PRACTICE DIRECTION

COURT OF QUEEN'S BENCH OF MANITOBA

RE: COMPREHENSIVE AMENDMENTS TO COURT OF QUEEN'S BENCH RULES (CIVIL) EFFECTIVE JANUARY 1, 2018

Animating the comprehensive amendments to the Court of Queen's Bench Rules coming into force on January 1, 2018 are the overriding objectives of timely and affordable access to justice and the principle of proportionality. While these objectives and this principle are reflected in essentially every new or modified rule, it is anticipated that judicial involvement in managing cases, which is pervasive throughout the new rules, will be a particularly effective tool in ensuring that these objectives and this principle are achieved. This judicial management has been incorporated as a particular component of the new rules given its obvious benefits and the overwhelming request of nearly all civil litigation practitioners who were consulted on a regular basis over the five-year period leading to these new rules.

The new rules and practices introduce four major changes:

1. Judicial involvement in managing cases – For all actions, any party can opt into the pre-trial process early in the proceedings. The new pre-trial conferences will be similar to case conferences now available under Rule 20A. Rule 20A will still govern discovery and other trial issues for actions under $100,000. However, the case conference rules are subsumed in the new pre-trial rules.

   A more active case management process will also be available for complex actions and applications.
2. Trial scheduling – Trials will be scheduled at the first pre-trial conference, early in the proceeding.

3. Judicially Assisted Dispute Resolution (JADR) – In addition to JADR, parties will be able to request a "neutral evaluation" of their case from a judge.
4. Summary judgment – Summary judgment motions cannot be heard without a pre-hearing conference.

What follows is a more comprehensive explanation of the above.

Pre-Trial Conferences and Scheduling Trial Dates

Rules

- Trial dates for an action may be set only by the pre-trial judge for that action (50.07(1)).
- A pre-trial conference may be scheduled at any time after the pleadings in an action are closed (50.02(1)).
- Trial dates are to be set at the first pre-trial conference (50.07(2)).
- It is imperative that the party who opts into the pre-trial conference ensures that it has taken sufficient steps in the action such that the matter will be ready for trial at an early date in accordance with the direction which follows below. To ensure that the matter is ready for a pre-trial at the time of the scheduled pre-trial conference, the presiding judge must review the nature of the action, the issues in dispute and the status of the litigation with the parties (50.04(1)). Following this review, the judge may make a direction that the pre-trial conference not proceed if he or she determines that it is not appropriate to hold a pre-trial conference at the time, may order costs against the party that opted in, and may direct that the parties not schedule a pre-trial conference until after a specified date or a specified step in the litigation has been completed (50.04(2), 50.04(3), 50.04(5)).
- Throughout the course of the pre-trial process, the action will be subject to active and ongoing supervision by the pre-trial judge, who will facilitate the just, most expeditious and least expensive determination or disposition of the action (50.01(2)). This approach is to reflect the court's role in addressing issues of delay

and access. The powers of the pre-trial judge are similar to those under the current Rule 20A. For example,

  - The pre-trial judge may, on motion by any party or on his or her own motion, without materials being filed, make any order or give any direction that he or she considers necessary or advisable to facilitate the just, most expeditious and least expensive determination or disposition of an action (50.05(3)).
  - The pre-trial judge may make orders or give directions about how the trial will proceed. For example, the pre-trial judge may establish reasonable limits on the time allowed to present evidence at trial (50.05(4)(o)).
  - Sanctions (as enumerated in Rule 50.09(1)) are available where a party, without reasonable excuse, fails to comply with an order or direction given by the pre-trial judge or where a party is substantially unprepared to participate at a pre-trial conference or does not participate in good faith at a pre-trial conference.

