

PROPOSED DRAFT COURT OF QUEEN'S BENCH RULE 20A

May 2009

Definitions

20A(1) In this rule,

"case conference judge" means the judge assigned to hold a case conference under this rule (« juge chargé de la conférence de cause »)

"trial co-ordinator" means a person assigned to be a trial co-ordinator for the purpose of this rule (« coordonnateur des procès »)

"expedited action" means an action to which this rule applies

Actions where procedure mandatory

20A(2) The procedure set out in this rule shall apply to all actions where the relief claimed is a liquidated or unliquidated amount not exceeding \$100,000 exclusive of interest and costs.

Where conflict with general rules

20A(3) The rules that apply to civil actions generally apply to an expedited action, except that in the event of a conflict between this rule and another rule as those rules relate to an expedited action this rule applies.

General principle

20A(4) The guiding principle of Rule 20A shall be proportionality. This rule shall be applied and interpreted in a manner that recognizes the need to secure the just determination of actions to which this rule applies through a proportional process that facilitates the goal of providing the parties with an expeditious and less expensive determination of their action. As a result, the case conference judge shall always consider what process is reasonable in relation to the amount at issue in the action.

Actions which may be included under this rule

20A(5) A judge may

- (a) upon motion made by a party to an action with a value that is higher than the mandatory value established by subrule (2) at any time after service of the statement of claim; or
- (b) upon motion made by a party to an action where the relief claimed is not valued; or
- (c) with the consent of the parties to the action; or
- (d) where it appears to the court that an action should have been filed under this rule;

order that with respect to an action other than an action referred to in subrule (2), the procedure set out in this rule apply.

Considerations re order

20A(6) Before making an order under subrule (5), the judge shall consider:

- (a) the nature of the action;
- (b) the amount that is probably at issue in the action;
- (c) the complexity of the issues involved in the action; and
- (d) the likely expense of the action to the parties;

and any other matters that he or she considers appropriate.

Inclusion of other actions

20A(7) Where, after considering the appropriate factors in subrule (6), the judge determines that the application of this rule to the action will result in the just, most expeditious and least expensive determination of the action, he or she shall make an order under subrule (5) that this rule apply to that action.

Heading of documents

20A(8) Every document in an action to which this rule applies shall have the following heading:

THE QUEEN'S BENCH
_____ CENTRE
(Expedited Action – Rule 20A)

First case conference

20A(9) Within 30 days of the close of pleadings in an action to which this rule applies, the plaintiff shall

- (a) obtain from the trial co-ordinator of the court a fixed date and time for a case conference with a case conference judge and the date must be within 90 days after the date of the close of pleadings; and
- (b) immediately give notice of the date and time of the case conference, in writing, to each lawyer of record of a party and to each party not represented by a lawyer.

Interim motions

20A(10) A party to an expedited action

- (a) must file all motions before the close of pleadings before a master;
- (b) must not, after the close of pleadings, without leave of the court, deliver to another party a notice of motion or affidavit unless a case conference has been conducted in relation to the action;
- (c) if a case conference has not been conducted and the motion is urgent, may request the immediate appointment of a case conference judge.

Case conference at request of a party

20A(11) Notwithstanding subrule (9), a party to an action under this rule may at any time after the statement of claim is served request from the trial co-ordinator of the court a fixed date and time for a case conference with a case conference judge, and the party requesting the case conference shall give at least seven days notice of the date and time of the case conference, in writing, to each lawyer of record of a party and to each party not represented by a lawyer.

Adjourning first case conference by consent

20A(12) If the first case conference is not set down by consent, any party who has not consented to the date may, within seven days of receiving notice of the date fixed, apply to the trial coordinator for an adjournment to a fixed date

that is no more than 30 days after the date originally fixed for the first case conference by the plaintiff.

Adjourning first case conference by judge

20A(13) All of the parties to the action or counsel representing the parties to the action shall appear at the first case conference. The case conference may only be adjourned if the case conference judge finds that there are exceptional circumstances that make it reasonable to adjourn the case conference to a fixed date.

