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SUPREME COURT OF PRINCE EDWARD ISLAND

PRACTICE NOTES

Practice Notes have been issued by the Chief Justices of the Supreme Court from time to time since the adoption of the Rules of Court which came into force on January 1, 1977. These Practice Notes were intended to help solve problems of procedure and interpretation of the Rules for the Bench and Bar. Former Chief Justice Nicholson issued a revision of the Practice Notes on April 15, 1985, as did former Chief Justices Carruthers and MacDonald in 1996. There have been changes and additional ones issued since then.

Over the years some confusion has arisen over the text of these Practice Notes and the exact number which have been issued. To clarify any misunderstanding, the enclosed revision of all Practice Notes has been approved and is expected to be followed. All old Practice Notes, though in some cases almost identical to the present Notes, should be discarded.

Members of the Bar should review and become familiar with these Practice Notes as it is expected they will be followed in all cases.

DATED September 1, 2006

Gerard E. Mitchell

C.J.P.E.I.

Jacqueline R. Matheson

C.J.T.D.

PRACTICE NOTE 1

PROCEDURE ON OPENING AND CLOSING SITTINGS AND CHAMBERS OF THE SUPREME COURT

At the appointed time the presiding Clerk of the Court will check the courtroom to ensure that counsel are in their places and everything is ready. The Clerk will then advise the presiding Judge and after having done so, will enter the courtroom immediately ahead of the Judge and say – "ORDER - ALL RISE"

The Judge and the Court Clerk will then take their respective places and while everyone is standing the Court Clerk will formally announce the opening of the court**.**

OPENING FOR CHAMBERS:

Her Majesty's Supreme Court for the Province of Prince Edward Island for the hearing of motions and applications is now in session. All persons having anything to do thereat may attend and they shall be heard. GOD SAVE THE QUEEN.
His Lordship Mr. Justice (Her Ladyship Madam Justice) _____
_____presiding.

OPENING FOR TRIAL AND SUMMARY CONVICTION APPEALS:

Her Majesty's Supreme Court for the Province of Prince Edward Island

(a) for the trial of civil cases with/without jury;
(b) for the trial of criminal cases with/without jury;
(c) for the hearing of summary conviction appeals;
(d) for the trial of small claims cases;

is now open and all persons having anything to do thereat may attend and they shall be heard. GOD SAVE THE QUEEN. His Lordship Mr. Justice (Her **Ladyship** Madam Justice)_____ presiding**.**

OPENING FOR APPEAL DIVISION:

Her Majesty's Supreme Court of Prince Edward Island Appeal Division for the hearing of APPEALS is now open and all persons having anything to do thereat may attend and they shall be heard. GOD SAVE THE QUEEN.
His Lordship Chief Justice_____ presiding.

AFTER THE OPENING BY THE CLERK:

- The Judge (Judges) may bow to counsel and counsel should respond
- Everyone is then seated except the Clerk.
- The Clerk will call the matter to be heard, announce counsel and be seated.
- The presiding Judge will then commence the proceeding.

ADJOURNMENT:

At the conclusion of the matter and at the end of the day, the Clerk will announce ALL RISE.

If the matter has concluded, the Clerk will announce:

HER MAJESTY'S SUPREME COURT TRIAL DIVISION
- OR -
HER MAJESTY'S SUPREME COURT APPEAL DIVISION

NOW STANDS ADJOURNED.

If the matter is to be continued on another day, the Clerk will announce:

THIS CASE NOW STANDS ADJOURNED UNTIL (give the date and time).

The Judge will then bow and counsel respond and the Judge will retire, everyone else remaining in their place until the Judge has left the courtroom.

PRACTICE NOTE 2

COURTROOM DECORUM AND LEGAL ETIQUETTE

1. Court Dress: Gowns should be worn for all court appearances except the following:

gowns do not have to be worn in uncontested chambers.

When a Gown is Worn:

Striped or dark conservative trousers or skirts should be worn with the gown as well as dark shoes.

Gowns should be worn only in court or court precincts. They should never be worn in public.

It is just as important to be properly dressed in judges= offices as in a courtroom. A suit or jacket with shirt and tie must always be worn by men. Similar attire or a conservative dress should be worn by women**.**

2. Enter the Judge

When the judge enters the courtroom for the day's first appearance, order should be maintained. Counsel, their clients, witnesses and everyone else present in the courtroom should rise and remain standing in their appointed places until the presiding Clerk opens the Court and the Judge is seated. Everyone, except the Clerk, will then be seated. The Clerk will then call the matter to be heard, announce counsel and be seated. Many judges bow to counsel before they take their seat on the bench and counsel should return the bow.

3. Recess

The following procedure is to be followed when the court takes a recess. The Clerk will stand and announce:

THIS COURT IS NOW IN RECESS, and then be seated.
The Judge then retires. Everyone will remain seated while the Judge retires for recess and also remain seated when the Judge re-enters the courtroom after the recess except the Clerk who will rise and call ORDER as the Judge enters. After the Judge resumes sitting the Clerk will announce:
THIS COURT IS NOW IN SESSION and then be seated. The presiding Judge will then resume the hearing.

4. Lateness

Counsel, who arrive in court after the court has been opened and the case has been called, should offer an apology to the Court and give an explanation for their lateness.

5. My Learned Friend

When addressing the Court, counsel should refer to opposing counsel as "my friend" and a Queen's Counsel as "my learned friend," When referring to counsel who is associated with him/her, he/she should say "my friend or my learned friend (as the case may be) who is associated with me."

In addressing witnesses, who as a rule have no knowledge of this legalistic nicety, the phrase should never be used unless it is modified. For example, "my friend, Mr. Jones, who has just finished asking you some questions. . ."

It must be remembered that there are many witnesses who do not understand the meaning of words like "counsel," "plaintiff," "accused," "defendant" and "Crown," and if they do not, it is quite proper to translate these terms into simple language.

6. Decorum at the Counsel Table

No matter how friendly they may be, counsel should ignore each other socially at the counsel table and during a trial. Cordial greetings, joking with each other and other indications of intimacy are likely to engender suspicion in a client and usually give the public a bad and wrong impression.

7. Procedure During Trial

During trial, opposing counsel should not address each other directly but through the Court.

The only correct way of making an objection is, for example, "My Lord, I object to my learned friend's question on the ground that it is. . ." stating the reason for the objection.

It is important to make any objection as quickly as possible, since once the answer is made, it cannot be ordered stricken from the record**.**

Typical improper objections:

(To opposing counsel): "You can't ask that"
"That's a leading question"
"That's hearsay"
"You didn't prove that"
"That wasn't in evidence"

(To the Court): "objection"
"I object"

Talking or whispering to other counsel at the counsel table when another counsel is examining or cross-examining a witness is bad manners, because it is distracting to the Court as well as examining counsel. If counsel must communicate while opposing counsel is examining a witness, he can easily do so in writing. There is no objection to a whispered colloquy between senior and junior counsel or counsel and client.

8. Referring to the Court

It is not proper for counsel to refer to the Court in the third person as "the judge". The Court should be referred to as "His Lordship" or "Her Ladyship". But when examining a witness, it is best to refer to the Judge as "the Court." The reason being is that if you ask the witness to "Tell His Lordship what happened,"the witness will often turn to the Judge and tell him the story in a low voice or confidential manner.

9. The Witness

Counsel should see that their witnesses are correctly attired in court and are presentable.

It is important that counsel should stay behind counsel table, or in any other appointed place, when examining or cross-examining a witness. Counsel should not get close to, or lean on the witness box when conducting an examination. The Court's transcription equipment is set up so that each person should speak directly into his own microphone.

In certain circumstances it will be necessary for counsel to be next to the witness, as when he wishes the witness to mark on a document.

Counsel should always be aware that the Court must hear the witness and by staying behind the counsel table he will have some idea of the volume of the witness's voice.

10. Addressing Judges

(1) When writing to a Chief Justice, address the envelope as:

The Honourable Norman H. Carruthers
Chief Justice
Supreme Court of Prince Edward Island
- or -
The Honourable Chief Justice Carruthers
Supreme Court of Prince Edward Island

Letter to the Chief Justice may open:

(most formal):
Dear Chief Justice Carruthers

(less formal):
My Dear Chief Justice Carruthers;
My Dear Chief Justice; or
Dear Sir:

(intimate): Dear Judge;
(but never): Dear Chief:

(2) Other Justices of the Supreme Court should be addressed on an envelope as:

The Honourable Madam Justice Matheson
Supreme Court of Prince Edward Island

A letter to a Justice of the Supreme Court would open in the same respect as to the Chief Justice except "Mr. Justice" is substituted for "Chief Justice."

An envelope to a Judge and his wife would be:

The Honourable Mr. Justice DesRoches and Mrs. DesRoches

And informally they are referred to as:

Mr. Justice and Mrs. DesRoches.

(3) In court or court precincts the judges are addressed as “My Lord”, “My Lady”, and otherwise as “Sir”, “Madam.” They are only addressed as “Your Lordship” when the word “you” would be used.

In the third person the Judges are referred to as “Their Lordships” (plural) or “His Lordship” or “Her Ladyship” (singular). Socially a judge is introduced and referred to as “Mr. Justice DesRoches” except “Chief Justice” is substituted when appropriate.

