Civil Procedure
Winter Term 2025

LECTURE NOTES NO. 12

IX. MOTIONS AND INJUNCTIONS

1. SIMPLE MOTIONS

Please familiarize yourself with **Rule 37** (procedure) and **Rule 39** (evidence) in respect of pre-trial motions, particularly: jurisdiction, service, motion records, and cross-examination on affidavits. The rules are straight-forward but please read the various provisions carefully.

The procedure on motions mimics that of Applications; the originating process is a Notice, evidence is in the form of affidavits and out of court cross-examinations, and the hearing is without oral evidence (unless the Motion Judge directs otherwise – rare except for Rule 20 motions).

***Some* common motions:**	**Rule**
Extend or abridge time.	3.02
Joinder of claims.	5.02
Add parties	5.03
Correct a party's name	5.04
Consolidation	6.01
Appoint Litigation Guardian	7.02(1.1)
Appoint representative for unascertained party	10
Leave to intervene as a party	13.01
Extend time for service of pleadings	3.02
Validate service	16.08
Remove lawyer as solicitor of record	15.04(1)
Set aside order noting party in default	19.03
Set aside default judgment	19.08
Exempt the action from mandatory mediation	24.1.05
Provide particulars	25.10
Strike out all or part of pleadings	25.11
Amend pleadings	26.01
Summary judgment	20.01
Determine question of law	21
Inspection of documents	30.04(5)
Production of documents from non-party	30.10(1)
Inspection of property	32.01
Notice of examination	31.02

Compel Answers	34.10
Medical Examination of a party	33.03
Directions for oral examination of a party	34.14
Taking evidence before trial	35.06
Grant Certificate of Pending Litigation	42.01

A. JOINDER (RULE 5) AND CONSOLIDATION (RULES 5 AND 6)

(i) Joinder

Rule 5

5.01 (1) A plaintiff or applicant may in the same proceeding join **any claims** the plaintiff or applicant has against an opposite party.

(2) A plaintiff or applicant may sue in different capacities and a defendant or respondent may be sued in different capacities in the same proceeding.

(3) Where there is more than one defendant or respondent, it is not necessary for each to have an interest in all the relief claimed or in each claim included in the proceeding.

5.02 (1) Two or more persons who are represented by the same lawyer of record may join as plaintiffs or applicants in the same proceeding where,

(a) they assert, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

(b) a common question of law or fact may arise in the proceeding; or

(c) it appears that their joining in the same proceeding may promote the convenient administration of justice.

(2) Two or more persons may be joined as defendants or respondents where,

(a) there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

(b) a common question of law or fact may arise in the proceeding;

(c) there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief;

(d) damage or loss has been caused to the same plaintiff or applicant by more than one person, whether or not there is any factual connection between the several claims apart from the involvement of the plaintiff or applicant, and there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief or the respective amounts for which each may be liable; or

(e) it appears that their being joined in the same proceeding may promote the convenient administration of justice.

5.03 (1) Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.

...

(4) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party.

...

(6) The court may by order relieve against the requirement of joinder under this rule.

...

5.05 Where it appears that the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing or cause undue prejudice to a party, the court may,

(a) order separate hearings;

(b) require one or more of the claims to be asserted, if at all, in another proceeding;

(c) order that a party be compensated by costs for having to attend, or be relieved from attending, any part of a hearing in which the party has no interest;

(d) stay the proceeding against a defendant or respondent, pending the hearing of the proceeding against another defendant or respondent, on condition that the party against whom the

proceeding is stayed is bound by the findings made at the hearing against the other defendant or respondent; or

(e) make such other order as is just.

Tanner v. McIlveen Estate
2012 ONSC 2983 (Ont. S.C.J.)

Two patients of the defendant physician sued for sexual assault and sought to join their claims and argue that each other's evidence was admissible in their trial as similar fact evidence. The defendant resisted and moved to sever the two trials under Rule 5.05.