Subsequent case conference and setting of trial dates

20A(14) After the first case conference has been held, a maximum of two subsequent case conferences may be scheduled either by the case conference judge or at the request of a party to the action, in accordance with the procedure under subrule (11). Unless there are exceptional circumstances the court shall set a trial date not later than at the third case conference.

Attendance of lawyer

20A(15) Unless otherwise directed by the case conference judge, the lawyer attending a case conference shall be the lawyer principally responsible for the conduct of the action.

Attendance of parties

20A(16) The parties to a proceeding shall attend a case conference upon the request of the case conference judge.

By telephone

20A(17) All case conferences after the first case conference may be held by means of a conference telephone call or other means of telecommunication.

Same case conference judge

20A(18) To the extent possible, the case conference judge who presides over the first case conference shall also preside over any subsequent case conference and any motion in the action.

Judge's duty to explore settlement

20A(19) At a case conference, the case conference judge shall explore with the parties the possibility of settlement.

Orders

20A(20) At a case conference, the case conference judge may, on motion by any party or on his or her own motion, without material being filed, make any order that he or she considers appropriate to ensure a just, expeditious and cost-effective determination of the action including an order

- (a) that the pleadings be amended or closed within a fixed time;
- (b) that motions be brought within a fixed time;
- (c) that procedures for discovery be completed within a fixed time;
- (d) that discovery, including examinations for discovery and interrogatories, be dispensed with or limited as to the nature, scope or duration of the discovery, having regard to the nature and complexity of the action, the amount at issue in the action, and the likely expense of discovery to the parties;
- (e) where there has been a motion for summary judgment, that further discovery be limited to matters not covered by the affidavits filed on the motion and any cross-examinations on the affidavits, and that the affidavits and cross-examinations be used at trial in the same manner as an examination for discovery;
- (f) that the number and type of expert witnesses be limited at trial;
- (g) that the parties exchange reports and resumes of any experts to be called to give evidence at the trial, and fixing the time within which to do so;
- (h) that a pre-trial conference be dispensed with and the action be set down for trial and fixing a date for the trial that is
 - (i) within 180 days of the date of the first case conference, or
 - (ii) at such other time as the judge may consider appropriate;
- (i) that the parties file an agreed statement of facts and that each party file a brief of law prior to the trial date;

- (j) that evidence at trial in whole or in part be adduced by affidavit;
- (k) that a further case conference be held at a time and place to be fixed; and
- (l) for costs against any party.

Motion materials

20A(21) Without limiting any other power a judge may have under subrule (20), a judge conducting a case management conference may do any or all of the following:

- (a) make orders on the basis of oral submissions only, which submissions shall be recorded if requested by any party to the action;
- (b) require written materials in relation to any motion or matter;
- (c) direct that a motion be brought in chambers with affidavit evidence or otherwise;
- (d) give directions respecting the bringing of any chambers motion;
- (e) give directions as to the preparation and entry of any order made;
- (f) give any other directions that he or she thinks just and expeditious having regard to the guiding principle of proportionality.

Documentary Disclosure

Relevant documents

20A(22) In an expedited action, rule 30.01(1)(c) does not apply. For the purposes of an expedited action, a relevant document is defined as:

- (a) all documents referred to in the party's pleading
- (b) all documents to which the party intends to refer at trial; and
- (c) all documents in the party's control or that once were in the party's control or possession that could be used by any party at trial to prove or disprove a material fact, including documents that may show that a party is advancing a position that is not credible.

Disclosure process

20A(23) Within 30 days after the close of pleadings or within 30 days after the action becomes an expedited action, whichever is later, each party must

- (a) prepare and deliver to every other party an affidavit attaching a list of all relevant documents and identifying those relevant documents over which it claims privilege;
- (b) at the request of the other party, deliver to every other party either a paper copy or an electronic copy of each of the listed documents, except those over which privilege is being claimed, provided that where the original document is not in electronic form, the original shall be made available for inspection.

