Rules of Court Committee

Request for Comments 2021-1

Streamlined Trials

In 2020 the Rules of Court Committee invited general comments on a proposal to amend the summary trial rules. A number of comments were received, and the Committee is now circulating for comment a more focused proposal for new **Streamlined Trial Rules**.

The Rules of Court Committee is now requesting comments on the attached draft Division 5 of Part 8 of the Rules, which deals with streamlined trials. Submissions are requested by December 15th, 2021, 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.

When choosing the mode of trial, there is tension 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.

The Committee's 2020 request for comments identified a number of issues with respect to the existing summary trial rules, and raised some general policy questions. A number of helpful comments were received. A consensus emerged on two issues:

1. There was general agreement that the existing procedure in rules 7.5 and 7.8 of "applying for a summary trial", under which the defendant could object to that mode of trial right up to the eve of the trial, was unworkable. In order to justify expending resources to prepare for a summary trial, some certainty on the mode of trial was needed at an earlier point in time.

2. There was also general agreement that the existing provision in rule 7.9 that the trial judge could decline to decide at the end of the summary trial significantly undermined the

utility of the process. Litigants would not invest the resources in a summary trial process unless they were certain that a final and binding decision would be made.

The attached draft rules directly address both of these issues.

A clear consensus did not emerge on a number of other issues:

1. Whether there should be a list of categories of claims for which a streamlined trial was mandatory or presumptively appropriate, and if so which categories should be on the list.

2. The nature of the evidentiary platform at a streamlined trial, for example whether all evidence should be introduced by affidavit, and whether there should be limits on examination and cross-examination.

The Committee has carefully considered all of the submissions received when drafting the attached proposal.

The Rules of Court Committee now invites interested parties to provide further comments on the attached proposal.

September 21st, 2021

Draft Streamlined Trials Proposal[1]

The overall proposal is to repeal Division 3 of Part 7, "Summary Trials", and add to Part 8, "Trial", a new Division 5 "Streamlined Trial".

The new provisions on streamlined trials will be moved to Part 8, "Trial", to emphasize that they are "trials" not some form of summary judgment.

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Part 8 Trial
Amend Division 1 - Mode of Trial

8.1(1) A court action may be tried by a jury trial under Division 1, a standard trial under Division 4, or a streamlined trial under Division 5.
8.1(2) Unless the Chief Justice directs that the mode of trial be by jury, or in part by jury and in part by judge alone, the trial must be by judge alone. (*Existing R. 8.1*)
8.1(3) Subject to rule 8.22 [*discharging the jury*] and any enactment, a judge may at any time direct or change the mode of trial to be used in an action or any part of an action.[2]

. . .

New Division 5 - Streamlined Trial

Use of Streamlined Trials

8.25 Court actions are to be resolved by the streamlined trial process whenever that process is proportionate to the importance and complexity of the issues, the amounts involved, and the resources that can reasonably be allocated to resolving the dispute.

The overriding principle is proportionality in proceedings. Compare R. 1.2.

Selecting the Streamlined Trial Mode

8.26(1) At any time after affidavits of records are served, or disclosure is substantially completed under rule 12.41, and up to 6 months before a scheduled trial date, any party to an action may select trial by the streamlined process by serving on all other parties a Selection of Streamlined Trial Mode in form 40.1.

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[1] This discussion document is intended to outline the applicable concepts. The exact drafting of the rules will be left to legislative counsel.

[2] Compare *Jury Act, s* 17(1.1): "If, on an application made under subsection (1) or on a subsequent application, a judge considers it appropriate, the judge may direct that the proceeding be tried by judge alone pursuant to the summary trial procedure set out in the *Alberta Rules of Court*."

The streamlined trial mode may be selected after discovery of records is substantially completed. The time of close of pleadings is probably too early, and awaiting the completion of questioning is too uncertain and may lead to delay in the overall process.

8.26(2) Within one month of being served with a Selection of Streamlined Trial Mode, any other party to the action may object to the use of the streamlined trial mode by serving an Objection to Use of Streamlined Trial Mode in form 40.2.

The forms will require the triggering party to briefly outline why the case is suitable for the streamlined trial procedure. Anyone objecting to the use of that procedure will be required to outline reasons for it, and not just object in the abstract. An objection that it is "too early to tell" will not generally be convincing.

Settling the Mode of Trial

8.27(1) Subject to rule 8.1(3), if no Objection to Use of Streamlined Trial Mode is served within one month, the action shall proceed by streamlined trial.

8.27(2) If an Objection to Use of Streamlined Trial Mode is served, the parties shall without delay jointly schedule a conference with the Court under rule 4.10 to set the mode of trial.

