Summary Trials

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For:
Alberta Civil Trial Lawyers Association
Weapons in Chambers
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Rules of Court Committee

Request for Comments 2020-1

Summary Trials

In light of the limited availability of trial time, and the need to resolve disputes in an efficient and expeditious manner, the Rules of Court Committee intends to examine the use of summary trials as a more efficient way of resolving disputes.

The Rules of Court Committee is now requesting comments on Division 3 of Part 7 of the Rules, which deals with summary trials. Submissions are requested by June 1st, 2020, and should be sent to: RCC@albertacourts.ca, **or** Barb Turner, Q.C., Secretary, Rules of Court Committee, John E. Brownlee Building, 9th Floor, 10365 – 97 Street, Edmonton, Alberta, T5J 3W7. Comment is invited on any aspect of the applicable rules, although the following discussion document is intended to highlight the issues identified to date.

For convenience, the existing Alberta rules are appended to this consultation memorandum.

Background

The Alberta *Rules of Court* contemplate a number of methods of adjudicating disputes, for example, trials of issues under R. 7.1, summary judgment under R. 7.2, summary trials under R. 7.5, and full trials under Part 8. Summary trials appear to be common in some jurisdictions, but not in Alberta. Why is that? How can we address this issue?

When choosing the mode of trial, there is a competition between two competing values:

- There is a recognition that a full trial is an impractical or unrealistic procedure for some disputes. The parties simply cannot afford that intensive a procedure, and they will have to "walk away from justice" if they are forced to trial.
- On the other hand, there is a reluctance to decide cases on an imperfect record, or using procedural shortcuts, because of the fear of injustice, or a compromise of the truth-finding function.

The challenge is to find a practical and workable procedure that strikes a proportionate balance between these two competing objectives.

What Is a Summary Trial?

A threshold question is the nature of a "summary trial". The rules on summary trials are found in Part 7 "Resolving claims without a full trial", not in Part 8 on "Trials".

A summary trial lies somewhere between a summary judgment application and a standard trial. Confusion arises because of the use of the word "summary" to describe two different procedures: *summary judgment* and *summary trial*. There are similarities but also fundamental differences between the two. One helpful change may be to use the phrase "streamlined trials" or "expedited trials" in future.

A key feature of a *summary judgment* application is that it attempts to decide a case without a trial. If the moving party can prove either "no merit" or "no defence" in a summary manner the dispute can be finally resolved. If it is not finally resolved by the summary judgment process, then the matter is "sent to trial", because there is "a genuine issue requiring a trial": see *Weir-Jones Technical Services Inc v Purolator Courier Ltd*, 2019 ABCA 49, 86 Alta LR (6th) 240.

If the moving party in a *summary judgment* application cannot establish the right to summary disposition, there is no substantive prejudice caused because the matter "goes to trial". In a standard trial the trial judge must decide, and if the plaintiff fails to meet the burden of proof, the action is dismissed. The *summary trial* procedure allows the summary trial judge to "not decide" at the end of the process: R. 7.9(2). The reason why R. 7.9 allows a summary trial judge to "not decide" is stated right in the rule: the judge is unable to find the facts necessary to decide, or it would be unjust to decide after a summary trial. These are obviously desirable values. However, diverting the summary trial at the end of the process wastes resources, and appears to be one of the main reasons why the summary trial process is not being used.

Barriers to Use of Summary Trials

The barriers to the use of summary trials appear to be:

Lack of Familiarity by the Bar. Lawyers are not in the habit of holding summary trials, they are not familiar with the procedures, and so they tend to be apprehensive or resistant to the idea. They are also hesitant to incur the costs of a summary trial when a final outcome is uncertain. Reforming the rules and better education may be the solution.

Fear of a Miscarriage of Justice. Even if the parties are motivated to use a summary process, sometimes the courts are reluctant to go along. Judges do not want to decide cases based on an

inadequate record, relying on the "burden of proof" if there are gaps in the case of one party or the other.

Barriers to Entry. Once all of the pretrial procedures are completed, setting a matter down for standard trial is fairly routine. Setting a matter down for a summary trial is less clear:

(a) There is uncertainty as to which disputes qualify for summary trials.

(b) There is a two-step process, in which one has to "apply" for a summary trial, and then do the summary trial itself.

    (i) Part 7 describes the process as an "application for judgment by way of summary trial", which appears to lead directly into the adjudication on the merits, creating a blend of an "application" and a "trial".

    (ii) Rule 7.8 provides that the defendant can object to the use of the summary trial procedure, on 5 days notice, "at or before the hearing". Thus, the plaintiff might do all of the work to prepare all of the evidence and argument for a summary trial, only to have it derailed at the time of hearing. Nothing is accomplished except more delay and expense.

(c) In those cases where a summary trial is appropriate, there is uncertainty as to what evidence and other materials can or should be used at the summary trial.

Uncertainty of Outcome. After a standard trial, the court is obliged to make a decision. One party will win, and one party will lose. Either the plaintiff will meet the burden of proof, or it will not. Trials may be lengthy and expensive, but at least they bring certainty. That is not true with a summary trial because of R. 7.9, which provides that at the end of a summary trial the judge may decline to decide if he or she is "unable to find the facts necessary". Thus, both parties (and the Court) might invest all of the resources necessary for the summary trial, but end up with nothing to show for it.

