

COURT OF QUEEN'S BENCH OF ALBERTA

Q. B. CIVIL PRACTICE NOTE NO. 8

SUMMARY TRIALS

EFFECTIVE SEPTEMBER 1, 2000

INTRODUCTION - EXPLANATORY NOTE

The Summary Trial Rules (Part 11, Division 1, Rules 158.1 - 158.7 of the *Alberta Rules of Court*) came into effect on September 1, 1998, with amendments which came into effect September 1, 2000. These Summary Trial Rules were modelled after B.C.'s Rule 18A, in effect since September 1993. Since 1998 a number of Alberta judicial decisions and directions have been rendered, and articles published, that are relevant to the procedural aspects of summary trials. The authorities provide a number of points of procedural direction, but may raise questions as to other procedures. These sources and questions of the Bar have suggested that some further broad judicial direction is necessary, and, in addition to the amendments effective September 1, 2000, that is the purpose of this Practice Note.

It is very important to recognize that the Summary Trial Rules were created with a view that they should be used for expeditious adjudication, and be as flexible as possible, limited (with some parameters) only by the imagination of counsel using them. Therefore, restrictions outside those specified in the Rules should be avoided if possible. Indeed, "judges should be careful but not be timid in using [the Summary Trial Rule] for the purpose for which it was intended", namely to expedite the early resolution of cases - that is, expediting the administration of justice¹. It is also important to recognize that "while every effort must be made to ensure a just result, the volumes of litigation presently before our courts, the urgency of some cases, and cost of litigation do not always permit the luxury of a full trial with traditional safeguards in every case particularly if a just result can be achieved by a less expensive and more expeditious procedure... [the Summary Trial Rule] substitutes other safeguards which are sufficient to ensure the proper attainment of justice".²

With that said, the Bar, Clerks' Office and the Judiciary should have a common understanding of what is expected. Specifically: the Bar needs to know how they set down a summary trial, what they need to provide and how the trial will be conducted; the Clerks' Office needs to ensure that the Bar has met the requirements, and that the time reserved

¹ *Compton Petroleum Corporation v. Alberta Power Limited* (1999), 242 A.R. 3, (Q.B. - Paperny J.), relying upon the leading B.C. test case of *Inspiration Management Ltd. v. McDermid St. Lawrence* (1989), 36 B.C.L.R. (2d) 202, at 214 (B.C.C.A.).

² McEachern C.J.B.C., in *Inspiration*, at 213.

is sufficient to determine the case; and the Judiciary needs to have the opportunity in advance of the trial to read anything that is intended to be relied upon at the summary trial.

With these things in mind, the following directions are prescribed to ensure that summary trials are an available tool to provide efficient (that is, time sensitive) and cost effective justice.

PRACTICE NOTE

Summary Judgment v. Summary Trial

1. There is a very clear distinction between an application for summary judgment (the tripartite test must be met - generally, no defence to the position being advanced - or the application is denied and the matter proceeds to trial), and a summary trial, which is like any other “conventional” trial, except the procedures are simplified.

One Stage v. Two Stage Proceedings

2.
 - (a) There are two components to a summary trial - (1) is/are the issue(s) suitable for a summary trial determination, and (2) the merits of the summary trial application. The Summary Trial Rules were created to be flexible enough to allow Counsel to proceed in 1 or 2 stages to have these components determined.
 - (b) Counsel may proceed with a two stage application. That is, they must comply with Rule 158.1, but may set the matter down in the first instance in regular chambers for advice and directions consistent with the Summary Trial Rules and this Practice Note. They may also seek a preliminary determination of issue (1) before proceeding to issue (2). However, in this circumstances, whether or not there has been a determination of issue (1) in chambers, at the summary trial the presiding justice may, having regard to the evidence, still determine that the matter is not appropriate for the summary trial procedures.
 - (c) For those counsel wishing to put issues (1) and (2) together, they may proceed with a one stage application. Indeed, many have suggested that a one stage application is preferred, but there is a freedom to counsel to so determine and the Court to rule.
 - (d) The flexibility for either a one stage or two stage application gives counsel the opportunity to evaluate the risks of time and cost of each alternative. Obviously, counsel for both sides may agree on a procedure and format, consistent with the Summary Trial Rules, and this Practice Note, and appear

before a chambers justice to confirm the procedure by a consent order for advice and directions.

