity to make a brief legal argument; (m) upon consideration of the evidence and submissions, the judge must render judgment; (n) the judge retains jurisdiction to modify these procedures as justice and fundamental fairness require. **Withdrawal of request for informal trial** F31.04 (1) A judge may permit a party to withdraw the party's consent to the informal trial process up until the beginning of the informal trial. (2) Where a party withdraws his or her consent, the judge must schedule a date for a regular trial or a regular trial must proceed on the date already scheduled. (3) Where a party withdraws his or her consent, a judge may make any order that the judge considers appropriate in the circumstances.

	Court may direct formal trial F31.05 (1) Where a judge determines that the informal trial process is inappropriate, the judge may, at any time before or during the informal trial, direct that a proceeding continue under the regular trial process. (2) Where a judge makes an order under subrule (1), the judge must determine the use to be made of any evidence already entered at the informal trial, if any, and may provide further directions or make an order under rule F14.07 ("Powers of case management judge").

Evidence

Rules of the Supreme Court, 1986 **Rule 56A.22- What Evidence the Court May Consider**	***Trial Division Family Rules*** **Rule F32- Evidence and Affidavits**
What evidence the Court may consider	**What evidence the Court may consider**
56A.22. (1) The Court may decide an issue on oral or affidavit evidence or in a manner that the judge conducting the trial thinks appropriate. (2) The Court may accept a document that appears to be proof of marriage in a foreign jurisdiction as proof of the marriage unless the contrary is proved. (3) If it is relevant to a proceeding that a party has committed adultery that party shall not refuse to answer a question about whether he or she has committed adultery.	F32.01 (1) A judge may decide an issue on oral or affidavit evidence or in a manner that the judge conducting a hearing or trial considers appropriate in the circumstances. (2) At trial, the judge may consider any pleading or other document filed in accordance with this part properly included in a Court file of which the other party has notice, unless a party has raised an objection to the document's admissibility at a prior case management hearing, at a trial readiness conference, or prior to the start of the trial and a judge has determined that the document should not be considered. (3) Subrule (2) does not apply to pleadings or other documents that have been filed on an application under rules F16 ("Procedural Interim Applications (Without Notice)") or F17 ("Emergency Temporary Relief (Without Notice)"), unless a hearing with notice to the parties was held in relation to the application.