For those interested in a more detailed account of legal etiquette and courtroom decorum, including some excellent examples of how to conduct an examination of a witness and the proper use of the English language in court, please refer to the S. Tupper Bigelow book “LEGAL ETIQUETTE AND COURT ROOM DECORUM” published by the Carswell Company Limited in 1955. This book is available in the Judges’ Library.

PRACTICE NOTE 3

FILING DOCUMENTS

From time to time the Court does not become aware of certain documents that lawyers file with the Registrar until Court is convened. This usually occurs when there has been an adjournment to allow time to file Briefs, with a return day being set, or in matters that are being brought quickly before the Court. As the staff in the Registrar's Office are not usually aware of any particular urgency in bringing the documents to the Court's attention, it is often not until the judge is in Court that he or she becomes aware of a certain document.

Therefore, to alleviate this problem, it will be the responsibility of the lawyer who is filing the document to instruct the Court Clerk who receives the documents that the document should be delivered immediately to the judge hearing the matter. Any adjournment that is caused by a lack of instructions to deliver the document immediately to the judge may be dealt with by an award of costs against the offending lawyer.

Your assistance in making the court work more efficiently in this area would be much appreciated.

PRACTICE NOTE 4

CASE MANAGEMENT - PRE-TRIAL CONFERENCE - GENERAL DIVISION

To keep the procedures as simple as a possible and because of our unique circumstances, the following procedure will be followed in pre-trial conferences:

Pleadings Close:

1. The usual time limits in the Rules of Court will apply up to this stage.

2. Case Management Telephone Call:

   Within forty-five (45) days after the service of the statement of defence or answer the case management coordinator shall set a date for a case management call with a judge or the case management coordinator for the purpose of planning and giving directions for the timing of further steps in the proceeding and setting the date for a pre-trial.

   The following will take place at the first Case Management Conference.

   The first meeting is a very informal process usually conducted by a telephone conference call at which the counsel and the case management judge or case management coordinator will briefly discuss the future progress of the case in the following terms:

   (a) the contested and uncontested issues will be identified;

   (b) the possibility of mediation, and other alternative dispute mechanisms will be explored;

   (c) each counsel will outline what information he will require from the other. Undertakings for production of material will be made, and the dates set for those productions will be specified;

   (d) with specific regard to property issues, the needs for valuations of property will be identified;

   (e) counsel will be asked to estimate the time they would need to prepare their case sufficiently for a proper pre-trial conference. A pre-trial conference date may be set at this meeting.

   All of the above information will be recorded by the judge or case management coordinator on a Case Management Conference Form. If a case management judge is involved, he/she usually will be the pre-trial judge. A copy of the case management conference form may be distributed. If the first conference is done by a conference call, the necessary adjustments to the above procedure shall be made.

Discovery:

3. Discovery should be completed within 90 days after pleadings are closed**.**

Pre-trial Conference:

PRACTICE NOTE 4CASE MANAGEMENT - PRE-TRIAL CONFERENCE - GENERAL DIVISIONCASE MANAGEMENT - PRE-TRIAL CONFERENCE - GENERAL DIVISION

4. (1) A pre-trial conference shall be held after the time for the completion of discovery under paragraph 3 or not earlier than 30 days from the date the transcript of evidence on discovery is completed, whichever shall last occur.

(2) The case management judge may direct the parties to attend personally with their counsel at all or part of a pre-trial conference.

For the purpose of the pre-trial conference it is understood that:

5. (1) counsel will be properly prepared and have produced to the other side and the court all the material necessary to come to a fair and equitable result;

(2) the judge will be prepared to make recommendations for settlement where possible;

(3) if the case is not settled, a Pre-trial Conference memorandum shall be prepared by the judge outlining what issues have been resolved, what issues are not resolved, and giving counsels= estimate as to the length of trial. The judge who conducts the pre-trial conference will be available up to the date of the trial to assist in settlement negotiations. A "last meeting" at the discretion of counsel, may be held to iron out last minute details.

It should be noted that the pre-trial conference is primarily a settlement conference. Adjournments will not be given lightly.

Trial Date:

6. At the pre-trial conference, the judge may authorize a trial date.

Complex Cases:

7. Where a party is of the opinion that the case has complex issues of law or fact, that party should at the initial conference with the case management coordinator inform her and she will obtain an appointment with a judge to continue the management of the case.

Miscellaneous:

8. (1) At the first case conference the judge or case management coordinator may set,

(a) a date for completion of the next one or more steps in the action;
(b) a date for the next case conference; and
(c) a trial date or a target date for the trial.

(2) At the first case conference, the case management judge or case management coordinator may give directions to deal with any problem that may arise in connection with carrying out the purpose of these rules.

9. No General Section case will be given a date for trial until after a pre-trial conference has been held.

10. Counsel should not request a pre-trial conference unless and until he or she is ready for trial and when counsel is ready for trial, he or she may contact the case management coordinator to obtain a date for a pre-trial conference.

11. Rule 50.01(3) states that a pre-trial conference memorandum shall be filed with the court at least seven days before the date set for the conference. The purpose of filing no later than seven days prior to the conference is to allow the pre-trial judge time to study the file. If a conference is to be beneficial to the parties the pre-trial judge must be aware of and understand all the issues. Having four or five memorandums placed on the judge's desk the night before the conference or the morning of the conference does not allow sufficient time to understand all the issues.

    Section 53(1) of the ***Supreme Court Act*** provides:

> 53(1) Subject to the express provisions of any statute, the costs of and incidental to all proceedings authorized to be taken in court or before a judge are in the discretion of the court or judge, and the court or judge has full power to determine by whom and by what extent the costs shall be paid.

    In the future, costs will be awarded against any party not abiding by Rule 50.01(3). Furthermore, the party against whom the costs are awarded must pay the costs that have been awarded before being allowed to file any further documents in the court or take any further steps in the action.

12. Counsel must exchange copies of documents a reasonable time prior to the pre-trial conference.

13. Minimal completion of the memorandum is not acceptable. All legal research should be completed before the pre-trial conference and all authorities should be cited and included in the memorandum.

14. Counsel having carriage of the case is required to be present at the pre-trial conference. Pre-trial commitments will be viewed as seriously as trial commitments. The entire pre-trial process is rendered ineffective unless counsel having carriage is in attendance; failure of counsel of record to attend is subject to cost consequences.

15. All documents intended to be used at the trial that may be of assistance at the pre-trial conference, such as medical reports, reports of experts, extracts from transcripts, etc. and any other documents which will be sought to be introduced at trial, shall be made available to the pre-trial judge. Correspondence between counsel should not be included as part of the pre-trial documents.

16. The party producing expert reports, and other documents which will be sought to be introduced at trial should file them with the pre-trial conference memorandum. The reports and other documents should be in a sealed envelope, and placed in the court file, marked "pre-trial documents". The pre-trial conference judge shall return them to the parties on completion of the pre-trial conference.

17. Adjournments may be granted by the case management coordinator up to 48 hours prior to the scheduled appointment. Thereafter, counsel must appear before the presiding pre-trial judge. Any adjournment will be a matter for consideration of the pre-trial judge in the ultimate disposition of costs.

18. All materials used on the pre-trial conference which counsel feel should not be left in the file, shall be removed on the completion of the pre-trial process.

19. The effectiveness of the pre-trial process in the settlement of cases depends on the pre-trial judge having all materials available to him or her for review well before the scheduled appointment. This will afford the judge an adequate opportunity to review the materials which counsel view as important.

20. As can be seen, the intent of this directive is to have discoveries completed at the earliest date possible and to have the case management judge involved at a stage earlier than the pre-trial conference. Your co-operation in attempting to speed up the disposition of trials would be appreciated.

PRACTICE NOTE 5

CASE MANAGEMENT - PRE-TRIAL CONFERENCE
Family Division

This guideline is to apply only to family matters that have been commenced by a statement of claim or a petition for divorce followed by the filing of a defence or an answer. The following steps will occur:

1. Issuance of statement of claim or petition.

2. (1) Within forty-five (45) days after the service of the statement of defence or answer the Case Management Coordinator shall set a date for a Case Management Conference with a judge for the purpose of planning and giving directions for the timing of further steps in the proceeding and setting the date for a Pre-trial Conference.

(2) The following will take place at the first Planning Conference.

Clients are not expected to attend at the first meeting, although they are not excluded if they wish to be there. The first meeting is a very informal process; counsel and case management justice will briefly discuss the future progress of the case in the following terms:

(a) the contested and uncontested issues will be identified;

(b) the possibility of mediation, and other alternative dispute mechanisms will be explored;

(c) each counsel will outline what information he will require from the other. Undertakings for production of material will be made, and the dates set for those productions will be specified;

(d) with specific regard to property issues, the needs for valuations of property will be identified;

(e) counsel will be asked to estimate the time they would need to prepare their case sufficiently for a proper Pre-trial Conference. A Pre-trial Conference date may be set at this meeting.

(3) Discoveries shall be completed within 60 days after pleadings are closed.

All of the above information will be recorded by the Judge on a Case Management Conference Form and may be signed by counsel and the Case Management Judge who will usually be the Pre-trial Judge. A copy of the Planning Conference Form may be distributed. The Case Management Judge will be available, on a speedy appointment basis, to meet with counsel at any time up to trial, to assist in their settlement negotiations. If the first conference is done by a conference call, the necessary adjustments to the above procedure shall be made.

