

# Supreme Court of Nova Scotia

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NOVA SCOTIA

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## MEMORANDUM *Civil Procedure Rules Revision Project*

**TO:** Steering Committee

**FROM:** Management of Litigation Working Group

**DATE:** February 15, 2005

**RE:** Progress Report

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The members of the Management of Litigation Working Group are:

Justice John D. Murphy (Chair)  
Justice Thomas Cromwell  
Justice W. D. Arthur Pickup  
Annette Boucher  
Michael S. Ryan, Q.C.

Aidan Meade  
Lee Anne MacLeod-Archer  
John E. S. Briggs  
William Charles

The Group has held five meetings, September 21<sup>st</sup>, October 28<sup>th</sup>, December 7<sup>th</sup>, 2004, January 11<sup>th</sup> and February 11<sup>th</sup>, 2005, during which it has:

- (a) addressed topics proposed for its consideration in the Law Reform Commission's Consultation with the Bar "Issues Memorandum" of June 16<sup>th</sup>, 2004;
- (b) considered input received by the Steering Committee during consultation meetings with members of the Bar;
- (c) reviewed suggestions submitted in writing; and
- (d) discussed concerns about the Rules identified by members of the Group.

The N. S. Law Reform Commission has provided extensive resource materials and comparative analysis, which have been of great assistance.



This Report will be organized by presenting the Working Group's comments and proposals (both with respect to Rules Revision, and where necessary Court Administrative Change) as responses to the questions posed in the Issues Memorandum, which, for ease of reference, will be set out prior to outlining Working Group suggestions. Views respecting other relevant issues will then be noted.

The Working Group believes that its mandate to date has been fulfilled; however, members are willing to give further consideration to previously identified or new issues in the context of relevant recommendations made by other Working Groups, or as directed by the Steering Committee.

### **SETTING DOWN AND PRE-TRIAL PROCEDURES**

- Should the Rules incorporate revised procedures for establishing trial readiness and for setting down, with particular reference to the following:
  - Prerequisites to Scheduling Trial
  - Date Assignment Conference Procedure
  - Setting Timetable Between DAC and Trial
  - Supplementary Expert Reports and Discoveries after Date Assignment
  - Timing of IME's
- Should a fixed trial date be assigned as soon as pleadings are closed?
- Should the procedure for objecting to Notice of Trial be revised?

**Comment:** Present procedures are uniformly condemned because litigants wish to secure a trial date earlier in the process, and consider to be unworkable the requirement that all discoveries be finalized (except for completion of experts within 60 days) in advance of conducting Date Assignment Conference (DAC). This is particularly problematic when the delay between DAC and trial date is substantial, and conditions change with reports needing to be updated prior to trial.

Current problems identified by the Group include too many collapsed trials, excessive adjournments, and parties' having to wait too long for a DAC and trial dates. The proposed revisions are intended to allow parties to more quickly work toward a fixed trial date, and prevent one party from being unreasonably delayed by the other. Objectives include Court involvement after the DAC to monitor compliance with important deadlines, earlier pre-trial conference, and an Early Dispute Resolution process occurring parallel to trial preparation to encourage the parties to focus upon settlement well in advance of trial.

## **Rules Revision**

The Group suggests that procedures be revised by adopting a pre-trial timetable involving prerequisites and milestones such as the following:

## **DAC Request**

After document disclosure and discovery of only the parties (or one responsible representative of a non-individual party) request may be made for DAC. With the leave of the Court, a DAC may be requested prior to completion of documentary disclosure and discovery of the parties.

Prior to requesting DAC, a party shall provide to all other parties a completed DAC Questionnaire, in form prescribed by the Rules, which shall include:

- (a) Statement indicating the status of the proceeding;
- (b) Further pre-trial requirements (including additional examination of parties, any non-party discovery, filing experts' reports, pre-trial motions, etc.);
- (c) Estimate of the time necessary to complete pre-trial procedures;
- (d) Statement indicating the number of witnesses it intends to call, and the time likely to be required for direct examination of each witness;
- (e) Estimate of number of days required for trial;
- (f) Statement of the earliest date that the party anticipates the case being ready for trial.