Lederman J.:

[8] **The Master found that the plaintiffs met the test for joinder. She found that the claims shared common issues of law and fact. The expert evidence necessary to establish the standard of care will be common to both plaintiffs' claims. The evaluation of the admissibility of similar fact evidence at trial is in and of itself an issue of mixed fact and law that is common to both plaintiffs. Moreover, multiplicity of proceedings which would unduly inconvenience the expert witnesses and possibly other witnesses at trial should be avoided.**

[9] The Master found that, furthermore, if the plaintiffs' claims are severed, there could be different determinations reached by two different trial judges on the issue of the admissibility of similar fact evidence. As a result, the continued joinder of the plaintiffs' claims would allow for the efficient judicial determination of the admissibility question.

...

[21] Rulings on the admissibility of similar fact evidence are solely within the authority of the trial judge. Depending on such findings, the trial judge has the power to allow the action to proceed or to sever the claims into two trials in order to avoid prejudice. Moreover, in this way, if the trial judge determines that the plaintiffs' evidence constitutes admissible similar fact evidence in support of each other's case, the trial judge can allow the action to proceed and thereby avoid the risk of inconsistent findings and verdicts that could arise if there were to be two trials; if the similar fact evidence is held to be inadmissible, the trial judge may order that there be two separate trials.

[22] In the end, the Master considered whether continued joinder would unduly complicate or delay or cause undue prejudice as is required by Rule 5.05 and reasonably exercised her discretion to conclude that, at this stage of the proceeding, severance was not appropriate.

[23] In doing so, the Master has made no error of law nor exercised her discretion on wrong principles and, accordingly, there is no basis to interfere with her decision.

[24] Having so found, it is unnecessary to consider whether the Master erred in concluding that joinder of the claims in the first instance was appropriate.

Buhlman v. Peoples Ministries Inc.
2009 CanLII 26918 (Ont. S.C.J.)

A school closed and 24 plaintiffs sued for wrongful dismissal. The school moved to separate the trials of the claims notwithstanding that all were represented by the same lawyer and that the actions were all against the same defendant.

Master Brott:

[7] The Statement of Claim identifies that each of the plaintiffs entered into a standard form employment agreement with the defendant which was renewed annually by the defendant. Peoples submits that the plaintiffs' claims for damages arise as a result of alleged breaches of contract arising from separate transactions. Peoples submits that there are only three common occurrences as follows:

(a) All plaintiffs were employed by the defendant;

(b) 21 of the 24 plaintiffs received Notices of Termination on the same day; and

(c) All of the plaintiffs had similar written employment contracts.

[8] The defendant asserts that what is at issue is whether the plaintiffs were wrongfully dismissed and that determination rests on whether or not they have been given improper notice. To determine notice, the court will look at the age, length of service, compensation and other relevant factors. It is the defendant's position that the factors relating to each plaintiff vary significantly.

...

[10] In assessing whether there are issues of fact or law common to the plaintiffs' claims in the context of multi-party litigation, the focus should be on whether there is a common issue of fact or law that bears sufficient importance in relation to the other facts or issues in the proceeding.

[11] The Statement of Claim sets out ten causes of action and of those, all plaintiffs share six of the ten causes of action. They include claims for wrongful dismissal, breach of contract, restoration of the salary freeze, performance bonus, punitive damages and retaliatory conduct.

[12] Peoples submits that the common issues of fact between the plaintiffs' claims (namely employment by Peoples and when notice was received) bear limited importance in relation to the other facts in the proceeding. It asserts that the plaintiffs were all employed in various capacities, they each had different circumstances of employment, (part-time, maternity leave, health issues et al), they each worked for the defendant for a different length of time, they each had different training and they each mitigated their damages differently.

[13] The defendant asserts that because there is no commonality between each of the plaintiffs, separate productions, examinations and expert evidence will be necessary because of the significantly different claims advanced by each of the plaintiffs.