3. Upon completion of the Case Management Conference, a Pre-trial Conference shall be held

as set forth in Rule 50. All discoveries and production of documents should be completed by this time. The policy of the court is to try to schedule a pre-trial conference early on in the action. This avoids the difficulty of trying to negotiate a settlement once the parties are entrenched in their positions as they might be prior to trial, especially after having disbursed large sums of money for legal fees.

Clients should attend the Pre-trial Conference unless they have a valid excuse. If a client is unable to attend, he or she must be accessible by telephone during the conference. Failure of a client to attend the conference or be available by telephone may result in an assessment of costs.

For the purpose of the Pre-trial Conference, it is understood that:

(1) counsel be properly prepared and have produced to both the other side and the Court all the material necessary to come to a fair and equitable result, this includes a statement showing the tax consequences of various levels of maintenance and support where same is claimed;

2) clients be in a proper frame of mind to work toward a settlement; and

3) the pre-trial conference judge is prepared to make recommendations for settlement where possible.

If the case is not settled, a Pre-trial Conference memorandum shall be prepared by the Judge outlining what issues have been resolved, what issues are not resolved, and giving counsels' estimate as to the length of trial. The Judge who conducts the Pre-trial Conference will be available up to the date of the trial to assist in settlement negotiations. A "last meeting" at the discretion of counsel, may be held to iron out last minute details.

It should be noted that the Pre-trial Conference is primarily a settlement conference. Adjournments will not be given lightly.

PRACTICE NOTE 6

TRIAL DIVISION - CONTESTED CHAMBERS PRACTICE

1. Contested chambers shall be heard in Charlottetown on Wednesdays and Thursdays commencing at 9:30 a.m. and in Summerside on Tuesdays commencing at 9:30 a.m.

2. Appointments for hearing applications or motions shall not exceed forty (40) minutes in length with each party being allotted twenty (20) minutes to present their case, argument and cross-examination.

3. In case of urgency, applications or motions can be made to the Judge in chambers to add items to the chambers docket.

4. Chamber applications or motions which are anticipated will exceed forty (40) minutes in length shall receive appointments in the discretion of the Registrar.

5. It is the responsibility of counsel making any appointment to anticipate the length of time required in chambers.

6. All contested applications or motions shall be heard in a courtroom in the presence of a clerk who will record the proceedings.

7. Divorces, adoptions and any applications where there is a possibility that it may be defended will be considered as a contested application.

8. Counsel should use every effort possible to set forth as many facts in their affidavits as possible thereby alleviating the need to present ***viva voce*** evidence.

9. When an application or motion is made, counsel shall ensure that the rule or section of the statute under which the application is made is set forth.

10. If a matter has been settled the Registrar should be informed immediately.

PRACTICE NOTE 7

MOTIONS AND APPLICATIONS

1. When filing an application or motion, counsel must assure that the rule or section of the statute under which the application or motion is made is set forth.

2. It has come to the attention of the Court that there are a considerable number of motions and applications being filed without compliance with Rules 37.06 and 38.05. Both these rules state what the contents of the notice shall contain. What is occurring is that notices are being filed without setting forth the relief sought, the grounds to be argued or listing the documentary evidence to be used. Instead, counsel are relying upon the supporting affidavits to attempt to convey to the Court the relief they are seeking.

3. If a responding party to an application or motion merely wishes to oppose the matter, a further application or motion should not be used. An affidavit should be filed setting forth the reasons why the application or motion is being opposed. If the opposition to the matter is on a question of law, a factum should be used setting forth the grounds for opposing the matter.

4. If the responding party to an application or motion wishes to make a counter-application or motion, the counter-application or motion may be made returnable at the same time as the original matter and should contain the same court file number.

PRACTICE NOTE 8

RELIEF UNDER THE DIVORCE ACT AND THE FAMILY LAW ACT

1. The following relief may be sought in a divorce proceeding commenced under the ***Divorce Act***: the dissolution of the marriage; child custody; child support and spousal support.

2. Further relief may be claimed under the ***Family Law Act*** in a divorce proceeding commenced under the ***Divorce Act*** without the necessity of commencing a separate action and subsequent consolidation.

3. Where relief is claimed under the ***Family Law Act*** in a divorce proceeding under the ***Divorce Act***, the necessary pleadings and financial statement required under the ***Family Law Act*** must be properly included in the divorce petition. It is not sufficient to just indicate in the divorce petition that relief is also being claimed under the ***Family Law Act*** without properly setting out the particulars of the relief being claimed under the ***Family Law Act***.

4. An action which seeks relief under both the ***Divorce Act*** and the ***Family Law Act*** shall not have a judgment granted as an uncontested divorce unless:

   (a) the issue of the dissolution of the marriage is uncontested;

   (b) each and every issue of corollary relief under the Divorce Act as well as each and every issue of relief sought under the ***Family Law Act*** has been first agreed to between the parties;

   (c) such agreement is evidenced by a written document, signed by each party, each of whom shall have received separate and independent advice.

5. Where, on the hearing of an uncontested divorce, which includes a claim for corollary or ancillary relief in addition to the simple dissolution of the marriage and no such written agreement has been filed in advance thereof, the Court will deal **only** with the issue of the dissolution of the marriage, and all other matters of relief will be adjourned for hearing at a later date other then on a day fixed for uncontested divorces**.**

PRACTICE NOTE 9

UNCONTESTED DIVORCE DOCUMENTS

It has come to the attention of the Court that documents filed in support of uncontested divorce petitions are often deficient or incorrect in the following manner:

1. (a) Pursuant to s. 11(1)(b) of the ***Divorce Act***, the Court is duty bound to ensure that all "children of the marriage" have been adequately provided for financially. Some counsel appear to be of the mistaken belief that merely because a child has reached their 16th year, the child is no longer a child of the marriage requiring support. That belief is certainly incorrect and in contravention of s. 2(1)(b) of the ***Divorce Act***. A child of the marriage may continue beyond age 16 if that child is unable to withdraw from his/her parents' charge. There may be various reasons for that child being or remaining dependent, but certainly the most common reason is the child attending an educational institution whether academic or vocational in nature. That child may indeed remain "a child of the marriage" into their early twenties (i.e., graduation with first degree).

   (b) In conjunction with the idea "child of the marriage" merely because the parents collectively agree that no maintenance be paid on behalf of the child(ren), it does not mean the Court will automatically accept such a decision. The Court's duty is to be satisfied that adequate financial contribution toward the child has been anticipated, and the Court may order the maintenance be payable regardless.

   (c) The use of the phrase, "there are no children under the age of majority" within the petition or affidavit concerning the children of the marriage, is in all likelihood of no consequence and therefore unacceptable. The Court asks that counsel clearly state if there are no children born of the union; or, if there are children:

      (i) list the names and birth dates of all children of the union; and
      (ii) qualify whether each child remains dependent pursuant to the definition of "child of the marriage" as found in s. 2(1)(b) of the ***Divorce Act.***

2. Per Rule 70.19(5)(a), please state in the petitioner's affidavit that there is no possibility of reconciliation.

3. Per Rule 70.19(5)(b), please state in the petitioner's affidavit that all the information in the petition is correct (not the information in the affidavit), and subsequent to that statement, list any additions, omissions or corrections applicable to the petition since its issue.

4. (a) Please refer to any settlement of division of assets by document name (e.g. Separation Agreement or Memorandum of Settlement) within the petitioner's affidavit.

   (b) In drafting Divorce Judgments, please do not lift/transfer long unenforceable excerpts from Separation Agreements pertaining to such things as what the attitudes of the parties should be or to what the parties will "confer" upon. Counsel are aware the Court is limited by the governing statutes in what it can enforce and to represent otherwise is a disservice to one's client.

5. Per Rule 70.19(5)(g), if the parties have reached a suitable division of property, either by formal or informal agreement, or if there is to be no division of property, the petitioner's affidavit must state that they do not wish to claim division at this time and that they understand they may be barred from doing so later.

6. According to Rule 70.19(5)(c), if the Certificate of Marriage filed in support of the motion is not signed by the Director of Vital Statistics for Prince Edward Island, the petitioner's affidavit must refer to the Certificate by title, date and place, name and office of issue, and state that it contains the correct particulars.

7. Please ensure all particulars of draft judgments are cross-checked with the petition for accuracy, as it is obvious that a number of documents are not being proofread before leaving counsel's office.

8. Divorce judgments should not contain clauses which purport to oust or restrict the court's jurisdiction to review or vary spousal or child support provisions in the future.

Approximately 75% of the Divorce Petitions that are filed contain one or more mistakes. Knowing that mistakes are so prevalent results in extra time having to be taken when the documents are reviewed causing further delay in the judicial system.

PRACTICE NOTE 10

EVIDENCE BY AFFIDAVIT IN DIVORCE CASES

The Court will, on an appropriate application made in Family Chambers, grant an order permitting the tender of affidavit evidence at trial, pursuant to Rule 31.04.

The affidavits proposed to be tendered shall first be submitted to the Chambers Judge, prior to his having made the order, and shall contain, inter alia, the following statements of fact:

(1) acknowledgement of receipt of service of the Petition for Divorce;

(2) acknowledgement that the deponent is the same person as that named as respondent or co-respondent as the case may be;

(3) acknowledgement of independent legal advice;

(4) acknowledgement of the provisions of Section 8 of the ***Evidence Act***, and waiver of rights thereunder, (in the case of the respondent);

(5) acknowledgement of knowledge of the nature of the proceedings, and of the implications of the affidavit;

(6) statement of the reasons why it is impossible or impractical for the deponent to attend at the hearing of the matter;

(7) statement of facts proposed to be admitted relating to the allegations set out in the Petition.