Setting Down

3. Any party to a proceeding may apply for a summary trial.
4. Counsel may set a matter down for summary trial, by “Notice of Motion for Summary Trial”³, in two ways, depending on the nature of the issue, the time it will take and the judicial district in which it is to be brought:
 - (a) notwithstanding the apparent complexity of the Summary Trial Rules, and this Practice Note, in the infrequent situation where the issue is very simple, does not require the judicial review of any material more than a normal chambers application, and can be determined within 20 minutes, it may be brought into regular chambers (family or non-family);
 - (b) any summary trial application may also go to regular chambers for an order for advice and directions; and
 - (c) for a matter that will take more than 20 minutes to argue, counsel must, before filing the Notice of Motion for Summary Trial, reserve a date(s) and time on the civil trial list, with:
 - (i) in Calgary and Edmonton, the Civil Trial Coordinator; and
 - (ii) in other judicial districts, the Trial Coordinator.
5. Counsel should be careful in their Notice of Motion for Summary Trial to make clear as to whether:
 - (a) the matter is to appear on the regular chambers list (family or non-family) or trial list, in accordance with paragraph 4 above; and
 - (b) all issues or only a specified issue(s) is/are being proposed for summary trial.
6. No Certificate of Readiness, or Pre-Trial Conference, is necessary. However, once a summary trial application has been filed, or is, on informal notice, expected to proceed, it is useful for applicant counsel (or respondent if applicant counsel does not do so) to seek a quick Pre-Trial Conference to identify the issues, to explore (informally) whether the matter can properly be determined by a summary trial -

³ This title to be used to assist the Clerks’ Office in distinguishing such a Notice of Motion for Summary Trial from other Notices of Motion.

thereby avoiding potential cost and delay, and to obtain advice and directions as to filings and timing or on any unusual aspect of the application.

7. It is to be noted that, by Rule 158.5(1)(g), there will be no *viva voce* on a summary trial without a justices's order, which shall be sought in advance of the hearing.

Filings

8. Subject to other direction under Rule 158.4(2)(d) and any order for advice and directions, a brief of fact and law, providing a summary of the facts and law intended to be relied upon (not to exceed 4 pages), and copies of any authorities intended to be relied upon, shall be filed, and served on the party(ies) opposite, not later than the following:
 - (a) applicant, on the 21st day prior to the hearing;
 - (b) respondent, on the 7th day prior to the hearing; and
 - (c) applicant, in rebuttal only, on the 3rd day prior to the hearing.

So that judicial consideration is properly focussed on the most important material, the pertinent parts of all documentary evidence and authorities (that is, other than the contents of the affidavit and brief) that counsel wishes the justice to have regard shall be specifically **highlighted** in the copies filed and served under this paragraph.

The Trial

9. A summary trial is, in spite of the procedure set out in the Summary Trial Rules and herein, a trial, with a final resolution of the matter or an issue (subject only to appeal). Accordingly, once the matter proceeds to trial, all the attributes of a trial shall, unless exempted by specific judicial order, apply - such as gowning.
10. Unless there is an order of the Court, an agreement, or substantive law applicable to the contrary, the applicant shall present evidence first and has the burden, on a balance of probabilities, to establish that the matter(s) in issue is/are appropriate for summary trial, and that the evidence justifies judgment in favour of the applicant on the merits - otherwise, the onus of proof that would otherwise be applicable does not shift simply because the matter is being heard as a summary trial⁴.

⁴ See: *Inspiration* and *Miura v. Miura* (1992), 40 R.F.L. (3d) 43; 66 B.C.L.R. (2d) 345, at 352 (B.C.C.A.).

11. As with any trial, counsel should be aware of the record that will be created, and, accordingly, available for the Court of Appeal - the normal rules for admission of new/fresh evidence will be expected to apply. Specifically, counsel should be alive to the distinction between lack of “sufficient evidence” for adjudication (Rule 158.6(1)) and the failure to adduce necessary evidence - only in the former case will adjudication be deferred.
12. The normal rules of admissibility at a “regular” trial apply. Accordingly, counsel should make certain that no inadmissible (e.g. affidavits based on information and belief), or irrelevant or immaterial, evidence is provided. For example, if counsel want to rely on evidence of their party, that party must “testify” (by affidavit, or *viva voce* by prior court order). A party cannot use his/her/its own evidence at examination for discovery as evidence at the summary trial - rather, only that of a party adverse in interest is admissible. It is important to recognize, especially in view of the new discovery rules setting the test as “relevant and material”, that evidence obtained at discovery may not be admissible at trial.

EXPERTS

13. While expert evidence may be adduced at a summary trial, the Summary Trial Rules do not modify Rule 218.1, and therefore, absent agreement or judicial advice and directions to the contrary, the time frames for summary trials may have to be elongated to take into effect Rule 218.1.

Costs

14. Schedule “C” does not specifically reference Summary Trials. However, items 10 (modified as appropriate in regard to footnote 2 thereof) and 11 would appear adequate in accordance with the Court’s discretion on costs. Note that the fees in item 11 are identical (except for 2nd counsel fees) to item 8 for special chambers.

FINALITY

15. Counsel and their clients need to realize that a summary trial is - **not** like an application for summary judgment, which if dismissed, proceeds to trial - a final disposition, like any other trial, subject only to appeal to the Court of Appeal.