[18] The pleadings and the evidence establish numerous facts and law which militate against severance. The claims of all of the plaintiffs arise from the same standard form employment contract. All plaintiffs were terminated at the same time. Many of the commonalities, which I accept for the purposes of this motion, are outlined at paragraphs 31 – 33 of the responding parties' factum. Further there is a good possibility that some of the plaintiffs will rely on the evidence of other plaintiffs at trial. Should the claims be severed, there would be an increase in cost and length of each trial.

[19] Although there are some differences with respect to the claims of each of the plaintiffs, I agree with Molloy, J in Suguitan v McLeod, [2002] O.J. No 878 (S.C.J.) that "the trial judge will easily be capable of sorting out which evidence relates to which plaintiff".

[20] On the issue of prejudice, I am not satisfied that the defendant has put forth a strong factual foundation of potential adverse

consequences. The caselaw is clear that the court must consider what is fair and just, given the consequences of a joined or separate action on each of the parties. On the evidence before me, I find that if severance is granted, the plaintiffs will suffer great inconvenience, significant adverse financial challenges and delay. I am satisfied that the joinder of the plaintiffs' claims balances the interests of the administration of justice and fairness to reach the most expeditious and least expensive result.

(ii) Consolidation

6.01 (1) Where two or more proceedings are pending in the court and it appears to the court that,

(a) they have a question of law or fact in common;

(b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason an order ought to be made under this rule, the court may order that,

(d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or

(e) any of the proceedings be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them.

...

Soilmec North America Inc. v. D'Elia
2011 ONSC 5214 (Ont. S.C.J.)

The plaintiff sued one defendant for failing to pay on a lease of drilling equipment and retaining the equipment after the lease terminated. The plaintiff also sued the defendants' directors personally in a separate action. The plaintiff sought to consolidate the two actions.

Boswell J.

[14] Orders to consolidate proceedings, or requiring that they be heard together, are discretionary. In exercising the discretion granted

by Rule 6.01, courts have looked not only at the factors enumerated in the rule, but also whether the balance of convenience favours such an order...

[15] The purpose of consolidating proceedings is to save expense and to avoid a multiplicity of pleadings and proceedings, with the potential for inconsistent results...

[16] **Consolidation differs in significant ways from an order that matters be heard together... Consolidated actions proceed as one. They typically require parties to re-plead so that there is just one set of pleadings. There is one set of discoveries and one pre-trial. All issues are subsequently dealt with in one trial. Actions ordered heard together, however, maintain their distinct identities. But that said, the court maintains the discretion to order common discoveries and pre-trials. In other words, many of the same economies may be realized even though actions are not formally consolidated.**

[17] Ultimately, in exercising the discretion under Rule 6.01, the court must be mindful of the direction in Rule 1.04(1) to interpret and apply the Rules so as to "secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

The Principles Applied to this Case

[18] In this instance, it is clear that the two proceedings – the KC Action and the Directors' Action – arise from the same transaction. In effect, the Plaintiff is seeking to impose personal liability on the Directors for any damages arising from KC's breach of the lease agreement. The breach of the lease by KC is an issue common to both proceedings.

[19] There are, however, significant differences between the two actions. For instance, the parties are different. There is an additional plaintiff in the KC Action. The Defendants are entirely different between the claims. More significant, however, are the differences in the issues to be determined. While KC's purported breach of the lease is an issue common to both proceedings, the issues are otherwise substantially different. The KC Action is essentially a claim for damages arising from a purported breach of contract. In the Directors' Action, the Plaintiff seeks to fix the individual Defendants with liability based on their roles as directors of KC. The claim is grounded, for the most part, in tort...

[20] In my view, **the most advantageous method of proceeding is to order the two matters heard one after the other, beginning**

with the KC Action. Essentially the Plaintiff asserts that KC breached the lease and should be responsible in damages. Further, that the Directors should be personally liable for their roles in causing KC to commit the alleged breaches. If the court determines in the KC Action that there has been no breach, or that no damages were suffered, then there really is no substance to the Directors' Action. If the same judge hears both actions, one after the other, then there is little risk of an `inconsistent finding regarding whether KC breached the lease or not.