PRACTICE NOTE 11

TRIAL RECORDS - RULE 48.03

The attention of counsel is directed to Rule 48.03(1) which sets forth the contents of the trial record. Only the items specified in Rule 48.03(1) are to be included in the trial records. Such documents as a report of a Family Court Counsellor, expert reports, pre-trial conference memorandum, etc. should not be included in the trial record.

PRACTICE NOTE 12

REMOVAL AS SOLICITOR OF RECORD

1. A solicitor of record who wishes to be removed as solicitor of record must follow the procedure as set forth in Rule 15.04 of the Rules of Court. Further reference may also be made to Legal Ethics - Mark M. Orkin, Code of Professional Conduct - Canadian Bar Association, and Rule 15.04 Ontario Rules of Practice.

2. Generally, a solicitor retained to conduct a lawsuit is under the obligation to carry it to termination and may only terminate on reasonable notice to the client and for a good reason.

3. A solicitor of record who wishes to be removed should apply to a Judge in Chambers for leave to be removed as solicitor of record.

4. The same practice should be followed in a criminal matter as in a civil matter.

5. This practice does not apply to a situation in which the client has elected to change solicitors.

PRACTICE NOTE 13PRESENCE OF NON-COUNSEL AT COUNSEL TABLEPRESENCE OF NON-COUNSEL AT COUNSEL TABLE

PRACTICE NOTE 13

PRESENCE OF NON-COUNSEL AT COUNSEL TABLE

1. Ordinarily, no one except counsel should be seated at the tables provided for them in the courtroom.

2. Everyone else, including police officers, should be seated in the area provided for the general public.

3. If counsel wish to have the accused, or a client, or a peace officer, or some other person, with them at the counsel table during a trial, such counsel should first seek the Court=s permission, identify the person and give the reason why they wish to have him or her seated at the counsel table.

4. Until permission is given, that person should not be seated at the counsel table.

5. Anyone who does get permission to sit at the table with counsel must dress and act at all times in a manner fitting to the dignity of the Supreme Court.

6. COUNSEL SHOULD remind their clients and witnesses that they should remain quiet while in the courtroom and that if they leave while the court is in session they must do so quietly.

PRACTICE NOTE 14

HIGHLIGHTING AND REFERENCING AUTHORITIES AND CITATIONS OF PEI CASES

1. All authorities cited and relied upon on motions, applications, trials and appeals must have the relevant portion highlighted by underlining, sidelining or highlighting in colour.

2. The Registrar will inspect all cited authorities in factums, briefs, etc., for compliance with paragraph 1 and will refuse to accept authorities for filing if there is non-compliance with paragraph 1.

3. Counsel may, in their discretion, limit the photocopying of unduly long cases to the specific passage or passages upon which they rely and the head note.

4. Counsel may file a joint book of authorities and just file one copy of any common authorities or rely on the other party=s copy of a common authority. Counsel are asked to make every effort possible to comply with this provision. Counsel disregarding this practice may be dealt with by having costs awarded against him or her.

5. Counsel must always cite the rule number or section of a statue that is relied upon as the authority for a motion or application.

PRACTICE NOTE 15

COURT ORDERS

1. Counsel for the successful party on a motion, application, trial or an appeal should draw an appropriate order to be signed by the presiding judge or judges.

2. The Prothonotary has been instructed that no costs shall be taxed unless a formal order has been filed.

3. No further steps in any proceeding will be allowed until all necessary previous orders (whether interlocutory or final) have been filed.

PRACTICE NOTE 16

MOTION TO VARY OR EXTEND EXISTING ORDERS

1. Except in matters in the Family Division, where any motion is made to vary or extend an existing order of the Court or a Judge, the motion should generally be made to, and heard by, the Judge who made the order with respect to which the variation or extension is sought.

2. The motion shall not be directed to the Judge in chambers nor placed on the regular chambers docket.

3. The solicitor acting on behalf of the applicant shall at the time of filing the motion arrange with the Registrar to have the motion set for hearing before the Judge who made the order as soon as it can be heard.

PRACTICE NOTE 17

EX PARTE ORDERS

All lawyers are reminded of the fact that **ex parte** orders or injunctions will not be granted except in an absolute emergency, unless some notice has been given to the opposite party or the opposing attorney.

PRACTICE NOTE 18

INTEREST

1. Sections 49-52 of the ***Supreme Court Act***, R.S.P.E.I. 1988, Cap. S-10 apply to the calculation of interest.

2. Where interest is to be collected on an execution, it is necessary to calculate the total interest by reference to s. 49 of the ***Supreme Court Act***. As varying rates will most likely apply, it is impossible to put a specific rate of interest in the Execution Order.

3. It is suggested that the following underlined wording may be used in Execution Orders:

IT IS ORDERED THAT:

1. Any Sheriff shall seize. . .and sell at public auction. . .that will satisfy the judgment creditor's claim **in the amount of $_____ plus interest calculated in accordance with the Supreme Court Act and probable costs of $_____.**

PRACTICE NOTE 19

ASSESSMENT OF COSTS BY PROTHONOTARY

1. When a party is having costs assessed by the Prothonotary pursuant to an order the party shall file a bill of costs and a copy of the order or other document giving rise to the party's entitlement to costs, with the Prothonotary, through the office of the Registrar.

2. The Prothonotary shall issue a Certificate not later than 30 days after the completion of the assessment hearing or not later than 45 days in the event the assessment amount is objected to under Rule 58.10, unless an extension is granted on motion to a judge.

3. A party having solicitor-client costs assessed by the Prothonotary shall file a request for assessment along with the subject account or legal bill with the Prothonotary who shall set the matter down for hearing to be heard within 40 days.

5. The Prothonotary shall issue a Certificate no later than 30 days after the solicitor-client assessment hearing unless an extension is granted on motion to a judge.

6. A Certificate on solicitor-client costs shall be effective when the order is made.

PRACTICE NOTE 20

SECURITY FOR COSTS

1. Counsel might wish to follow the attached affidavit and draft bill of costs that was filed in a motion in Ontario seeking security for costs. It addresses the information the Court requires on such a motion. Only the material that relates to the issue of the calculation of the costs is attached.

PRACTICE NOTE 20

Court File No. 92-CQ-2887

ONTARIO COURT (GENERAL DIVISION)

BETWEEN:

POLAR PRODUCTIONS AND
SPORTS CONSULTANTS INC.

Plaintiffs

- and -

AULT FOODS LIMITED, carrying on
business as THE SPORTS NETWORK,
TEN ENTERPRISES and JLL BROADCAST GROUP

Defendants

NOTICE OF MOTION

The Defendants will make a motion to the Court on Thursday, the 15th day of April, 1992 at 10:00 a.m., or as soon after that time as the motion can be heard, at 145 Queen St. West, in the City of Toronto.

THE MOTION IS FOR an Order for security for costs.
THE GROUNDS FOR THE MOTION ARE:

1. The Plaintiff is ordinarily resident outside Ontario.
2. The Plaintiff is a corporation and there is good reason to believe that the Plaintiff has insufficient assets in Ontario to pay the costs of the Defendants.
3. Rule 56 of the rules of Civil Procedure.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

1. The Affidavit of C. Clifford Lax.
2. The Affidavit of Peter Pleckaitis

DATE: March 24, 1992

GOODMAN & GOODMAN
250 Yonge Street
Suite 2400
Toronto, Ontario M5B 2M6
Solicitors for the Defendants

TO: MORRIS COOPER
Cumberland Court
99 Yorkville Avenue
Toronto, Ontario M5R 2K5
Solicitors for the Plaintiffs

PRACTICE NOTE 20

Court file No. 92-CQ-2887

ONTARIO COURT (GENERAL DIVISION)

BETWEEN:

POLAR PRODUCTIONS AND
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TEN ENTERPRISES and JLL BROADCAST GROUP

Defendants

AFFIDAVIT OF C. CLIFFORD LAX

I, C. Clifford Lax, of the City of Toronto, in the Municipality of Metropolitan Toronto, MAKE OATH AND SAY:

1. I am a partner in the firm of Goodman & Goodman, solicitors for the Defendants herein, and as such have knowledge of the matters to which I hereinafter depose.

2. I was called to the Bar in 1970 and am the senior litigation partner at Goodman & Goodman.

3. A review of the pleadings in this action indicates that it deals with ongoing dealings between the parties over a period of almost three years. It involves serious allegations against the Defendants including breach of fiduciary duty, breach of confidence and deceit and misappropriation of assets. It also alleges intentional interference of contractual relations and claims that there have been damages to the reputation of the Plaintiff. Fundamentally, at issue in the action is a complicated allegation that the Defendant has somehow expropriated a "syndication network" allegedly developed by the Plaintiff pursuant to its contractual relationship with the Defendant.

4. It is my conservative estimate in reviewing the pleadings that there will be five days discovery in total in these proceedings. One day of these discoveries would arise as a result of the Defendant's counterclaim. A reasonable estimate of the length of the trial is twelve days of which I consider that two days in total would be attributable to the Defendant's counterclaim. Up to the point of trial, the file will be handled by Ken Crofoot, a partner in Goodman & Goodman called to the bar in 1984. At trial, due to the amount in issue and the nature of the claim I consider it appropriate that the Defendant be represented by myself and Mr. Crofoot with the further assistance of an articling student.

