

**AN OVERVIEW OF PART 8 OF THE
2011 REVISED QUEEN'S BENCH RULES**

EXPEDITED PROCEDURE*

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I. INTRODUCTION

1. The revisions to the Queen's Bench Rules were completed in 2011. It is expected that the new Rules will come into force on 1 July, 2013, providing that the French translation is completed. The expedited procedure set out in Part 8 will replace the simplified procedure rules under the current Part 40. The key features of the new rules, as compared to Part 40, are:

- a. The monetary limit of claims that may be brought under the expedited procedure is \$100,000.00, as opposed to the \$50,000.00 limit under Part 40;
- b. The jurisdiction has been expanded to include builders' lien claims;
- c. Part 8 provides for the conduct of examinations for discovery, subject to time limitations;
- d. The conduct of a pre-trial conference;
- e. Evidence at trial is adduced by way of *viva voce* testimony as opposed to by way of affidavit although, in the case of uncontested evidence, affidavits may be submitted with the consent of the parties;
- f. Subject to an order of the Court, the trial of the action is limited to three days as opposed to limits on the length of cross-examination or re-examination under Part 40.

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2. The application and interpretation of the Expedited Procedure Rules are informed by the Foundational Rules set out in Part 1 of the Revised Rules. As set out in Part 1, the purpose and intent of the new rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost effective way (Rule 1-3). In order to achieve this purpose and intent, the new rules put an obligation on the parties to facilitate the quickest means of resolving the dispute at least expense and to use the resources of the Court effectively.

3. Specifically, the parties are obligated, jointly and individually during the action, to:

- a. Identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense;
- b. Periodically evaluate dispute resolution process alternatives to a full trial;
- c. Refrain from filing applications or taking proceedings that do not further the purpose and intention of the Rules; and
- d. When using publically funded court resources, use them affectively.

4. Part 1 also introduces the concept of proportionality to the conduct of litigation. The concept of proportionality involves a consideration of:

- a. The amount involved in the proceeding;
- b. The importance of the issues in dispute;
- c. The complexity of the proceeding.

The Court, in exercising its discretion to grant a remedy or impose a sanction is to be guided by the concept of proportionality. The Expedited Procedure is an embodiment of these concepts.

II. PART 8 – EXPEDITED PROCEDURE

(A) Application of General Procedure Rules

8-1 The rules that apply to an action apply to an expedited procedure proceeding pursuant to this Part, unless this Part provides otherwise.

5. Generally, the conduct of an action in the expedited procedure is similar to that under the general procedure but subject to certain limits. These limits include the nature and value of the claims that may be brought, the length of examination for discovery, length of pre-trial briefs, length of trial and limitations as to costs. These limits are discussed below. Counsel will need to refer to the general procedural rules with respect to such matters as pleadings, parties, document disclosure, discovery and trial.

(B) Nature of Claims that may be Brought Under Part 8

6. Rule 8-2 sets out the types of claims that ought to be brought under the expedited procedure. The rule reads:

8-2(1) Subject to subrules (2) and (3) and unless the Court orders otherwise, the expedited procedure in this Part applies to an action if:

- (a) the only claims in the action are for one or more of money, land, a builders' lien and personal property and the total of the following amounts is \$100,000.00 or less, exclusive of interest and costs:
 - (i) the amount of any money claimed in the action by the plaintiff for pecuniary loss;
 - (ii) the amount of any money to be claimed in the action by the plaintiff for non-pecuniary loss;
 - (iii) the fair market value, as at the date the action is commenced, of:
 - (A) all land and all interests in land claimed in the action by the plaintiff; and

- (B) all personal property and all interests in personal property claimed in the action by the plaintiff;
 - (b) the parties to the action consent; or
 - (c) the Court, on its own motion or on the application of any party, so orders.
- (2) The expedited procedure in this Part applies to an action only if the trial of the action can be completed within 3 days.
 - (3) The expedited procedure in this Part does not apply to:
 - (a) family law proceedings, other than a family property action in which the only relief claimed is a division of family property;
 - (b) class actions; or
 - (c) actions when the trial is before a jury.
 - (4) If there are two or more plaintiffs, the expedited procedure set out in this Part applies to an action pursuant to clause (1)(a) if the plaintiffs' claims, considered together, meet the requirements of that clause.
 - (5) If there are two or more defendants, the expedited procedure set out in this Part applies to an action pursuant to clause (1)(a) if the plaintiff's claim against each defendant, considered separately, meets the requirements of that clause.