There is no list of categories of disputes that must use the streamlined trial procedure, although there is a presumption in rule 8.27(5) that certain types of disputes are suited for that procedure. The philosophy is that the choice of the streamlined trial procedure is "litigant driven". If the parties agree that the streamlined trial procedure is proportionate to their dispute, the Court will generally acquiesce.

A court application or conference is not required at this stage, unless there is a dispute about the use of the streamlined trial procedure. Under rule 8.29 a pretrial conference is required before the streamlined trial is scheduled.

8.27(3) Any dispute about the mode of trial shall be resolved in a summary manner, relying on the pleadings, statements by the parties of the issues to be resolved at the streamlined trial, outlines of the evidence that would be called at the streamlined trial, and other relevant information.

The rule does not require that litigants file affidavits about "why this matter is suitable for a streamlined trial". That is a matter for argument, based on the court record and the input of counsel.

8.27(4) At any conference or application under this Division, the judge may:

(a) direct that the trial proceed, in whole or part, as a streamlined trial or a standard trial;

(b) make a procedural order, including an order that any potential witness be examined before trial, or an order for security for costs; and

(c) give any other direction to further the purpose and intention of the *Rules* set out in this Division and rule 1.2.

8.27(5) At any conference or application under this rule, the following actions are presumed to be suitable for the streamlined trial process:

(a) actions for the recovery of a liquidated sum less than $500,000;

(b) actions for the recovery of real or personal property;

(c) actions for damages for personal injury where the damage award would likely be under $75,000;

(d) family property actions, taking into consideration whether the family property includes an active business or farming operation;

(e) spousal and child support claims;

(f) wrongful dismissal actions.

The proposed rule does not list any categories of action for which the streamlined trial process is mandatory; no type of action is excluded. A streamlined trial would generally be the proportionate procedure for the types of actions listed in this rule.

The proposed presumptive limit on damages for personal injury claims is set at $75,000, which is the cut off amount for a jury trial. Given the economics of pursuing a personal injury claim to trial, it would be possible to set the presumptive limit at, say, $500,000. The parties can elect, or the court can direct, that any personal injury action use the streamlined trial procedure.

8.27(6) A streamlined trial is not a disproportionate process solely because:

(a) Issues of credibility may arise,

(b) Some *viva voce* evidence may be required at the trial,

(c) Cross-examination of some witnesses may be required, or

(d) Expert evidence may be introduced.

The premise of the streamlined trial procedure is that a fair and proportionate resolution of the dispute can occur at a streamlined trial. In many cases issues of credibility, and the weighing of expert evidence, can be handled at a streamlined trial.

8.27(7) If any conference judge or the trial judge concludes that an objection to the use of the streamlined trial mode was unjustified or delayed the judge may make a procedural or sanction order, and any costs incurred may be treated as thrown away costs.

Record for the Streamlined Trial

8.28(1) The parties have a joint responsibility to prepare the record for a streamlined trial so as to ensure an efficient adjudication, including by:

(a) Identifying the real issues in dispute;
(b) Agreeing on relevant and material facts and records that are not in dispute;
(c) Ensuring that only the relevant and material evidence necessary to resolve the dispute is contained in the trial record.

Under the proposed rule, each party will file its own Streamlined Trial Record under rule 8.28(2) or (3). Issues of admissibility can be resolved at trial.

8.28(2) Prior to scheduling the trial date, any party may serve on the other parties:

(a) an affidavit or affidavits in support of that party's case outlining the key relevant and material facts in support of its position;
(b) a draft statement of agreed facts, unless a notice to admit facts has previously been given under rule 6.37; and
(c) a draft table of contents for its Streamlined Trial Record, listing the materials reasonably needed at trial by one or more of the parties, including:

(i) the latest version of the pleadings, but not earlier versions unless relevant;
(ii) a list of anticipated witnesses, indicating which are proposed to give *viva voce* evidence at the trial;
(iii) the affidavits in support of that party's case;
(iv) any agreed statement of facts, notice to admit facts, and reply to notice to admit facts;
(v) a list of the records necessary to resolve the claim;
(vi) any other affidavits that party proposes to rely on, including notice whether the affiant will testify at the streamlined trial;
(vii) the affidavits of any anticipated expert witnesses, including copies of the expert's reports and qualifications;
(viii) extracts from any admissible transcripts the party proposes to rely on.

Generally, the plaintiff will file its Streamlined Trial Record first, but in case of delay any party could initiate the process. At this first stage, the party will provide copies of the affidavits that will be the foundation of its evidence at trial. Only a table of contents is required with respect to the other documents, as some, such as expert reports, may not

yet be available. Generally, all parties will already have copies of most of the listed items.