5. Attached hereto as Exhibit "A" is a draft Bill of Costs which I consider to be a reasonable estimate of the costs on a partial indemnity basis which will be incurred by the Defendant sin the defence of this proceeding. This draft Bill of Costs is exclusive of the time which will be involved in the prosecution of the counterclaim.

SWORN BEFORE ME at the City of Toronto,)
in the Municipality of Metropolitan Toronto,)
this 23rd day of March, 1993)
Commissioner for taking Affidavits) C. Clifford Lax

EXHIBIT "A"
DRAFT BILL OF COSTS

Pleadings		$1,000.00
Affidavit of Documents	Clerk - 10 hrs x $50	$500.00
	Counsel - 2 hr. x $150	$300.00
Motions	Security for Costs	$1,000.00
	Strike Jury Notice	$1,000.00
	Refusals	$1,000.00
Discoveries	Preparation - Counsel - 20 hrs. x $140	$2,800.00
	Attendance - four days - 32 hrs. x $140	$4,480.00
Trial	Preparation	
	- 1st counsel 20 hrs. x $160	$3,200.00
	- 2nd counsel 40 hrs.x $140	$5,660.00
	- student 50 hr. x $50	$2,500.00
	Attendance (10 days)	
	1st counsel ($1,600 day)	$16,000.00
	2nd counsel ($1,400 day)	$14,000.00
	student ($500 day)	$5,000.00
TOTAL FEES:		**$58,440.00**

Disbursements

Statement of Defence	$70.00
Transcript - 1st copy, 175 pages x 2 days x $3.75	$1,312.50
2nd copy, 175 pages x 2 days x $.75	$262.50
Court copy, 175 x 2 x $.75	$262.50
Form and Reporter fee per hour ($34 x 7hrs. 2 days)	$476.00
TOTAL DISBURSEMENTS:	**$2,383.50**
TOTAL FEES AND DISBURSEMENTS:	**$60,823.50**
GST at 7%	$4,257.65
TOTAL	**$65,083.15**

PRACTICE NOTE 21

COSTS

1. Where costs are awarded on motions, applications and pre-trials they shall normally be fixed and made payable forthwith.

2. Costs on motions and applications, including ex parte matters shall normally be awarded on the basis of the Costs Guide attached hereto.

3. Costs shall not be awarded on ex parte matters dealt with on filed materials unless the applicant files a signed memorandum containing the required information mentioned in Form 57B.

PRACTICE NOTE 21

COSTS GUIDE

In order to assist PARTIES in making costs submissions under Rule 57, and in completing Form 57B, the following guide is suggested. This guide includes the MAXIMUM rates that the courts will normally consider when fixing partial indemnity costs. The maximum rates are intended to apply only to the more complicated matters and to the more experienced counsel within each category. The parties are reminded that, to the degree that partial indemnity rates are helpful in making costs submissions, they should utilize rates in their submissions that fall within the range established by these maximums that is appropriate to their particular matter after giving due consideration to the factors set out in Rule 57.01(1).

GUIDE

Fee items in addition to the hearing itself which may be included in an award of costs include discovery of documents, drawing and settling issues on special case, setting down for trial, pre-motion conference, examination, pre-trial conference, settlement conference, notice or offer, preparation for hearing, preparation of order, issuing or renewing a writ of execution or notice of garnishment, seizure under writ of execution, seizure and sale under writ of execution, notice of garnishment, or for any other procedure authorized by the Rules of Civil Procedure.

Law Clerks and students-at-law	maximum of $50.00/hr
Lawyer (less than 5 years)	maximum of $90.00/hr
Lawyer (more than 5 but less than 10 years)	maximum of $120.00/hr
Lawyer (10 or more but less than 20 years)	maximum of $140.00/hr
Lawyer (20 years and over)	maximum of $160.00/hr

Gerard E. Mitchell
Chief Justice of Prince Edward Island

Jacqueline R. Matheson
Chief Justice - Trial Division

September 1, 2005

PRACTICE NOTE 22

TRANSCRIPTS AND TAPES OF EVIDENCE

1. Court clerks do not prepare transcripts of evidence but will provide CD's/tapes of the evidence to any party who makes a request for same.

2. The following procedure is to be followed when requesting copies of the evidence:

   (a) Counsel, or a party, if unrepresented, puts a request in writing, for a CD or tape to the Trial Coordinator;

   (b) The Trial Coordinator estimates the cost of the CD or tape, and if the cost will exceed $25.00, counsel or a party must pay the estimated cost before the evidence is copied;

   (c) Upon payment of the fee referred to in (b), the CD or tape shall be provided to counsel or a party making the request;

   (d) If the transcript of the CD or tape is to be used on an appeal or for any other court purpose, the parties must comply with s. 55(3) of the ***Evidence Act***;

   (e) If the parties are unable to reach an agreement under s. 55(3), a judge of the Court shall be immediately informed and the parties shall seek directions from a judge;

   (f) Where the parties have reached an agreement under s. 55(3), the transcripts shall be produced forthwith.

3. An audio recording of court proceedings may be used only:

   (a) for the preparation of a typed transcript;
   (b) to permit the solicitor or party of record to review the testimony; or
   (c) to verify or supplement notes made for the purpose of preparation of material for broadcast or publication**.**

4. An audio recording of a court proceeding shall not, either in whole or in part, be used for broadcast, audio reproduction or re-taping.

PRACTICE NOTE 23

TRANSCRIPTS OF ARGUMENT

1. Argument made by counsel does not form part of the evidence and will not be included in a transcript of the evidence unless counsel obtains judicial approval for a transcript of the argument. Substantial reasons must be shown before an order will be obtained. This does not apply to submissions on sentencing.

PRACTICE NOTE 24

RELEASE OF JUDGMENTS -- TRIAL DIVISION

The Supreme Court Trial Division and the Law Society of Prince Edward Island adopted a protocol for the release of Supreme Court Judgments. The protocol is published here in the form of a Practice Note.

PROTOCOL FOR RELEASE of SUPREME COURT JUDGMENTS

The purpose of this Protocol is to alleviate the problem of clients learning the outcome of their litigation from the media or others. This Protocol and the previous policy it replaces (memo to all Members from the court, dated October 16, 1991) was prepared at the request of the Law Society to permit lawyers to advise their clients of the contents of court judgments prior to the general release of the judgments by the court.

The Protocol was approved by the Supreme Court of Prince Edward Island on December 22, 1995, and by the Council of the Law Society of Prince Edward Island on February 12, 1996.

*** * * * ***

The following shall be the procedure to be followed in the release of written judgments given in the Supreme Court Trial Division.

1. When a judgment is ready for release, the court stenographer responsible for typing the judgment shall inform, by telephone, the lawyers or lawyers= secretaries that the judgment has been signed and that a copy for each lawyer is available from the court stenographer for pick-up or for delivery by fax.

2. Lawyers may release a copy of the judgment to their respective clients immediately, but
   (a) shall not release the judgment or any particulars thereof to the media or any third party and
   (b) shall request their respective clients not to release the judgment or any particulars thereof to the media or any third party

   until the time of general release of the judgment by the Court.

3. Twenty-four hours after the court stenographer has notified the lawyers of the availability of the judgment
   (a) the Court shall release the judgment to the general public and the media; and
   (b) the court stenographer shall file the original copy of the judgment in the office of the Registrar.

4. In the calculation of the twenty-four hour period, Saturdays, Sundays and statutory holidays shall not be included.

5. In cases where a party if unrepresented by counsel, the court stenographer
   (a) shall inform the party directly of the availability of a copy of the Judgment;
   (b) shall explain the release of judgments policy to the party; and
   (c) shall request the party not to release the judgment or any particulars thereof to the media or any other third party until the stipulated twenty-four hour period has expired.

PRACTICE NOTE 25

ESTATES PRACTICE

1. It has come to the attention of the Court that the practice among lawyers varies as to what should be contained in an estate inventory. Two instances may be given. In one case the value of the estate was in the vicinity of $500,000 made up of a house and lot, stocks and bonds. However, household goods and furniture were only valued at $1,000. In a second case the value placed on a farm exceeded $200,000 but no value was placed on farm implements.

2. The first question that may be asked is whether the Court should go behind the petition for probate or administration and question what the executor or administrator has sworn to. In cases where, from the face of the record, there is an apparent discrepancy or oddity, there is a duty of the Court to ask for an explanation. Subsequently, in both of the above instances, the solicitors for the estates informed the Court that in fact the value of the household assets was undervalued and in the second case that there was a substantial equity in the farm implements.

3. Lawyers should be conscious of the fact that they are opening themselves to a claim of negligence if they do not inform executors or administrators as to the requirements of the law when declaring an estate inventory. A creditor of the deceased might successfully claim reliance on the inventory in not pursuing a claim. Later, after the assets have been disbursed the creditor could learn that in fact all the assets were not set forth in the inventory. While a subsequent claim would be against the executor or administrator, the latter would undoubtedly join the solicitor, claiming that it was the solicitor who gave advice as to the contents of the inventory. Since the personal representative would in most cases be unaware of the legal intricacies of estates, the solicitor would have a heavy burden placed on him.

4. Section 33 of the ***Probate Act*** requires that any person named as an executor shall prove the will and file it in Court. Further, the named executor **shall apply for Letters Probate** or file a declaration of his refusal.