[21] In the meantime, both actions remain at the pleadings stage. Affidavits of Documents have not been exchanged and discoveries have not yet been held. The court has the discretion under Rule 6.01(2) to give directions regarding the process to be followed in the two proceedings to avoid unnecessary costs or delays. In my view, it makes sense that there be common discoveries and pre-trials in the actions. But the actions should otherwise be tried separately, with the Directors' Action to immediately follow the KC Action.

[22] One of the benefits of proceeding in the fashion I have outlined is that the trial judge will, pursuant to Rule 6.02, retain the discretion to order that the actions proceed other than as I have directed. It may be that, as a result of further developments in the actions, there is good reason to proceed in a manner other than what I have outlined. The trial judge will have the discretion to proceed as he or she sees fit, at the relevant time. Arguably, based on the wording of the rule, the same discretion is not retained if the actions are consolidated.

1014864 Ontario Ltd. v. 1721789 Ontario Inc.
2010 ONSC 3306 (Ont. S.C.J.)

Master Dash:

[1] In this action a property owner was sued by his neighbour in nuisance for allowing a large display sign, erected without a permit, to block the view of the neighbour's sign. The property owner commenced a separate action in negligence against the lawyer who represented him on the purchase of the property for failing to ensure the sign was lawful and for failing to ascertain that a portion of the property would be subject to expropriation. The property owner commenced a further separate action against the vendor of the property for misrepresentations about the pending expropriation.[1] The property owner moves to have all three actions consolidated or tried together. The motion is supported by the neighbour, but opposed by both the vendor and the lawyer.

…

[17] **In my view the proper approach on a motion for consolidation or trial together is to first ascertain whether the moving party has satisfied one or more of the three "gateway" criteria set out in rule 6.01(1)(a), (b) or (c) and then consider all relevant factors as well as section 138 of the Courts of Justice Act which directs the court to avoid a multiplicity of proceedings whenever possible, in order to exercise the court's discretion and make such order as is just. I will attempt to set out a list of factors courts have considered on motions for trial together as well as some of the "bifurcation factors" modified appropriately to reflect that this is a motion to try actions together, not sever issues within an action.** I point out that the list that follows are considerations for ordering trial together of various actions, which is the relief sought on this motion, and not full consolidation of various actions,[16] for which some different factors may apply.

[18] A non-exhaustive list of some of the considerations on ordering trial together may, depending on the circumstances, include:

(a) the extent to which the issues in each action are interwoven;

(b) whether the same damages are sought in both actions, in whole or in part;

(c) whether damages overlap and whether a global assessment of damages is required;

(d) whether there is expected to be a significant overlap of evidence or of witnesses among the various actions;

(e) whether the parties the same;

(f) whether the lawyers are the same;

(g) whether there is a risk of inconsistent findings or judgment if the actions are not joined;

(h) whether the issues in one action are relatively straight forward compared to the complexity of the other actions;

(i) whether a decision in one action, if kept separate and tried first would likely put an end to the other actions or significantly narrow the issues

for the other actions or significantly increase the likelihood of settlement;

(j) the litigation status of each action;

(k) whether there is a jury notice in one or more but not all of the actions;

(l) whether, if the actions are combined, certain interlocutory steps not yet taken in some of the actions, such as examinations for discovery, may be avoided by relying on transcripts from the more advanced action;

(m) the timing of the motion and the possibility of delay;

(n) whether any of the parties will save costs or alternatively have their costs increased if the actions are tried together;

(o) any advantage or prejudice the parties are likely to experience if the actions are kept separate or if they are to be tried together;

(p) whether trial together of all of the actions would result in undue procedural complexities that cannot easily be dealt with by the trial judge;

(q) whether the motion is brought on consent or over the objection of one or more parties.