7. The new rule increases the monetary value of claims from \$50,000.00 under Part 40 to \$100,000.00, exclusive of interest and costs. In the case of a claim involving land or personal property, the \$100,000.00 limit is calculated based on the fair market value of the land, or the personal property, or any interest therein, as at the date the action is commenced. Regardless of whether the claim is for money or an interest in land, it is recommended that counsel conduct a preliminary assessment of the amount of damages the client is seeking, or the value of land or personal property involved, to determine if the claim is within the monetary limit.

8. Although Part 8 allows a plaintiff to bring a claim involving land and interest in land, foreclosure and cancellation actions may not to be brought under the expedited procedure.

Pursuant to Rule 10-51(2), the general procedure and practice of the Court is to apply in all foreclosure and cancellation actions.

9. Any claim that falls within the scope of 8-2(1)(a) must be brought under the expedited procedure if the trial of the action can be completed within three days. Prior to initiating the claim, counsel should also conduct an assessment of the length of time a claim may take in trial prior to issuing the claim. This may be difficult to do given that counsel will not always be able to estimate the length of time the other parties will take to present their evidence at trial.

10. In many cases, counsel will be able to ascertain from the complexity of the legal and factual issues that a trial may be longer than three days. Cases where extensive expert evidence is required or numerous factual witnesses must be called are likely examples. Given the obligation of the parties to use the quickest means of resolving a claim at the least expense, where there is uncertainty as whether the trial will exceed three days, counsel should likely commence the action under Part 8.

11. Rule 8-4 allows the Court to make an award in excess of \$100,000.00. This is necessary as Rules 8-2(1)(b), (c) and (5) potentially allow for claims that exceed the \$100,000.00 monetary limit.

12. Unlike Part 40, builders' lien claims are not excluded. Family law proceedings, other than actions dealing solely with the division of family property, class actions, jury trials, foreclosure and cancellation actions (Rule 10-51) are excluded.

13. Under new Rule 9-1(1), a demand for jury may be served and filed at any time before a trial date has been assigned. Accordingly, the issue of whether to try the matter before a jury should be addressed by the plaintiff's and defendant's counsel early in the action. The Expedited Procedure is not available for jury trials.

(C) *Multi-Party Proceedings*

14. There is a difference in the calculation of the monetary limit in cases where there are multiple parties to the litigation. Under 8-2(4), if there are two or more plaintiffs, the monetary value of their claims are considered together in determining whether the action falls under the expedited procedure.

15. In contrast, where the plaintiff is commencing an action against two or more defendants, the plaintiff's claim as against each defendant is to be considered separately. This means that in cases involving multiple defendants, the plaintiff's total claim may exceed the \$100,000.00 monetary limit.

16. In assessing whether to add multiple defendants to the claim, counsel must keep in mind that the three day time limit on trial still applies. Also, counsel should have regard to the rules regarding joining and separation of claims and parties in Part 3 of the General Procedure. In situations where adding additional defendants may unduly complicate or delay the action or cause undue prejudice to a party, a separate action should likely be commenced.

17. The new rules do allow for an action that exceeds the monetary limit on the consent of all parties or on an order of the Court. This will likely involve a consideration of the number of witnesses, the complexity of the evidence and the length of time for trial. Assuming that the matter will likely take three days or less to try, consideration should be given by the parties to consenting to having the matter dealt with under the expedited procedure. This accords with Rule 1-3(3) which obligates the parties, jointly and individually, to facilitate the quickest means of resolving the claim at the least expense.

18. Part 8 does not specifically address cross-claims, third party claims and counterclaims and these will be governed by Part 3 of the new rules. In the case of cross-claims and third party claims, these are allowed under Part 3 if:

- a. The co-defendant or third party may be liable to the defendant for all or part of the plaintiff's claim, including a claim for contribution or indemnity;
- b. Is or may be liable to the defendant for any other relief or remedy relating to or connected with the subject matter of the main action.