Within ten days of receiving a completed questionnaire, each other party shall either:

- (a) complete a similar Questionnaire, and provide that document to the party who initiated the process; or
- (b) if unwilling to participate in joint application for DAC, schedule an attendance for resolution of differences among the parties respecting readiness for trial at Appearance Day, where the Judge shall either order that DAC be scheduled or direct steps to be taken prior to scheduling DAC.

Any party which neither delivers a DAC Questionnaire in response nor applies to delay scheduling of DAC within the prescribed time shall be deemed to accept the contents of the initiating party's DAC questionnaire.



If no application has been made to delay DAC, the initiating party may, 15 days after delivering DAC to opposing parties, file all completed DAC questionnaires and request that DAC be scheduled.

Court Administration shall, within ten days of receiving DAC Request, advise the parties of the date and time set for DAC. That date shall be within 30 days of the date the DAC Request was filed.

## **DAC**

DAC's should be recorded and ordinarily conducted by telephone, unless a party requests, or a Judge directs, personal attendance.

Unless the presiding Judge determines otherwise, the following shall occur at Date Assignment Conference:

- a) Trial dates will be set.
- b) A pre-trial conference will be scheduled at least 60 days before Trial Date.
- c) A Finish Date for completion of all pre-trial procedures, including filing expert reports and follow-ups, additional discoveries, and all applications, shall be set. The Finish Date shall be at least 30 days prior to the pre-trial conference.
- d) If the presiding Judge determines that it is appropriate to do so, intermediate dates for completion of particular filings or activities may be established.
- e) It will be determined whether Early Dispute Resolution initiatives (including any application for Summary Judgment) (Rule 13), determining questions of law (Rule 25), or Reference (Rule 35) will be pursued. Completion of such steps by the Finish Date will be required.
- f) If the parties want a Settlement Conference, a date shall be scheduled at least ten days before pre-trial conference, and the parties will be asked to choose an evidence based mini-trial format or traditional format without evidence.

### **Pre-trial Conference**

Pre-trial conferences should be recorded and, at the discretion of the presiding Judge may be held by telephone or in person. The Judge presiding at the pre-trial conference may but shall not necessarily be the Trial Judge. The presiding Judge shall:

- a) Confirm that the parties are ready for trial, and set dates for completion of any outstanding items. (There shall be no adjournment of the trial date after the pre-trial conference, without leave of the Court in exceptional circumstances.)
- b) Schedule any additional settlement conference requested not less than 30 days before trial.
- c) If the parties are not ready for trial, ascertain the reasons, impose appropriate sanction, cancel trial date, and direct steps to be taken before application can be made for another DAC.

Additional pre-trial conferences may be held as directed by the Court, on its own initiative or following application by a party.

### **Administration Changes:**

- (a) DAC's should be held at regular times (for example one Friday of each month) so that lawyers may anticipate the need to be available to attend. Several Judges may be required to conduct DAC's on the regular "assignment day."
- (b) DAC's may be attended by a lawyer practising with trial counsel, although counsel who will be conducting the trial are strongly encouraged to attend personally.
- (c) Pre-trial conference shall be attended by the lawyer who will be conducting the trial.
- (d) Judges, counsel, and court staff must work together to ensure DAC's are scheduled and conducted as soon as possible following request. Court schedulers will no longer be able to offer lawyers a choice of DAC dates, and judicial rota changes may be required to ensure prompt availability for dates for DAC's.
- (e) The revised procedure should not require a Notice of Trial.

The increased role of the Court monitoring post-DAC progress responds to views expressed by Members of the Bar during consultation with the Steering Committee, and should not be perceived as reinstatement of case management. Court monitoring prior to setting of Trial Date is not increased, and judicial intervention after DAC normally addresses only the overall status of Trial readiness and Early Dispute Resolution activity. Unless the DAC Judge determines that it is appropriate or optional case management is invoked (see below), the Court will not set or monitor completion dates for particular activities, such as I.M.E.'s, filing reports, or discovery completion. The parties will be left to develop their own timetable, with a view to everything being completed by the FinishDate, 30 days before Pre-trial conference (90 days before Trial Date).

### **OPTIONAL CASE MANAGEMENT**

- Should the Rules address optional case management, including the following:
  - Procedure for Request by One or Both Parties
  - Case Management by Court Direction in special cases
  - Conference Procedure and Maintaining Record
  - Motion Hearings - By Case Management Judge?