B. DETERMINE A POINT OF LAW UNDER RULE 21

21.01 (1) A party may move before a judge,

(a) **for the determination, before trial, of a question of law** raised by a pleading in an action **where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs**;

Gowling Lafleur Henderson v. Springer
2013 ONSC 923 (Ont. S.C.J.)

Per Himel J.

[20] In ***Toronto Dominion Bank v. Deloitte Haskins & Sells*, (1991) 5 O.R. (3d) 417(Gen. Div.)** at para. 3, R.A. Blair J. listed the following principles or tests to be applied on a motion under Rule 21.01(1) as follows:

> **(i) the allegations of fact in the statement of claim, unless patently ridiculous or incapable of proof, must be accepted as proven;**
>
> **(ii) the moving party, in order to succeed, must show that it is plain, obvious, and beyond doubt the plaintiff could not succeed;**
>
> **(iii) the novelty of the cause of action will not militate against the plaintiff; and,**
>
> **(iv) the statement of claim must be read generously with allowance for inadequacies due to drafting deficiencies.**

[21] In *Toronto Dominion Bank*, he also wrote at para. 54: "I am of the view that these same principles or tests apply whether the motion is brought under rule 21.01(a) or (b). Both involve a consideration of legal principles applied to facts as set out in the pleadings."

[22] The test to be applied on a motion to strike a pleading under Rule 21 is, assuming that the facts as stated in the statement of claim can be proven, whether it is "plain and obvious" that the pleading discloses no reasonable cause of action : see Hunt v. Carey, [1990] 2 S.C.R. 959 at para. 33. Only if the action is certain to fail because it contains a radical defect should it be struck (*Hunt* at para. 33). On such a motion, no evidence is admissible. The motions judge is to read the

pleadings generously with allowance for inadequacies due to drafting deficiencies...

[23] **Rule 21.01(1)(a) is designed to shorten proceedings by determining legal issues before trial where the law is clear, the law is not hypothetical, the law is not dependent upon disputed facts and the legal conclusion is plain and obvious. The court should not at this stage of proceedings dispose of matters of law that are not fully settled in the jurisprudence...**

2. INTERLOCUTORY INJUNCTIVE RELIEF

Injunctive relief is an "extraordinary remedy". It will only be granted in the clearest of cases.

The basic test for an interlocutory injunction was set out by the Supreme Court of Canada in ***R.J.R.- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, at paras. 41-43, 49-50 (S.C.C.)**. **The moving party must establish that:**

(a) **there is a serious issue to be tried;**

(b) **they will suffer irreparable harm or harm not compensable by an award of damages, if the injunction is not granted; and,**

(c) **the balance of convenience favours the moving party, in the sense that the harm to the moving party if the injunction is not granted must exceed the harm to the defendant if the injunction is granted.**

The **Courts of Justice Act** provides the jurisdiction of the court:

> **Injunctions and receivers**
> **101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.**
>
> Terms
> (2) An order under subsection (1) may include such terms as are considered just.

The Rules provide the procedure to be followed, subject to modification by the court:

RULE 40

40.01 An interlocutory injunction or mandatory order under section 101 or 102 of the Courts of Justice Act may be obtained on motion to a judge by a party to a pending or intended proceeding.

40.02 (1) An interlocutory injunction or mandatory order may be granted on motion without notice for a period not exceeding ten days.

(2) Where an interlocutory injunction or mandatory order is granted on a motion without notice, a motion to extend the injunction or mandatory order may be made only on notice to every party affected by the order, unless the judge is satisfied that because a party has been evading service or because there are other exceptional circumstances, the injunction or mandatory order ought to be extended without notice to the party.

(3) An extension may be granted on a motion without notice for a further period not exceeding ten days.

(4) Subrules (1) to (3) do not apply to a motion for an injunction in a labour dispute under section 102 of the Courts of Justice Act.

40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

40.04 (1) On a motion under rule 40.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.

One must also consult both provincial and regional **Practice Directions** respecting procedures for injunctive relief.