19. However, the limits prescribed by Rule 8-2 will apply to cross-claims, third party claims and counterclaims and this may raise an issue as to whether the actions may be continued under Part 8. Assuming that the cross-claim or third party claim is for contribution or indemnity, there should be no issue with the monetary limit prescribed by Rule 8-2. However, where the cross-claim or third party claim is for additional relief that exceeds the monetary limits set out in Rule 8-2, and the parties do not consent to continuing to proceed under the expedited procedure, an application may have to be made under Rule 8-5 to determine whether the matter should be moved to the general procedure.

20. Similar considerations arise in the case of a counterclaim. If the counterclaim exceeds the monetary limit, the parties should consider whether to bring an application pursuant to Rule 8-5 to move the matter into the general procedure.

(D) Notice of Expedited Procedure

21. In issuing the Statement of Claim under the expedited procedure, the Notice to Defendant required by Form 3-9 must include a statement that the action is brought under the expedited procedure as set out in Part 8 of the Queen's Bench Rules.

22. Rule 8-3 allows any party to file a notice of expedited procedure. Where a plaintiff has commenced an action to which Rule 8-2 would apply, but has brought the claim under the general procedure, a defendant may file a notice under 8-3 to bring the matter within Part 8.

8-3 If this Part applies to an action:

- (b) any party may file a notice of expedited procedure in Form 8-3; and
- (c) the words “Subject to Part 8 Expedited Procedure” must be added to the style of cause, immediately below the listed parties, for all documents filed after:
 - (i) the notice of expedited procedure is filed pursuant to clause (a); or
 - (ii) the Court order is made pursuant to clause 8-2(1)(c).

(E) Moving Action to General Procedure

23. Rules 8-5 and 8-6(2) allow the Court on its own motion, or on the application of a party, to move the matter from the expedited procedure to the general procedure. Rule 8-5 reads:

8-5(1) This Part ceases to apply to an expedited procedure action if the Court, on its own motion or on the application of any party, so orders.

(2) If the Court makes an order pursuant to subrule (1) that this Part ceases to apply to an action, the words “Commenced in Part 8 Expedited Procedure and continued in the general procedure” must be added to the style of cause, immediately below the listed parties, for all documents filed after the order is made.

24. This is similar to the provision contained in Rule 483 of Part 40 of the current rules. The cases decided under Rule 483 may provide some guidance as to when it may be appropriate to make such an application. Generally, those cases provide that the general procedure will be considered in the following circumstances:

- a. The procedural limits under the expedited procedure may prejudice the ability of a party to present their case;
- b. The case involves complex evidentiary or legal matters, or both;
- c. The application may also be brought where a claim is outside the scope of Rule 8-2 as to monetary limit, subject matter of the action, or when the length of trial may exceed 3 days.

(F) Interlocutory Applications

25. In the interest of saving time and cost, the Part 8 does place limits on the ability of the parties to bring interlocutory applications prior to the conduct of the Pre-Trial Conference. Rule 8-6 sets out this limitation and the types of applications that may be made prior to pre-trial.

8-6(1) Subject to subrule (2), a party to an expedited procedure action shall not serve a notice of application on another party unless a pre-trial conference has been conducted in relation to the action.

(2) Subrule (1) does not apply to:

- (a) an application made for an order pursuant to rule 8-5 that this Part cease to apply to the action (an application to move the action to the general procedure);
- (b) an application made to obtain leave to bring an application referred to in subrule (3);
- (c) an application made pursuant to Division 2 or Division 3 of Part 7; (Division 2 – application for summary judgment; Division 3 application to strike out or amend pleadings);
- (d) an application made pursuant to Subdivision 3 or Division 1 of Part 6 (appearance day motion);
- (e) an application made to add, remove or substitute a party; or
- (f) an application made by consent.

(3) On application by a party, a judge may relieve a party from the requirements of subrule (1) if:

- (a) it is impracticable or unfair to require the party to comply with the requirement of subrule (1); or
- (b) the application mentioned in subrule (1) is urgent.