5. Section 48 of the ***Probate Act*** requires every personal representative before the granting of Letters Probate of Letters of Administration to **file an inventory**. The inventory **shall** ". . .contain a true description and estimate of the real and personal estate of the deceased person. . .". It is clear from the ***Probate Act*** that if there is a will it must be filed with the Court. Secondly, the executor must apply for Letters Probate. Further, in applying for letters Probate or Administration a full and complete inventory of all real and personal estate must be filed.

6. There appears to be some confusion arising from s. 2(2) of the Regulations made under the ***Probate Act***, which states that "where probate is required solely for the purpose of vesting the title to real property the fee is $50." It must be understood that if there is a conflict between an act and a regulation made under the Act, the provision in the ***Act*** must prevail. Here, the ***Act*** requires an inventory of all real and personal property to be filed. Further,

there is nothing in the Regulations that states a detailed inventory need not be filed. The Regulation merely sets a fee.

7. The fee that is being set by the Regulations is applicable solely to cases where there is no property **other than real estate**. If there is other property it must be listed in the inventory. Further, if there is property, other than real estate, the full fee set out under s. 2(1) of the Regulations must be paid.

8. In estimating the value of an asset that is not assessed for some tax purposes or, is not valued by some market valuations, i.e., stocks, bonds, etc., all the Court requires is an estimate that is reasonable. It is not, at the present time, necessary to have a valuation done by an appraiser. There are enough auction sales on Prince Edward Island to give an executor or administrator or a solicitor a rough idea of the valuation of personal assets.

9. A further problem that has arisen is that some solicitors are advising clients or are under the impression that personal assets are jointly held as between husband and wife and there is no need to account for them in the inventory. Until such time as the Court has been given acceptable law supporting such an interpretation, the Court will assume personal assets to be owned by a husband and wife in equal shares. It has been said that Courts on various occasions, in some cases where there is uncertainty as to the type of gift being given, have "leaned over backwards" to interpret gifts to two or more persons as being given equally among the donees. I believe the same principle should apply here.

   One may only look to a case where a person may have put all his money or her money into purchasing works of art for the matrimonial home. If the person should die intestate, or by will leave "all my personal property to my wife and children equally," it would not appear to be logical that the wife or husband could come in and claim the works of art as being jointly owned by he or she and the deceased spouse, thereby defeating any claim of the children.

   In the case of a deed jointly held, stocks, bonds or bank accounts in the joint names of the spouses, the deceased has specifically turned his or her mind to joint ownership. In that case, there is no need to include such jointly held property in the inventory of the estate. It will also be open for a person to prove that a certain asset was jointly held with the deceased or, did not, in fact, belong to the deceased.

10. Where there are no personal assets or where there is a claim that the assets were held jointly, a paragraph explaining the situation should be placed in the petition.

11. Counsel are further advised that inventories should contain a breakdown of the composition of assets, i.e., it is not satisfactory to merely state "Stocks - $100,000." Each stock, its type, share value and number of shares should be listed.

12. On closing an estate, the bills of all accounts owing by the estate should be produced.

13. Section 46(5) of the ***Probate Act*** provides for the dispensation of a bond in estates that are to be administered. The bond may be disposed with "upon application made by or on behalf of

the applicant." Compliance with this subsection may be made by the attorney for the estate setting forth in a letter to the Court the request to have the bond dispensed with.

14. Form 65FF, Proof of Will, is deficient in that it does not explicitly state that the second witness signed "in the presence of" the testator or testatrix. Therefore, in the future the following words "and in the presence of the testator (rix)" should be added to the Proof of Will after the word "time."

15. It is to be noted that in the case of both the petition for probate or administration, and the petition to pass accounts, the inventory should be attached to the petition, along with an affidavit verifying both the petition and inventory.

16. It appears that many estate inventories are being filed with only a nominal valuation for personal property. In the future, all lawyers should ensure that the executor or administrator places a reasonable value on the personal assets, i.e., clothing, jewellery, household goods and furniture. If valuations are not reasonable, then the Court will have no alternative than to ask for an assessment to be made by a properly qualified person.

17. When submitting an inventory which includes real estate there should be indicated the location of the land, the amount of the land (i.e. house and lot, or __acres) and the property number.

18. Where it is intended to apply to the Court for either a waiver of the requirement of a bond or for waiver of the requirements for sureties under s. 46(5) of the ***Probate Act***, the better practice is to contact the Court for interim approval prior to having the estate documents signed. By doing this it may save the time and expense of having the administrator or others reattend to your office to sign additional documents if your request for waiver is refused.

19. When closing an estate there should be filed with the Court, previous to the date of the hearing, all affidavits of publication, posting or service, and a copy of the proposed Decrees on Passing Accounts. All receipts of accounts paid by the personal representative must be brought before the Court on the closing.

When Closing an Estate:

When closing an estate you should note rule 65.43(4) and (5) which require the provincial guardian to be informed if an infant is concerned, and the committee or guardian in the case of a mentally incompetent person.

20. The inventory that is filed with a petition to pass accounts varies greatly among lawyers. Generally, there is insufficient information contained in the inventory. In order to standardize the form of inventory both for an estate closing and the inventory filed seeking Letters Probate or Letters of Administration. The form of inventory used in the estate of Thomas Alfred Pickard 539-Will 42-32 June 4, 1958, should be followed.

21. **Personal Representative - Commission**

The personal representative is not entitled to any commission prior to the estate being closed.

22. **Caveats - Proof of Will in Solemn Form - Caveator Filing Caveat Prior to Probate**

The practice to be followed when seeking to prove a Will in solemn form is confusing. The ***Probate Act***, Rule 65 (Estates of Deceased Persons) and the Forms made under the Rules, make the determination of the procedure to be followed very difficult to understand. There is undoubtedly a need to amend the ***Probate Act*** and **Rules**, but in the meantime the following procedure should be followed:

(a) Any person interested in a Will who wishes to make an objection to the Will may file a caveat (s.39(1), Form 65EE). The first form does not ask for proof in solemn form. It merely informs the Registrar not to do anything further in the estate without notice to the caveator. It gives time to the caveator to make inquiries and to decide whether there are grounds to appeal the grant or to afford the caveator an opportunity to raising any question regarding the grant, either on motion or application, as a preliminary step to an action to the issue of a grant. At a later time the caveator may ask that the Will be proved in solemn form. The alternative form is to be used when the caveator asks for proof of the will in solemn form.

(b) An affidavit must accompany the caveat (Form 65GG).

(c) If the caveator has filed a caveat requesting proof in solemn form, or a caveat which does not require proof in solemn form, but later wants to have the Will proved in solemn form, the caveator shall make an application to the Court (s. 39(1)), requesting the court to issue a citation calling upon the personal representative to prove the Will in solemn form. Notice of the application shall be served on the personal representative, the principal purpose being to determine a date for the hearing. Rule 65.08 which states the caveator shall serve a notice upon the personal representative calling upon the personal representative to prove the Will in solemn form within 10 days, should be ignored.

(d) The affidavit in support of the application for the Citation to Parties should set out the names and addresses of all interested parties under the will, those interested under a previous Will and those who would take on an intestacy. If a minor or a mentally incompetent person is involved, service must be made on the Official Guardian as official trustee.

(e) The citation to be issued by the Court is Form 65FF. It does not require the Will to be proved in solemn form within 10 days but requires an appearance to be entered by any interested person if they wish to take part in the determination of the question. The appearance must be entered within 10 days. Thereafter, the Court will set a date for the hearing**.**

(f) The citation must be served by the caveator on all interested parties, which includes the personal representative. The citation order should set forth the means by which service shall be made.

(g) Where a citation has been issued the personal representative shall file a petition in accordance with Rule 65.07.

23. Caveat Filed by Caveator - Application then Made for Probate by Personal Representative

(a) Where a caveat has been filed and the personal representative then applies for probate, the Registrar will send a warning (Form 65HH) to the caveator, requiring the caveator to enter an appearance usually within 10 days. If no appearance is entered, the application for the grant will be dealt with in the usual manner.

If an appearance is entered, the person propounding the Will shall apply for a Citation to Parties (Form 65FF).

24. A personal representative may prove a Will in solemn form with or without a caveat having been filed (s.38(1)).

25. A caveat may be used in any circumstance where an interested person has a concern about the administration or probate of an estate.

26. Anyone having any questions regarding this procedure should seek the direction of the Court prior to taking any steps in the matter.

27. Precedent Estate Files
When filing the initial inventory and, if the estate is being closed, the final inventory, the form of the inventory in the estate of T. Alfred Pickard should be followed. The Registrar will provide copies of these inventories upon request.

PRACTICE NOTE 26

TRUSTEES' FEES FOR THE CARE AND MANAGEMENT OF TRUSTS

1. Section 31 of the ***Trustee Act***, R.S.P.E.I. 1988, Cap. T-8, provides that "trustees. . . are entitled to such fair and reasonable compensation for their care, pains and trouble, and their time expended in and about the trust estate, and in such proportion where there is more than one trustee, as is determined by the Court."

2. In the past, where the trustee's remuneration was not set by the agreement setting up the trust, it was necessary to apply to the Court to have a trustee's remuneration decided. This remuneration has usually been determined at five percent (5%) of gross income passing through the trustee's hands.