### **Rules Revision:**

- The present optional case management regime followed in Halifax, which does not conflict with any of the revisions suggested to the Rules, should be retained.
- Retain Rule 68.04(4)(e), which provides that on Appearance Day the Court may direct that a sufficiently-complex case be subject to management by a Judge.
- The Rules should also provide for appointment of a Case Management Judge at the initiative of the Prothonotary or a Judge at any time following the close of pleadings. (The most likely time for such an appointment would be during Date Assignment Conference.)
- Rules should provide that with the consent of the parties, Case Management Judge may preside at pre-trial motions.
- Rules should provide that Case Management Judge may issue orders reflecting developments during case management proceedings.

- Rules should provide that Judge determine whether case management proceedings will be recorded.
- Rules should provide that minutes of case management meetings be prepared by the parties as directed by the Case Management Judge.

### **SETTLEMENT CONFERENCES**

- Should the directions respecting Settlement Conferences contained in Practice Memo 27 be revised, expanded or incorporated into a Rule, with particular reference to the following:
  - Optimum Time to Conduct
  - Filing Requirements and Deadlines
  - Party Input to Assignment of Judges
  - Desirability for Uniform Approach by Judges
  - Recording Result

#### **Rules Revision:**

- The Working Group adopts the recommendations respecting Settlement Conferences contained in the Progress Report of the Early Dispute Resolution Working Group dated February 11, 2005, **and also recommends that the Rules contain a provision such as the following:**

**“The Judge presiding at a settlement conference (including mini-trial) shall not be informed of any agreement made by the parties prior to the conference that they be bound by any decision or recommendation made by the Settlement Conference Judge.”**

### **LONG TRIALS**

Should the Rules specifically address long trial issues including:

- Scheduling and Lead Time
- Steps Which May be Taken Between Date Assignment and Trial?



**Rules Revision:**

- The Working Group does not recommend different Rules respecting scheduling long trials, and suggests that the changes proposed generally for setting down and pre-trial procedures are sufficiently flexible to address issues which may arise in cases where long trial is required.

**Administrative Change:**

- **The Working Group considers the acute delays presently experienced by litigants seeking dates for trials expected to exceed ten days to be unacceptable.** We recommend that Court Administration adopt scheduling policies which will lead to more prompt scheduling of long trials, which should generally be available following delay times comparable to those for short trials.

**JURY TRIALS**

- Should the Rules respecting scheduling of jury trials be revised?
- Should the Rules allow juries to be given a range of damages?
- Should the Rules give Judge express authority to order Jurors to keep their deliberating secret?

**Rules Revision:**

- The Working Group suggests that the general revisions proposed concerning setting down and pre-trial procedures be applied to jury trials, and that no additional Rules are necessary.
- Juries should be provided by the Judge with a range of damage awards for consideration.
- The Rules should give the Trial Judge express authority to order Jurors to keep their deliberations secret.

### **SEVERANCE OF LIABILITY AND DAMAGES**

- Should Rules be revised to more completely address severance of liability and damages, particularly for jury trials?

#### **Rules Revision:**

- Rules should not contain further direction concerning severance of liability and damages. The Court can sever under the present Rules. Providing encouragement for severance in the Rules could be counter productive in those cases where liability and damages are closely intertwined and cannot be considered separately or where severance could lead to two juries dealing with different aspects of the case.
- The Working Group noted that defendants frequently refuse to admit liability until the last moment, even in clear cases, and this may frustrate operation of the Interim Payments Rules. The Group considered this difficulty would be better addressed through stricter application of cost sanctions rather than by expanding the severance provisions.

### **CHAMBERS PRACTICE**

- Are reforms required for chambers practice, particularly respecting:
  - Filing Deadlines
  - Affidavits Including Cross Examination
  - Oral Evidence

#### **Rules Revision:**

##### **Filing**

- Rules require change to clarify that ex parte applications must be filed one clear day prior to scheduled hearing date, except for emergencies.

##### **Affidavits**

- Rule governing affidavits should provide that deponents are not required to be present at chambers applications, unless an opposing party specifically requests the deponent's presence at least one clear day before the hearing date.

- Rule respecting affidavits should recognize inherent right to cross examine deponent, but also provide that Judge may determine that cross examination is inappropriate or unnecessary, and suspend the inherent right.
- Rules should authorize Judge to impose time limits on cross examination, or order that extended cross examinations take place via discovery process outside of court (reference Rule 18, Rule 38.10).