Cost of production

20A(24) The cost of producing or copying a document shall ordinarily be paid by the person requesting the production or copy. However, the court may on motion allocate the cost of production or copies as between the parties as the court deems just.

Continuing obligation to provide list

20A(25) If a party who has provided an affidavit attaching a list or revised list of documents later learns that the list is inaccurate or incomplete, the party is under a continuing obligation to

- (a) add to the list any documents or class of documents that must be added to provide an accurate and complete list of the documents of which disclosure is required under subrule (23)(a) and
- (b) as soon as possible deliver to the other parties a revised affidavit attaching the revised list along with copies of the newly listed documents.

Inspection of documents

20A(26) A party who has prepared or revised a list of documents under subrule (23) or (25) must, on request, make the originals of the listed paper documents available for inspection at the address for delivery of that party or at such other location as that party and the party requesting inspection may agree. The court may on motion order an inspection of any electronic equipment on which documents are or should be electronically recorded.

Party may request additional documents

20A(27) If a party who has received a list of documents under subrule (23) or a revised list of documents under subrule (25) believes that the list omits documents or a class of documents that should have been disclosed under those subrules, the party may, by written demand, require the party who prepared the list to

- (a) add to the list the documents or class of documents referred to in the demand
- (b) deliver to the demanding party the revised affidavit attaching the revised list along with copies of the newly listed documents and
- (c) make the originals of the newly listed documents available for inspection in accordance with subrule (26).

Motion for production of documents

20A(28) If a party who receives a demand under subrule (27) does not fully comply with it, the party making the demand may on motion apply to the case conference judge by teleconference, or in chambers, for an order requiring the party who received the demand to comply with it.

Court may order production of documents

20A(29) On a motion under subrule (28) in relation to a list or revised list of documents, the court may order the party who prepared the list to

- (a) add to the list any documents or class of documents that the court considers should have been disclosed under subrules (22) and (23)
- (b) provide to the other parties the revised affidavit attaching the revised list along with copies of the newly listed documents and
- (c) make the originals of the newly listed documents available for inspection in accordance with subrule (26).

Considerations of court

20A(30) When considering a motion for the inspection or production of documents, the court must balance the significance of producing the documents to the determination of the material facts at issue as against the difficulty or cost of complying with the order. The guiding principle shall be proportionality.

Examination for Discovery

Limits on discovery

20A(31) The availability and conduct of an oral examination for discovery under Rule 20A shall be subject to the following limitations:

(a) Where the damages at issue in an action are fixed, or provisionally assessed by the case conference judge as being less than \$50,000, no party to the action may conduct oral examinations for discovery, or deliver interrogatories, without leave of the case conference judge. Leave shall not be granted unless the party seeking to conduct an oral discovery can demonstrate that there are exceptional circumstances that make it less expensive and more expeditious to conduct oral discoveries in the action, as compared to other actions of a similar type and value.

(b) Subject to paragraph (c) where a party has satisfied the court that exceptional circumstances exist, the oral examination for discovery permitted under this rule must not exceed three hours in duration for each party that the court permits to be examined.

(c) The court may extend the time allowed for an oral examination for discovery where it has been demonstrated that the party being examined unduly frustrated or obstructed the examination.

(d) Where the value of an expedited action exceeds \$50,000, each of the parties to the action shall have the right to an examination for discovery that does not exceed three hours in duration unless otherwise ordered by the case conference judge. No interrogatories may be delivered without leave of the case conference judge.

(e) Where the value of an expedited action exceeds \$50,000, the court may extend the time allowed for the examination for discovery where the party being examined has unduly frustrated or obstructed the examination for discovery, or if the court is satisfied that there are exceptional circumstances that make it less expensive and more expeditious to conduct extended oral discoveries in the action, as compared to other actions of a similar type and value.