The proposed rule does not place any limit on the number of affidavits that a party may include in its Record. Depending on the complexity of the action, no one witness may have all the necessary personal knowledge. Further, imposing a page limit on the affidavits or the Record is likely impractical, although overly inclusive Records could trigger costs consequences.

8.28(3) Within three months of receiving the affidavits and table of contents of a Streamlined Trial Record under rule 8.28(2), every other party shall prepare and serve on the other parties a draft table of contents for its Streamlined Trial Record, listing the materials that party believes are reasonably needed at trial as provided for in rule 8.28(2), and an affidavit or affidavits in support of that party's case, but without duplicating any material already included in the record.

Since each party prepares its own Streamlined Trial Record, there will be no delay resulting from the need to agree on the contents of the Record. Subject to rules 8.28(5) and 5.15, or any prior ruling by a judge, issues of admissibility will be decided at trial.

8.28(4) Subject to rule 8.29(3), any party may supplement or amend its Streamlined Trial Record prior to the action being scheduled for trial.

8.28(5) The inclusion of any item in the Streamlined Trial Record shall not be an admission of the truth of the contents of that item or its admissibility as evidence, except for the deemed admissions in rule 5.15[3].

8.28(6) Except by consent or court order, no further cross-examination on the affidavits included in the Streamlined Trial Record is permitted.

This rule displaces the presumption in rule 6.7 that there is a right to cross-examine on an affidavit. Cross-examination would still be permitted, but by consent or court order: see rule 4.11(a) and 8.27(4)(b). The assumption is that there has been prior questioning under rule 5.17, or previous cross-examination on affidavits. Any further cross-examination would occur at the trial under rule 8.30. There is an argument that cross-examination on the affidavits should be allowed, to keep the amount of cross-examination that occurs at the trial to a minimum.

[3] Records are genuine, copies are true copies, letters were sent and received as indicated, etc.

Note that if there was cross-examination on affidavit, the entire transcript would form part of the trial record, not just portions that the examining party might wish to read in.

8.28(7) Any admissible material properly on the court file may be referred to at the streamlined trial, even if it is not reproduced in the formal Streamlined Trial Record.

In order to encourage the parties to keep the Streamlined Trial Record as compact as possible, a party would not be penalized if evidence that is otherwise found on the court file was not included in the Record. Compare R. 14.28(1) on the equivalent rule on appeals.

Scheduling of Streamlined Trials

8.29(1) When the action is ready for trial, the parties must

(a) exchange draft hearing management orders setting out the procedures to be followed at the streamlined trial, and

(b) book a pretrial conference or a conference under rule 4.10 to confirm readiness for trial and the amount of trial time required, and to resolve any other issue related to the management of the streamlined trial.

A conference with a judge is required at this stage of the streamlined procedure, at the time that the action is being scheduled for trial.

8.29(2) When the action is ready for trial, the parties must file a completed copy of their Streamlined Trial Records, and serve a copy on the other parties.

Up to this point, the parties may only have exchanged the tables of contents of substantial parts of their Streamlined Trial Records. At the point where the action is being scheduled for trial, the full versions of the Records must be available.

8.29(3) After a streamlined trial is scheduled, a Streamlined Trial Record can only be amended or supplemented with the consent of the other parties, or by court order.

In order to avoid surprise, there must be some certainty with respect to the contents of the Streamlined Trial Record, but the trial judge would retain a discretion to admit other evidence. Appropriate orders to preserve fairness, including orders as to costs, could be made.

8.29(4) A streamlined trial shall be scheduled in accordance with Division 2 using Form 37, with the necessary modifications.

8.29(5) When estimating the trial time needed for a streamlined trial, the parties shall include at least one half day of preparation time prior to the commencement of the trial for the trial judge to review the Streamlined Trial Record.

> *The Streamlined Trial Records could be substantial, and enough time must be scheduled to allow the trial judge to review them. Counsel must allow sufficient time for preparation. The calling of evidence at a streamlined trial will presumably commence no earlier than at 2 PM on the first day.*

8.29(6) The parties shall confirm the scheduled streamlined trial date in accordance with rule 8.7.

Procedure at the Streamlined Trial

8.30(1) Prior to the commencement of the streamlined trial, each party may provide to the judge a precise and focused written opening statement not attaching any records, and not exceeding 10 pages.

8.30(2) Subject to rule 13.18(3)[4], any contrary direction, and the rules of evidence, evidence at a streamlined trial will be entered by affidavit.