### **Regular, Special and Complex Chambers**

- Matters for regular or general chambers should be limited to one-half hour, with no cross examination on affidavits or oral evidence permitted.
- Applications requiring over one-half hour and up to two hours should be designated as special chambers. Each party should be allocated a specific amount of time, not to exceed one hour, for presentation of their case (including evidence and submissions).
- Applications involving a time requirement of more than two hours should be designated as complex chambers.
- Parties should be required to arrange a specific scheduled appointment time for special chambers and complex chambers.
- Parties should be required to complete a much more detailed form especially when filing special or complex chambers applications.
- All chambers applications should be accompanied by a memorandum, filed no later than the deadline for filing Notice of Application.
- **Affidavits and Memoranda for special chambers shall be filed at the times established in the current Rules.**
- **Time for filing affidavits and memoranda for complex chambers shall be fixed when the date for hearing is scheduled.**

### **Chambers Costs**

- Expense for deponents to attend chambers applications will be borne initially by the party filing the affidavit. Travel costs and other expenses will be set and awarded at the conclusion of the chambers hearing in the discretion of the Court.



- Technology should be used as much as possible to avoid the need to bring parties long distances to attend chambers.
- The Working Group recommends that the Rules emphasize (either in a section dealing with chambers, or with costs) that the Court may direct that costs be paid forthwith following chambers. Requiring immediate payment should be encouraged in appropriate cases.

### **APPEARANCE DAY**

- Should appearance day practices be addressed in the Rules?

### **Rules Revision:**

- The Working Group favours Rules provision such as those set out in current Rule 68.04, amended as necessary to reflect other revisions for the Rules (for example, replacing (g) “strike a notice of trial” with:  
    resolve differences among parties respecting readiness for  
    trial, and provide appropriate direction.

### **Administrative Change:**

- Appearance Days should be introduced on a regular basis in districts outside Halifax.

### **ORDERS**

- Should the Rules set out requirements for filing of orders and prescribe time limits?
- Rules should state that unless otherwise directed, the successful party shall provide a draft order to all other parties within ten days following receipt of a decision, or **within ten days following resolution during settlement conference**. Within five days after receipt of a draft order, any party may object to its form or content by giving written notice to the successful party, **stating** the objection and **proposing** revised wording. The successful party shall, within 20 days following receipt of decision or after settlement, deliver the order to the presiding Judge, incorporating any agreed revision, and accompanied by a copy of the notice of any unresolved objection.

### **COMPLIANCE, SANCTIONS**

- Should there be a Rule requiring compliance with undertakings?
- Should the Rules provide revised remedies for non-compliance with disclosure obligations and commitments to fulfill undertakings?
- Should the Rules provide for sanctions when prescribed deadlines are not met?

**Comment:** Practising lawyers have expressed repeated complaints that the Court does not enforce the Rules strictly, and should impose sanctions much more readily.

#### **Rules Revision:**

- The Rules presently provide sufficient ability to enforce the Rules and impose sanctions. The Group recommends that the Court universally adopt a policy of requiring stricter adherence, and more readily and uniformly impose sanctions, particularly significant cost awards for non-compliance.
- The Court should not intervene when the parties agree to waive a time deadline, provided Court Administration receive written notice of such agreement, and that it not affect scheduled trial dates.

### **MISCELLANEOUS**

- Special Rules should not be developed for particular types of cases, such as those involving personal injury. The Group's intention has been to recommend Rules including those applicable to setting down and pre-trial procedures sufficiently flexible to accommodate all types of cases.
- Similarly, the Group does not recommend adopting special Rules for self-represented litigants, but emphasizes the importance of plain language and maintaining simplified procedures.
- The Rules require some flexibility, but must provide authority to impose appropriate sanctions where necessary.

**Duration of Originating Notice:**

- Unnecessary inconvenience arises from plaintiff's failure to serve Originating Notices and repeatedly seeking renewal and extension of time to serve. The Group recommends that Originating Notices be valid for an initial period of one year, and that they be renewable **once upon Application to the court prior to expiry** for a further period of one year, **and not thereafter** unless there is strong evidence service **that** could not be effected.

**Defence Prior to Service**

- **Rules should allow a Defendant to file a defence at any time after an Originating Notice is issued (even if it has not been served).**

JDM/tlc