Other Barriers: Are there other barriers to the use of summary trials? How can they be addressed?

Issue #1 *Suitability for Summary Trial*

Under the present Rules, a litigant does not have a right to use the summary trial process, but rather must "apply" to use the procedure. Rule 7.5 involves a considerable dedication of resources just to invoke the process: see *SHN Grundstuecksverwaltungsgesellschaft v Hanne*, 2014 ABCA 168 at paras. 3-5.

Under the existing R. 7.8, the suitability of the summary trial procedure is not necessarily decided until the summary trial commences, and the other party has the option of objecting to the procedure up to five days before that scheduled date. Should greater certainty be introduced into the rule?

One option would be to specify those actions that are presumptively to be decided by summary trial. In those cases, it would be up to any party resisting the procedure to apply to redirect the action to a full trial.

To illustrate, a summary trial could be presumptively required for all family property disputes, or all family property disputes excepting those involving an active business, all personal injury actions, or all personal injury actions under a certain threshold, all claims for liquidated sums, all claims that primarily depend on the interpretation of documents, all child and spousal support claims, etc.

Are there categories of claims that are presumptively suitable, or not suitable for summary trial? Is there a better way to select the summary trial procedure?

Issue #2 *Procedure to Trigger a Summary Trial*

The present Rules contemplate an "application for judgment by way of summary trial", a blend of "application" and "trial" procedures. One does not "set down" a summary trial. Rather one "applies for judgment", and then enters into a two-step process whereby (i) the suitability of the process, and (ii) the merits are examined during a summary trial/application process. See the discussion in *WestJet v ELS Marketing Inc*., 2013 ABQB 666 at paras. 41-8, arguing that when the procedure is invoked the "summary trial process is, itself, on trial".

The present Rules contemplate a two-step procedure. First there is an application to use the summary trial procedure. Then there is the summary trial itself. At present the two-step procedure is merged, and the suitability of the summary trial procedure is not (potentially) decided until most of the preparation work for the summary trial, including the preparation of expert reports and affidavits, has been done. Neither the parties nor the judge have a firm idea of what is actually going to happen on the scheduled application/trial date. Is this just going to be an argument about whether the summary trial process is suitable? Or is there actually going to be a summary trial on the merits? What preparation is appropriate? Should all the witnesses show up?

Should the Rules retain use of the two-step procedure, while more clearly severing the two steps? This might effectively require a type of "pre-summary-trial application" in every case. How much evidence would the triggering party have to adduce at this stage (see R. 7.5(2))?

Alternatively, should either party be able to trigger a summary trial process, forcing the other party to object within a very tight timeline? Are there other viable solutions?

Issue #3 *The Platform for a Summary Trial*

The potential finality of the process is an important factor for any litigant participating in a summary trial. The paper record must be carefully prepared to ensure that there are no gaps. The burden of proof does not change. There can be no shortcuts in preparation. Only admissible evidence can be relied on. The process must be approached as a trial, potentially leading to a final and binding outcome.

In a standard trial, there is a presumption that all evidence will be introduced through *viva voce* testimony: R. 8.17. The main feature of a summary trial is the use of affidavits and other written forms of evidence. At present, there are very few directions on what evidence will be introduced: see R. 7.5(2) and (3). The record for each summary trial must therefore be built from scratch, although there are template orders in existence that provide guidance: see for example Appendix "A" to ***Moncrieff v Hayne,*** 2013 ABQB 657.

Is it practical to provide a presumptive list of items that will form the basis for a summary trial? For example, should there be a "Summary Trial Book" containing all the evidence and key documents? E.g.:

(a) The most recent versions of the pleadings.
(b) Any agreed statements of fact or admissions
(c) One affidavit (from each of the parties with firsthand knowledge of the matter) setting out the facts supporting the claim, and attaching any admissible documents to be relied on.
(d) Possibly, additional affidavits from other non-party witnesses?
(e) Extracts from transcripts that are to be relied on at the trial.
(f) Expert reports, and the qualifications of the experts (in affidavit format?)
(g) Other??

Should there be a presumption that no *viva voce* evidence is allowed at a summary trial, without leave? Alternatively, should there be limits on oral evidence, including the number of witnesses and length of testimony?

Should there be presumptive rules about what will happen at the summary trial? For example:

(i) Each party must rely on its affidavits, and it will not (without leave) be allowed to examine its affiants in chief, but the other side will be allowed a limited cross-examination, with re-examination being in the discretion of the court? See Ont. R. 76.12(1) which allows 10 minutes of examination.

(ii) Possibly, that witnesses will not be expected to attend the trial unless prior notice has been given of a desire to cross-examine, or that all cross-examination must take place prior to trial (see R. 8.15), and

(iii) Experts will not be called unless notice is given (see R. 5.39 and 5.40), in which case there can only be a limited cross-examination, and re-examination with leave?