(f) No party is obliged to undertake to provide information at an oral examination for discovery, unless the information is demonstrably material to the claim or defence, and production of the information sought is

consistent with relevance as it is defined in this rule and the principle of proportionality.

Witnesses

Disclosure of witnesses

20A(32) Within 60 days after the close of pleadings or within 60 days after the action becomes an expedited action, or within 60 days of any oral discoveries permitted under this rule, whichever is later, each party to an expedited action must deliver to each other party and to the case conference judge:

- (a) a list of the witnesses that the party delivering the list proposes to call at the trial of the expedited action, which list must
 - (i) include the party delivering the list, if that party intends to give evidence at trial, and
 - (ii) include any expert witnesses permitted by this rule and
- (b) for each of the witnesses included in the list, a brief summary of the material evidence to which the witness will testify.

Effect of failure to disclose

20A(33) Unless the court orders otherwise, at the trial of an expedited action, a party may not call a person as a witness unless

- (a) the witness' name has been disclosed in accordance with subrule (32)(a), or has been disclosed as soon as practicable after the witness has been identified and
- (b) a summary of that witness' evidence has been provided in accordance with subrule (32)(b).

Experts

20A(34) Unless the court orders otherwise, each party to an expedited action is entitled to call, to give oral opinion evidence at trial, not more than

- (a) one expert of the party's choosing; and

(b) if the expert referred to in paragraph (a) does not have the expertise necessary to respond to the other party's expert, one expert to provide the required response.

Report from experts

20A(35) Any party calling an expert shall file a report from the expert within the time limes set out in subrule (32) unless the court orders otherwise.

Neutral experts

20A(36) The court may on its own motion, or on motion of one of the parties, order the parties to retain a jointly instructed expert to give a required opinion at trial rather than permit experts to be retained individually by each party to the action to address the same issue in an adversarial fashion. If the court orders that a jointly instructed expert be retained:

- (a) the parties may agree on who should be the expert, or, if the parties are unable to agree, the court may
 - (i) select the expert from a list prepared or identified by the parties, or
 - (ii) direct that the expert be selected in any other manner the court may direct;
- (b) each party may give instructions to the expert;
- (c) a party who gives instructions to the expert must, at the same time, send a copy of the instructions to the other parties;
- (d) the court may give directions about
 - (i) the payment of the expert's fees and expenses, and
 - (ii) any inspection, examination or experiments which the expert wishes to carry out, and
 - (iii) the instructions to be given to the expert;
- (e) the court may, before an expert is instructed
 - (i) limit the amount that can be paid by way of fees and expenses to the expert, and

(ii) direct that the instructing parties pay that amount into court;
and

(f) unless the court otherwise orders, the instructing parties are jointly and severally liable for the payment of the expert's fees and expenses.

Costs and sanctions

20A(37) When a party to an action fails to set up a case conference date as required by this rule or to comply with a time limit imposed by this rule or to abide by an order of the case conference judge, the case conference judge shall make an order for costs against that party or may strike out the claim or defence of that party, unless the party who has breached the rule, order or time limit can provide a reasonable excuse for doing so. Costs shall be fixed and awarded and payable forthwith on the basis of the tariff appropriate to the value of the action.

Memorandum re issues

20A(38) The case conference judge shall

(a) issue a memorandum indicating the issues that have been identified for trial; and

(b) direct that a copy of the memorandum be provided to the lawyers and unrepresented parties.

Facts deemed to be established

20A(39) Any facts identified by the case conference judge as being not in dispute, or ordered to be adduced by affidavit shall be deemed to be admissible for the purpose of the trial, and the trial shall be conducted accordingly, unless the trial judge orders otherwise.

Case conference judge not to preside at trial

20A(40) Except with the consent of the parties, a judge who presides at a case conference under this rule shall not preside at the trial of the action.

Judgment exceeding \$100,000

20A(41) Nothing in this rule limits the amount of a judgment or order that may be made in an action governed by this rule.