- Unless otherwise directed by the Chief Justice or his or her designate, the pre-trial judge will hear all motions arising in the action, except a motion for summary judgment (50.05(2)). However, to reflect the principle of proportionality that parties no longer have the "right" to litigate every issue, the pre-trial judge may refuse to permit interlocutory motions to proceed such that formal contested motions are exceptional procedures that are only permitted when absolutely necessary (50.05(4)(c)).
  - An example of when a judge other than the pre-trial judge hears a motion would be if the pre-trial judge's schedule would unduly restrict the timing of the hearing of a motion.
- While changes to the duration of a trial may be made through the pre-trial process to reflect the elimination or narrowing of issues, the rescheduling of a trial will only be permitted in exceptional circumstances and, where permitted, may result in an award of costs. A scheduled trial date may only be adjourned by the Chief Justice or his or her designate on the request of a party or the pre-trial judge (50.07(4)).

Practice

Scheduling of Trial Dates

- The trial date will be scheduled no later than 18 months after the first pre-trial conference, with the exact date depending on the availability of dates and the status of the action. For example, generally, more procedurally complex actions may require a longer time to be ready for trial, while an action that is completely ready for trial may be scheduled for the first available trial date. It is expected that the majority of cases will be set for trial on dates between 9 and 15 months after the first pre-trial conference.
    - To permit scheduling within this timeframe and recognizing that an overwhelming majority of civil cases resolve prior to trial:
        - The court will be booking multiple trials relative to the number of judges available to hear trials (i.e. overbooking).
        - Counsel will generally be expected to book more than one trial in a given time period.
    - As the trial date approaches (approximately 10 days before the first scheduled trial day), in the event that the court does not expect to have a sufficient number of judges available to hear all the trials that are scheduled to proceed, counsel will be informed accordingly and information will be sought as to the background and nature of the action, the witnesses, the impact of additional delay, and any other relevant considerations for the purpose of the court determining which trials will proceed and which trial(s) will be rescheduled to a later date.
        - Priority in proceeding with the scheduled trial date will be given to those trials that were scheduled prior to January 1, 2018, to reflect that those actions would not have benefited from the new scheduling model (in effect as of January 1, 2018).

        - Following receipt of any information provided by counsel, the court will advise counsel which trial(s) will be adjourned, along with available dates for the trial to later proceed.
        - Where a trial is rescheduled to a later date, if the parties are willing, the court will advise the parties if time becomes available during the originally scheduled trial time for the matter to still proceed in that period.
    - Where counsel has booked more than one trial for the same time period and as the trial date approaches, it is apparent to counsel that more than one of these trials is in fact proceeding, counsel must make a motion before the Chief Justice (to be heard by the Chief Justice or his or her designate) at least one week prior to the scheduled trial dates to adjourn a conflicting trial date.

Transitional Provisions

- For transitional purposes, where there has already been a pre-trial conference in an action prior to January 1, 2018, all of the new rules governing pre-trial conferences will apply (including the role and powers of the pre-trial judge) except for Rules 50.05(2)(b) and 50.07(2), which provide as follows:

> 50.05(2) Unless otherwise directed by the Chief Justice or his or her designate on the request of the pre-trial judge or a party to the action, the pre-trial judge must
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> . . . . .
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> (b) hear all motions arising in the action, except a motion for summary judgment.
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> 50.07(2) Trial dates are to be set at the first pre-trial conference.

- In the event that a party to an action where there has been a pre-trial conference prior to January 1, 2018 seeks to have Rules 50.05(2)(b) and 50.07(2) also apply, that party may so indicate in writing to the presiding pre-trial judge and at the next pre-trial conference, the presiding judge will review the nature of the action,

the issues in dispute and the status of the litigation with the parties (50.04(1)) and determine whether the pre-trial conference will proceed with Rules 50.05(2)(b) and 50.07(2) applying to the pre-trial conference (50.04(2)).