Issue #4 *Finality of the Summary Trial Process*

Judges can dismiss *summary judgment* applications if there is a genuine issue requiring a trial. In a *standard trial*, if the plaintiff does not produce the necessary evidence to prove its claim, the plaintiff loses. That may be unfortunate, but it is not necessarily unfair or unjust: see ***Middelaer v Berner***, 2013 BCCA 189 at paras. 11-2. The certainty of outcome is one of the important features of a trial, or any adjudication.

What level of certainty of outcome should attach to *summary trials*? At the end of a summary trial, should there be a presumption that if the plaintiff has not met the burden of proof, the plaintiff should lose? In a summary trial should the summary trial judge no longer have a discretion to refuse to decide, or alternatively should "refusing to decide" be exceptional, not routine? Compare Ont. R. 76.12(4) which requires a decision after summary trial.

One safeguard is to only send to a summary trial those cases that have a reasonable prospect of being resolved using that procedure. Should the summary trial judge have regard to "proportionality", that is whether the nature of the dispute warrants the resources required for a standard trial? Another consideration could be whether each party was given a "fair opportunity" to present its case, and failed to take advantage of that opportunity.

An alternative to "not deciding" would be to confirm the power of a summary trial judge to adjourn the summary trial, permit further evidence to be called, or otherwise give procedural directions that are proportionate to the issues and fair to the parties. A further alternative would be to strengthen R. 7.10 and provide that the summary trial judge must remain seized of the matter, and would preside at any full trial that might eventually be required.

Issue #5 *Other Issues*

Are there other issues or factors that can improve the effectiveness of the summary trial process? The Rules of Court Committee invites comments and input from the public on the identified issues, and the issue of summary trials generally.

Alberta Rules of Court
Part 7 Division 3
Summary Trials

Application for judgment by way of summary trial

7.5(1) A party may apply to a judge for judgment by way of a summary trial on an issue, a question, or generally.

(2) The application must
- (a) be in Form 36,
- (b) specify the issue or question to be determined, or that the claim as a whole is to be determined,
- (c) include reasons why the matter is suitable for determination by way of summary trial,
- (d) be accompanied with an affidavit or any other evidence to be relied on, and
- (e) specify a date for the hearing of the summary trial scheduled by the court clerk, which must be one month or longer after service of notice of the application on the respondent.

(3) The applicant may not file anything else for the purposes of the application except
- (a) to adduce evidence that would, at trial, be admitted as rebuttal evidence, or
- (b) with the judge's permission.

Information note

The rules anticipate that the parties will agree on how to manage applications for judgment by way of a summary trial. If the parties need assistance, they may seek a procedural order or Court assistance under Part 4 [*Managing Litigation*].

Response to application

7.6 The respondent to an application for judgment by way of a summary trial must, 10 days or more before the date scheduled for the hearing of the application, file and serve on the applicant any affidavit or other evidence on which the respondent intends to rely at the hearing of the application.

Application of other rules

7.7(1) Part 5 [*Disclosure of Information*] Division 2 [*Experts and Expert*

Reports] applies to an application under this Division unless the parties otherwise agree or the judge otherwise orders.

(2) Part 6 [*Resolving Issues and Preserving Rights*] applies to an application under this Division except to the extent that it is modified by this Division.

Objection to application for judgment by way of summary trial

7.8(1) The respondent to an application for judgment by way of a summary trial may object to the application at or before the hearing of the application on either or both of the following grounds:

(a) the issue or question raised in the claim, or the claim generally, is not suitable for a summary trial;

(b) a summary trial will not facilitate resolution of the claim or any part of it.

(2) Notice of the objection and anything on which the objector intends to rely must be filed and served on the applicant 5 days or more before the objection is scheduled to be heard.

(3) The judge must dismiss the objection if, in the judge's opinion,

(a) the issue or question raised in the claim, or the claim generally, is suitable for a summary trial, and

(b) the summary trial will facilitate resolution of the claim or a part of it.

Information note

At a hearing before or at the start of a summary trial, the judge may make a procedural order or an order under Part 4 [*Managing Litigation*]. Typical orders include those that state

- the evidence a party intends to adduce at the summary trial
- that a deponent must attend questioning
- that no further evidence be adduced
- that a party must file a brief
- time frames within which items must be concluded.

A summary trial may be conducted by an electronic hearing (see rule 6.10 [*Electronic hearings*]).

Decision after summary trial

7.9(1) After a summary trial, the judge may

(a) dismiss the application for judgment, or

(b) grant the application and give judgment in favour of a party, either on an issue or generally.

(2) Judgment must be granted after a summary trial unless

(a) the application is dismissed,

(b) on the evidence before the judge, the judge is unable to find the facts necessary to decide the issues of fact or law, or
(c) the judge is of the opinion that it would be unjust to decide the issues on the basis of the summary trial.

Judge remains seized of action

7.10 A judge who has heard an application for judgment by way of a summary trial may remain seized of the action.

Order for trial

7.11 A judge, at any stage of a summary trial application, may
(a) order the trial of the action generally or on a question or issue and give directions with respect to preparation for trial and a trial date, or
(b) give any procedural order that the circumstances require.