> *This rule displaces the presumption in rule 8.17 that evidence at trial is introduced by the testimony of witnesses in court. The presumption is that evidence at a summary trial will be entered by affidavit, and live evidence will be the exception. However, the evidence at a streamlined trial must still be admissible under the rules of evidence, and affidavits based only on information and belief would generally not be admissible.*

8.30(3) Unless otherwise ordered, or permitted by the trial judge, the presentation at a streamlined trial is as follows:

(a) the core of the plaintiff's case will be set out in an affidavit or affidavits in support of its case, which shall attach or refer to relevant admissible records as required;

(b) if permitted by any pretrial order or the trial judge, the plaintiff's affiants may be examined in chief, presumptively for no more than 15 minutes;

(c) the defendant and any other parties will be given a reasonable opportunity to cross-examine the plaintiff's affiants;

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[4] "13.18(3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit".

(d) the trial judge may permit re-examination of the plaintiff's affiants, which may be limited by time, by topic, or otherwise;
(e) the plaintiff's other evidence will be introduced in affidavit form, and the affiants need not be made available for cross-examination at trial unless provided for in any pretrial order, upon reasonable notice under rule 8.15(3);
(f) experts shall be examined before trial under rule 5.37, the opinions of expert witnesses will be introduced at the trial by affidavit, and experts need not be made available for cross-examination at trial unless provided for in any pretrial order, upon reasonable notice under rule under rule 8.15(3);
(g) experts shall be presumed to be qualified in their proposed area of expertise, unless reasonable notice has been given under rule 5.36;
(h) the core of the defendant's case will be set out in an affidavit or affidavits in support of its case, which shall attach or refer to relevant admissible records as required;
(i) if permitted by any pretrial order or the trial judge, the defendant's affiants may be examined in chief, presumptively for no more than 15 minutes;
(j) the plaintiff and any other parties will be given a reasonable opportunity to cross-examine the defendant's affiants;
(k) the trial judge may permit re-examination of the defendant's affiants, which may be limited by time, by topic, or otherwise;
(l) the balance of the evidence of the defendant and any other party shall be entered in the same manner as the plaintiff's case, with any necessary modifications.
(m) closing arguments will be limited to 30 minutes for each separately represented interest.

This rule confirms the presumption that evidence at the streamlined trial will primarily be introduced in affidavit form. The Court's discretion over costs can be used to control misuse of the streamlined trial process, for example if affiants or experts are unnecessarily called to testify at the trial.

8.30(4) Without limiting the discretion of the trial judge, any application to vary the procedure set out in rule 8.30(3), or any other application for directions respecting the trial, shall be brought no later than three months before the scheduled commencement of the trial.

8.30(5) Except where inconsistent with this Division, the rules in Divisions 3 and 4[5] apply to streamlined trials, with the necessary modifications.

[5] Division 3 deals with attendance of witnesses at trial, and division 4 deals with procedure at trial.

Decision after Streamlined Trial

8.31(1) A streamlined trial is a full trial on the merits.

8.31(2) The trial judge shall grant judgment after the conclusion of the streamlined trial.

> *This rule assures the parties that a streamlined trial will result in a final adjudication of the action. If a party does not meet the burden of proof on it, it will be unsuccessful. The present rule 7.9, which allows the trial judge to decline to decide after the conclusion of the summary trial, is a major impediment to the utility of any streamlined process. The principle of proportionality requires a weighing of the competing objectives of (a) providing an affordable method of dispute resolution, and (b) ensuring the most robust method of discharging the truth-finding function. Limits on court resources preclude having a standard trial for every dispute. Unreasonably thorough court procedures can force some litigants to "walk away from justice".*

8.31(3) If the streamlined trial is adjourned after commencement of the trial, the assigned trial judge shall remain seized of the action.

> *Parties will be reluctant to use the streamlined trial process if there is a risk that the resources needed to prepare for the streamlined trial will be wasted through unnecessary adjournments. Ensuring continuity of the assigned trial judge is necessary to provide that assurance.*

Consequential Amendments

Add to R. 4.10(2), relating to issues to be discussed at a Court conference:

(g) any issue related to a streamlined trial.

Add to R. 7.3, the summary judgment rule, a new provision allowing the Court to direct the mode of trial when a summary judgment application is unsuccessful:

> (4) If the application is unsuccessful the Court may, with respect to all or part of a claim, direct that it proceed to a streamlined trial, and make a procedural order respecting the trial.

Amend s 17(1.1) of the *Jury Act* by changing the reference to the "summary trial procedure" to the "streamlined trial procedure".