Case Management

Rules

- The Chief Justice or his or her designate may, on his or her own or on the request of a judge or party to a proceeding, order the parties to attend one or more case management conferences (50.1(1)). An order may be made for case management if the judge determines that the active management of a judge is required to ensure that the proceeding moves forward in an expeditious manner having regard to the factors referred to in Rule 50.1(2).
    - Case management is available in any proceeding (where the request is made and the criteria are met). A proceeding means an action or application (1.03) and thus case management extends to both actions and applications.
    - It is also open to a judge involved in the proceeding to request that the Chief Justice or his or her designate order the parties to attend one or more case management conferences.
    - Where an action is subject to case management, the provisions of Rule 50 (governing pre-trial management) apply, with necessary changes (50.1(5)).

Practice

- To make a request for case management, a party or their counsel may make a request in writing to the Chief Justice or the Associate Chief Justice and must include in the request the background of the proceeding and address each of the issues identified as considerations in Rule 50.1(2) and any other relevant factors.
- Generally, such requests by a party for case management ought to be made prior to any pre-trial conference.

- The Practice Direction regarding the setting of trial dates does not apply to matters in case management.
    - So, an example of where an action justifies the appointment of a case management judge having regard to the considerations outlined in Rule 50.1(2) is where the 18-month outer limit for the setting of a trial date is unworkable.

Rule 20A

- Rule 20A actions are subject to the same pre-trial and case management rules and practices as are non-Rule 20A actions. As such, while many of the procedural limitations governing Rule 20A actions remain, Rule 20A case conferences have been eliminated. Unless the pre-trial judge directs otherwise, no more than three pre-trial conferences may be held for an expedited action under Rule 20A (50.02(8)).
- The amended rules provide that for transitional purposes, when a case conference judge has been assigned to an expedited action under the former Rule 20A, that judge is deemed to be the pre-trial judge for the action and he or she may exercise the powers of a pre-trial judge under Rule 50 in relation to the action (20A(33)).

Summary Judgment Motions

Rules

- Where a party brings a motion for summary judgment, the party must obtain a date for a summary judgment conference from the trial co-ordinator if all parties consent to the date, and if they cannot consent to the date, the party must bring a motion before a judge on the civil uncontested list to schedule a date for the summary judgment conference (20.02(1), 20.02(2)).
    - All that is required to obtain the date for a summary judgment conference is the filing of the moving party's motion for summary judgment. This motion is to be returnable on the civil uncontested list. If the parties

consent to a date for a summary judgment conference, the summary judgment motion is then to be adjourned to the contested list pending the summary judgment conference. In the event that the parties cannot consent to a date for a summary judgment conference, the summary judgment motion is to be adjourned to the contested list pending the determination on the civil uncontested list of the motion to schedule a date for the summary judgment conference.

  - The summary judgment conference takes place before the scheduling of the contested hearing of the motion for summary judgment.

- The judge presiding at the summary judgment conference must review the nature of the action and discuss the motion for summary judgment and the evidence that the parties intend to rely upon at the hearing (20.03(1)).
  - The purpose of this summary judgment conference is to determine whether the summary judgment motion will be permitted to proceed and if so, determine how the motion will be conducted (for example, the evidence on the motion and relevant timelines) (20.03(4)-(7)).
  - The hearing of the contested summary judgment motion will be set by the summary judgment conference judge.
- Unless otherwise directed by the Chief Justice or his or her designate, the judge who presided at the summary judgment conference must hear the motion for summary judgment (20.06).
- If a motion for summary judgment is dismissed, either in whole or in part, the judge who heard the motion must, where practicable, act as the pre-trial judge for the action following the motion and this same judge must preside at the trial of the action (20.09, 20.10).
  - An example of when a different judge may be assigned is where the schedule of the judge who heard the summary judgment motion unduly delays the action proceeding forward.