3. The Judges of the Supreme Court have decided that they will adopt, as a rule of general application, the fixing of the remuneration of trustees at no more than five percent (5%) of gross income from time to time coming into the hands of the trustee on an annual basis, together with two-fifths of one percent (1%) of capital annually and such other amounts as the Court may allow on application made by the trustee to pass its accounts. Trustees should make application to the Court for approval of ongoing allowances under s. 31, and this practice memorandum at the end of each trust year. An annual determination is deemed desirable when it is not otherwise provided for the settlement deed or document establishing the terms and conditions of the trust.

PRACTICE NOTE 27

QUIETING TITLES ACT

In order to clarify the practice concerning petitions under the ***Quieting Titles Act***, the following procedure must be followed:

1. In the first instance, every application shall be supported by all of the documents required under s. 5 of the ***Act*** and counsel should be prepared to place before the Judge all the evidence to support the petition. If the petition and supporting documents give all of the information required by the ***Act***, it would not be necessary to have viva voce evidence.

2. If the Judge is satisfied that the evidence produced is sufficient to eventually give a certificate of title, he shall give directions under s. 11(1) for publication of a notice of the application.

3. After the required publication has been made and should there be no adverse claims filed with the Registrar, counsel may attend before a Judge to obtain the certificate of title. Preferably it should be before the Judge to whom the application was made.

4. If an adverse claim is filed, the matter shall be set down for hearing at which time the applicant would be required to prove his claim.

5. In the majority of cases, it is unnecessary to have the full description of the property published. Counsel should make every effort to use the shortest description possible but always include the parcel number for the property.

6. Copies of deeds that are filed to support a petition to quiet title must be legible. If the photocopy of the deed is not legible, then it is incumbent upon counsel to have a typed copy of the deed made and certified. Any petitions that come before the Court with illegible deeds will be set over until such time as legible deeds are filed.

PRACTICE NOTE 28

JURISDICTION OF PROTHONOTARY

Section 20(5) of the ***Supreme Court Act*** R.S.P.E.I. 1988, Cap. S-10 and Rule 37.02(2) sets forth the jurisdiction of the Prothonotary of the Supreme Court. Under the **Rules of Court**, he has jurisdiction to hear any uncontested motion, with the exception of those motions mentioned in Rule 37.02(2).

The Prothonotary will hear uncontested motions in his office in Charlottetown on a daily basis.

All uncontested motions, within the Prothonotary's jurisdiction, that were formerly dealt with in uncontested chambers, should now be brought before the Prothonotary. The normal practice will continue in Summerside.

PRACTICE NOTE 29

SUMMARY CONVICTION APPEALS

1. It has become evident in some recent summary conviction appeals that the appellant has not been cognizant of the section of the ***Criminal Code*** under which the appeal should be taken to obtain the desired remedy.

2. A summary conviction appeal may be launched under two sections, 813 and 830. All summary conviction appeals should state under which section of the ***Criminal Code*** the appeal is being made. It is suggested that paragraph 1 of the Notice of Appeal commence with the words, Pursuant to s. of the ***Criminal Code***, the above named appellant appeals. . .

3. The book Criminal Law Evidence, Practice and Procedure by John L. Gibson, Parts 5 and 6, sets forth in clear detail the relevant sections relating to appeals under ss. 813 and 830. A brief overview of the practice and procedure and case law in this area is also contained in the book and should prove useful.

PRACTICE NOTE 30

CHANGE OF PLEA TO INCLUDED OR OTHER OFFENCE

1. Subsection 606(4) of the ***Criminal Code*** sets out the procedure for any change of plea to an included or other offence. It reads as follows:

> Notwithstanding any other provision of this Act, where an accused or defendant pleads not guilty of the offence charged but guilty of the other offence arising out of the same transaction, whether or not it is an included offence, the court may, with the consent of the prosecutor, accept that plea of guilty and, if such plea is accepted, the Court shall find the accused or defendant not guilty of the offence charged and find him guilty of the offence in respect of which the plea of guilty was accepted and enter those findings in the record of the Court.

2. Accordingly, when defence counsel indicates that there is going to be a change of plea, the clerk should rearraign the accused on the original charge.

3. The accused should then enter a plea of not guilty to the original charge, and then say that he pleads guilty to another offence.

4. Next, the accused or counsel should specifically state what offence and section of the ***Code*** the accused is pleading guilty to.

5. At this point, the Crown should state that it consents and provide the Court with any statement of facts that the Court will need to accept the guilty plea.

6. The Judge may then question the accused as to whether he understands the nature of the charge, and understands what the effect of a guilty plea is. The Judge may then find the accused not guilty, as originally charged in the indictment, but guilty of the particular offence to which he has just pleaded. The Judge should specifically state which section of the ***Code*** the accused has pleaded guilty to.

7. Upon such finding, the Clerk shall endorse the indictment with a not guilty plea to the original charge but a finding of guilty regarding the offence to which the accused has just entered the plea.

PRACTICE NOTE 31

FRONT SHEETS

Any memorandum, factum, record, appeal book, or other document requiring a front sheet shall indicate thereon the name of the party filing the document, either in writing, boldfacing, highlighting, etc. The purpose of this procedure is to enable a judge to quickly identify who has filed the document.

PRACTICE NOTE 32

GENERAL TOPICS

This Practice Note contains a series of practices that all members of the legal profession are asked to observe and follow.

1. **Closing Estates**
When filing the Executor's/Administrator's Final Accounts strict compliance with the general form of Final Accounts filed in the Estate of Alfred Pickard is required. If necessary, a draft of the Final Accounts may be submitted to the Court for general approval. If the Final Accounts are not in the approved form, the hearing will be adjourned.

2. **Costs**
Counsel are urged to make use of the procedure set forth in Practice Note #21 if costs of an application or motion are being sought. Without the information contemplated by Practice Note #21 being set forth, lesser costs than counsel might be entitled to may be awarded.

3. **Exhibits**
When filing an affidavit that has an exhibit attached, the exhibit stamp should be on the exhibit, not on a separate piece of paper attached to the exhibit.

4. **Filing Case Law**
When filing cases, those parts of the case which are relied on should be emphasized by a coloured marker or florescent pen.

Duplicate Filing
A respondent should make every effort not to duplicate any of the materials filed by an applicant**.**

5. **Front Covers**
On a motion, the front page should indicate the purpose of the motion, i.e. summary judgment, amendments of pleadings, extension of time, etc. The name of counsel on any document with a front cover should be clearly stated, either by highlighting, underlining, or other means on the front cover.

6. **Motions and Applications - Grounds**
The form to be used on a motion or application requires the grounds of the motion or application to be set forth. The former states the "grounds to be argued" are to be specified "including a reference to any statutory provision or rule to be relied on."

In compliance with the directions contained in the Rules it is not appropriate to include in the grounds the detailed factual situation being relied on as this should be contained in the affidavit of the applicant. For example, an applicant who is seeking custody of a child would refer to the statutory provision under which the application is to be made and state it is in the best interest of the child that the applicant has custody. If support is being sought, it is sufficient to say that the applicant needs support and the respondent has the means to pay support.

7. **Motions and Applications - Record**
When filing materials for use on a motion or application there is no need to file the complete

statute, regulation or rule. It is sufficient to file only the sections of the statute, regulation or rule being relied on.

8. **Pre-Trial Conference Memorandums**
Rule 50.01(3) requires the filing of a pre-trial conference memorandum at least seven days before the date set for the conference. Breach of this requirement may result in costs being awarded against the offending party.

9. **Pre-Trial Brief**
Rule 48.12 requires the filing of a pre-trial brief at least seven days prior to the date for the trial. Failure to comply with this rule will result in costs being awarded against the offending party and may result in an adjournment.

10. **Quieting Title**
Counsel are reminded that a Petition for Quieting Titles is not to be used as a substitute for probating an estate.

The abstract of title should be in the following general form:

<u>Conveyance</u>

John Brown	Document #7403
to	Liber 110, Folio 242
Harry Black	Dated: October 26, 1998
	Registered: October 27, 1998
	Locus
Harry Black	Document #8842
to	Liber 110, Folio 248
Robert White	Dated: November 2, 1998
Conveyance	Registered: November 4, 1998
	Land including locus
<u>Mortgages</u>	
Robert White	Document #3333
to	Liber 346, Folio 720
Bank of Montreal	Date: November 2, 1998
	Registered: November 5, 1998
	Locus

This form of an abstract is easier to read than some of the forms that are presently used. Each entry should state whether the land being transferred is the locus, part of the locus or less than the locus.

Counsel are reminded that Quieting Title of property should not be used as a substitute for probating estates. If any questions should arise as to the proper procedure to follow to obtain title to land, prior to the proceeding being commenced, counsel should seek the opinion of the Court.

11. **Service of Documents**

When a particular document is served on more than one lawyer, there shall be filed only one document showing the acknowledgement of receipt. For example, in a recent case the Application Record had to be served on three lawyers. The Application Record exceeded 100 pages. A separate Application Record was served on each of the three lawyers and then filed in the Court, resulting in four Application Records being in the file.

12. **Simplified Procedure**

(a) Rule 75.1.07(2) requires the filing of a pre-trial conference memorandum in the format of Form 75.1A. **Please follow this form.**

13. **Spousal Support**

The amount of spousal support being requested should be clearly set forth. The fact that the party seeking support does not know the exact income of the intended payor spouse does not mean an estimate of income cannot be made so that an amount for spousal support can be suggested.