26. Division 2 and Division 3 of Part 7 relate to applications for summary judgment or to strike out or amend a claim or defence. The reference to Part 6 relates to “appearance day” motions. These motions are restricted to applications where relevant facts are not reasonably contested and the matter can be heard within 30 minutes.

27. Rule 8-6 does not expressly permit applications pursuant to Division 3 of Part 6 for a preservation and protection of property or orders and injunctive relief. In order to obtain such relief, an application for leave would have to be made to the Court on the grounds that the matter is urgent or that the limitation is impracticable or unfair. There is no prohibition against combining the application for leave with the application for the substantive relief.

(G) Document Disclosure/Examinations for Discovery

28. The general procedure rules governing document disclosure and examinations for discovery set out in Part 5 will apply to the expedited procedure. This is subject to the limit imposed pursuant to Rule 8-7 that the examination of any person, by all parties who are adverse in interest, must not exceed two hours without the consent of the person being examined.

29. In the case of multi-party litigation, and in the absence of consent, this is a significant restriction. Aside from applying to the Court to extend the period, one of the ways that the parties can work within the rule is to reach an agreement to extend the time limit and/or obtain an agreement that each party may use the questions and answers given by the person being examined in the trial of the action.

(H) Pre-Trial Conference

30. Unlike Part 40 of the existing rules, pre-trial conferences are held under the expedited procedure. Part 4 of the new rules relating to the scheduling and conduct of the pre-trial conference apply to the expedited procedure except for the requirement that a joint request for pre-trial conference must be filed not more than one year after the date of service of the Statement of Claim on all the defendants (Rule 8-8(1)). If a party to the action under the expedited procedure fails or refuses to sign a joint request for pre-trial conference, a pre-trial date may be obtained using the procedures set out in Rule 4-11.

31. Rule 8-8 also limits the length of pre-trial briefs to 8 pages excluding documents intended to be used at trial or authorities relied on. This includes both the facts and the argument portion of the brief. Counsel will advise not to include in the written portion of their brief reproductions of sections of statutes and regulations or quotations from authorities. These should be referenced in the written body of the brief to a schedule or appendix.

32. Rule 8-9 allows the pre-trial conference judge to adjourn a trial date if it is likely that the trial will be more than 3 days. Under the old procedure, an adjournment of the trial date, once fixed, had to be made on application to the trial judge and this provides flexibility around setting trial dates in those circumstances.

(I) Trial

33. Part 8 does not contain any specific rules regarding the conduct of the trial other than Rule 8-10, which does allow, on the consent of all parties, to file uncontested evidence at trial by way of affidavit.

34. The actual conduct of the trial will be governed by the rules in Part 9 of the general procedure.

(J) (Costs)

35. Under Rule 8-11, the costs of the conduct of the action in the expedited procedure are limited based on the length of the time at trial, as opposed to the existing tariff which assesses costs based on the value of the claim. Unless the court orders otherwise the costs are determined as follows,

- a. \$5,000.00 if the hearing of the trial is one day or less;
- b. \$6,000.00 if the hearing of the trial is two days or less but more than one day;
- c. \$7,000.00 for a trial of more than two days.

36. These amounts cover all of the steps in the litigation including preparation of pleadings, document disclosure, examinations for discovery, conduct of pre-trial conference and trial. However, there is discretion in the Court to increase or decrease the amount of costs a party may recover. In exercising its discretion under Rule 8-11, the Court may consider any formal offers of settlement pursuant to Division 5 of Part 4. However, this does not require the Court to make an award of double costs under Rule 4-31.

(K) Transition

37. It is anticipated that the new rules will come into force on 1 July, 2013. Rule 18-2 of Part 18 provides that the new rules will apply to every existing proceeding. Accordingly, where an action has been commenced that would fall within the ambit of Rule 8-2, the expedited procedure will apply to that action upon the rules coming into force. Rule 18-3 permits the parties to apply to the Court if the application of the new rules to an existing proceeding causes any difficulty, injustice, or if there is an impossibility in compliance with the new provisions. Under Rule 18-3, the Court may make any order it considers appropriate including the suspending the operation of any rule and substituting one or more of the current rules.