    - Another example of when a different judge may be assigned to hear the trial is when this judge, following an unsuccessful motion for summary judgment, conducts a neutral evaluation of the case (see below).
- The motion for summary judgment will be the subject of the foregoing rules and practices governing summary judgment motions regardless of whether the action is the subject of a pre-trial conference or case management. That is, the pre-trial judge or case conference judge will not hear the motion for summary judgment (50.05(2)). In the event that the motion for summary judgment is dismissed, either in whole or in part, and the judge who heard the summary judgment motion acts as the pre-trial judge, the original pre-trial judge or case conference judge will remain available (where practicable) for the purpose of more extensive settlement discussions (50.06(1)).

Practice

- For transitional purposes, where a motion for summary judgment has been filed prior to January 1, 2018, all of the new rules governing summary judgment will apply except for the rules regarding summary judgment conferences. No summary judgment conference is required prior to the hearing of a contested summary judgment motion that was filed prior to January 1, 2018.

Applications and Motions (other than motions for summary judgment)

Rules

- With the exception of motions for summary judgment (which are heard by a judge at first instance), where an action is not in pre-trial or case management all motions that are within the jurisdiction of a master will be heard by a master at first instance. This includes motions in Rule 20A actions.
- For contested motions, Rule 37.08.1(1) requires the filing of a written agreement that establishes timelines for completion of the preliminary steps in the motion.

- For contested applications, Rule 38.07.1(1) provides default timelines for completion of the preliminary steps in the application where the parties have not established their own schedule by filing a written agreement that sets out specific deadlines for completing these steps (38.07.1(2)).
- If the parties are unable to reach an agreement under these rules, the moving party (in the case of a motion) or any party (in the case of an application) must bring a motion to establish a schedule for completion of these preliminary steps (37.08.1(3), 38.07.1(3)).
    - A motion to establish a schedule for completion of the preliminary steps is to be returnable on the civil uncontested list.

Practice

- For transitional purposes, a motion filed prior to January 1, 2018 to be heard by a master will be heard by a master and a motion filed prior to January 1, 2018 to be heard by a judge will be heard by a judge.

Judicially Assisted Dispute Resolution (JADR) and Neutral Evaluation

- The existing practice of a joint written request being made by the parties of the Chief Justice or the Associate Chief Justice to have one of at least three judges whom the parties have jointly agreed would be acceptable to conduct a judicially assisted dispute resolution, will remain.
- Another form of informal dispute resolution that is now offered by the court in civil matters is a neutral evaluation. The parties may make a joint written request of the Chief Justice or the Associate Chief Justice to have a judge provide a neutral evaluation of the probable outcome of the matter following a presentation of each party's best case.
    - The request must identify, where applicable, the pre-trial judge in the action and the judge who heard a motion for summary judgment in the action; and

    - The request may include a list of at least three judges whom the parties have jointly agreed would be acceptable to conduct a neutral evaluation of the action.
- If the Chief Justice or the Associate Chief Justice determines that a matter is appropriate for a neutral evaluation, he or she will notify the parties and advise which judge (whether from the proposed list of judges or otherwise) has been assigned to conduct the neutral evaluation. A preliminary meeting will then be scheduled by the parties with this judge for the purpose of determining the manner in which the neutral evaluation is to be conducted, including the manner in which the case is to be presented.
    - Where a neutral evaluation is scheduled with a judge who heard an unsuccessful summary judgment motion, it may be that the neutral evaluation is based on the evidence and argument presented at the hearing of the motion for summary judgment.
- Following the presentation of each party's case, the judge conducting the neutral evaluation may provide the parties with a non-binding and without prejudice opinion respecting his or her view on the strengths and weaknesses of each party's case.
- The judge conducting the neutral evaluation must not preside at the trial of the action unless all the parties consent, and, even then, the assignment of the trial judge will remain within the discretion of the Chief Justice or his or her designate.

Coming into effect

This Practice Direction comes into effect immediately.

ISSUED BY:

"*Original signed by Chief Justice Joyal*"

The Honourable Chief Justice Glenn D. Joyal
Court of Queen's Bench (Manitoba)

DATE: November 7, 2017