14. **Trial Record**

Rule 48.02 requires the filing of a tria1 record. Henceforth, no trial will proceed unless the plaintiff files a trial record. Failure to comply with this rule shall result in costs being awarded against the plaintiff.

Dated September 1, 1999

PRACTICE NOTE 33

GENERAL TOPICS

This Practice Note contains a series of practices that all members of the legal profession are asked to observe and follow.

1. **Filing Case Reports**

   (a) Cases taken from any electronic data base which contain paragraph numbers may be filed.

   (b) It is preferred that cases taken from any electronic data base which do not contain paragraph numbers or the Law Report page number should only be filed for the pre-trial conference, but not for use in the trial brief.

   (c) Cases filed from Quicklaw should be printed using the HTML format.

   (d) In citing cases:

      (I) Before a case has been published in any report, the judgment should be cited using the neutral citation where applicable, e.g. *Zenner v. Brown*, 2000 PESCTD 12.

      (ii) Once the judgment is published in a report, the neutral citation should be used as a parallel citation: e.g. ***Zenner v. Brown***, [2000]...Nfld & P.E.I.R. xx, 2000 PESCTD 12.

2. **Summary Judgment**
   Unless specifically requested for a longer time, the time allotted for a motion for summary judgment is one hour.

3. **Pre-trial Conferences**
   Any documents, reports, etc. expected to be used at trial should be filed for the pre-trial conference.

4. **Director of Child Welfare Cases**
   In Director of Child Welfare cases that proceed to trial, a statement of defence, as in other defended cases, must be filed.

5. **Maintenance Enforcement Hearings**
In respect to persons coming before the court for maintenance enforcement hearings, requesting time to make a motion for variation of a support order, the respondent will generally be allowed four to six weeks to obtain a date for a hearing. If the respondent has not obtained a date for the variation hearing in the time allowed by the judge, the Director of Maintenance Enforcement will bring the matter back to court for the enforcement hearing.

6. **Status Hearings**
It was decided at a recent meeting of the Rules Committee that in lieu of status hearings, pursuant to Rule 48.13 of the Rules of Court a telephone conference call with a judge and counsel would be scheduled.

February 15, 2000

PRACTICE NOTE 34

FILING ELECTRONIC VERSIONS OF MATERIAL IN THE APPEAL DIVISION

1. The Appeal Division of the Supreme Court is now in a position to accept an electronic version of any computer generated material filed on an appeal. This applies to the transcript of evidence and each party's factum.

2. The Appellant should request the person or firm who types the transcript of evidence to forward a copy of the transcript in electronic form to Sheila Gallant of the Appeal Division. This may be transmitted by e-mail to "sfgallant@gov.pe.ca" or by filing a diskette containing the material. Each party to an appeal should forward a copy of its factum in electronic form to Sheila Gallant in the same manner as provided for a copy of the transcript of evidence. E-mail is the preferred method.

3. It would be preferable to have the electronic version of the material formatted in Word Perfect 6.1; however, the Court will accept other formats**.**

4. The filing of the computer generated material in electronic form is in addition to, and not in lieu of, the present requirements for the filing of material on an appeal.

February 2000

PRACTICE NOTE 35

Rectification

1. Rectification of a deed is not to be used in cases where a piece of land has not been included in a deed; i.e. two lots are described, but a third has not been because it was "forgotten." In such a case the motion should be under the ***Quieting of Titles Act***.

Witnesses

2. You are requested to inform the Court Clerk if you have a witness who might wish to affirm rather than swear on the Bible prior to taking the stand. Any other special requests that the witness might have should be passed on to the Court Clerk in sufficient time to allow the necessary arrangements.

Judges' case book

3. The following cases do not have to be filed in motions, applications, briefs, etc. in family matters as they will be in a Judges' case book:

Moge v. Moge, [1992] 3 S.C.R. 813;
Bracklow v. Bracklow, [1999] 1 S.C.R. 420;
Cassidy v. Cassidy, 2000 PESCTD 56***;***
Creelman v. Creelman, 2000 PESCTD 64;
Peter v. Beblow, [1993] 1 S.C.R. 980.

I would appreciate receiving the names of other frequently referred to cases in family law or sentencing cases to be added to the Judges' case book. In future, when referring to a case that is in a Judges' case book, reference need only be made to paragraph and page number.

Family law

4. Unless interim relief is being sought, when an application is used to commence a proceeding for support or custody, it shall not be set down on a Chambers day. In such a case, the Registrar shall obtain from the parties an estimate of the time the hearing will take and then give a date on the regular court calendar.

PRACTICE NOTE 35

Filing

5. Forwarding documents by any means directly to a Judge or Judge's clerk does not constitute filing with the Registrar. (i.e. fax, e-mail, mail, hand delivery)

Kenneth R. MacDonald
Chief Justice - Trial Division
Dated October 30, 2000

PRACTICE NOTE 36

UNCONTESTED CHAMBERS GUIDELINES

1. Materials for use on motions or applications

(a) The Rules of Civil Procedure will apply in relation to all matters concerning the hearing of motions and applications. In particular, the attention of counsel is directed to Rule 37.10 and Rule 38.10, which concerns materials for use on motions and applications.

(b) On uncontested motions or applications, Rules 37.10 and 38.10 are to be strictly adhered to, except where otherwise noted (as in (3) herein). As proof of a claim, affidavit evidence is required and statements of counsel on the hearing are not sufficient.

2. Uncontested motions or applications

In regard to unopposed motions or applications, and in regard to those in which an order or judgment is to be granted on consent, counsel should prepare a draft order or judgment for the assistance of the presiding judge.

J. Armand DesRoches
Chief Justice - Trial Division
December 20, 2001

PRACTICE NOTE 37

RE RULES 30.03(4) AND 30.04

As noted in a recent decision of this Court, Rule 30.03(4) of the P.E.I. Rules of Court expressly requires the annexation to the affidavit of documents of a true copy of all documents which are not privileged. This particular Rule does not appear in the Ontario Rules of Civil Procedure. Rule 30.04 of the P.E.I. Rules of Court, on the other hand, like the Ontario Rule, provides for the inspection by one party of any document of the other party that is not privileged and is referred to in that party=s affidavit of documents. There is an apparent conflict between these two Rules.

The prevalent practice in this Province is for copies of documents to accompany the affidavit of documents as required by Rule 30.03(4). In order to resolve the apparent conflict between Rules 30.03(4) and 30.04 they shall be interpreted as follows:

a) Rule 30.03(4) requires the annexation to the affidavit of documents of a true copy of all documents which are not privileged; and

b) Rule 30.04 provides an opportunity for a party to inspect the original or the original copy of any document that is annexed to the other party=s affidavit of documents as required by Rule 30.03(4).

J. Armand DesRoches
Chief Justice - Trial Division
October 30, 2002

PRACTICE NOTE 38

DISCRETIONARY PUBLICATION BAN - COMMON LAW OR STATUTORY

In ***Dagenais v CBC***, [1994] 3 S.C.R. 835 the Supreme Court of Canada held that when a party seeks a discretionary publication ban the media are entitled to "reasonable notice" of the application/motion and the opportunity to make representations, before a decision on whether to issue a ban is made.

To provide uniformity of practice the following procedures should be followed:

1. The notice should include details of the order sought, the time and place of hearing, the text of any interim orders which may have been granted and contact information for counsel for the parties.

2. The media should be given the same notice of the application/motion as the respondent would receive under the Rules of Court.

3. The media outlets listed on the attached page have indicated they wish to receive notice and have agreed to accept service by e-mail. Other media outlets should be served in the same manner as a respondent under the Rules of Court, unless they otherwise agree, or the trial judge otherwise orders.

4. The trial judge has discretion to determine the issue of standing of any media outlet wishing to make representations on the motion.

Jacqueline R. Matheson
Chief Justice - Trial Division
September 22, 2005

Media B Publication Ban Notification

CBC
Donna Allen (Radio)
donna_allen@cbc.ca
Sally Pitt (TV)
sally_pitt@cbc.ca

CTV
atvnews@ctv.ca

Journal
Darlene Shea
dshea@journalpioneer.com

Guardian
Gary MacDougall
gmacdougall@theguardian.pe.ca

Island Radio
Scott Chapman
news@cfcy.pe.ca

Eastern Graphic
pmacneill@islandpress.pe.ca

PRACTICE NOTE 39

RELEASE OF JUDGMENTS – APPEAL DIVISION

The Supreme Court of Prince Edward Island - Appeal Division has adopted the following protocol for the release of its Judgments. The protocol is published here in the form of a Practice Note.

The following shall be the procedure to be followed in the release of written judgments given in the Supreme Court of Prince Edward Island - Appeal Division.

1. When a judgment is ready for release, the court reporter responsible for typing the judgment shall e-mail or telephone the parties or their lawyers or lawyers' secretaries forty-eight (48) hours in advance of the judgment's filing.

2. In cases where parties are representing themselves, the court reporter shall explain the judgment release process.

3. After notifying the parties involved, a notice will be placed on the Supreme Court Website giving the name of the case and the judgment's release date.

4. On the release date, the judgment will be filed at nine a.m. and copies given to each party.

5. After the judgment has been filed at nine a.m. on the release date, the judgment will be added to the Supreme Court website as soon thereafter as possible. Once on the website, the decision becomes available for public access.