



## THE NUNAVUT COURT OF JUSTICE

### PRACTICE DIRECTIVE #44

## ALTERNATIVE DISPUTE RESOLUTION IN NUNAVUT

---

*Explanatory Note: The Nunavut Court of Justice is committed to facilitating alternative dispute resolution processes in Nunavut. This Practice Directive guides the profession in its use of alternative judicial dispute resolution processes under the Rules of Court.*

---

Once a legal action has been started, there are a number of dispute resolution mechanisms short of a trial to resolve matters in dispute. These alternatives include traditional case management as well as judicial dispute resolution (JDR) carried out by a case management judge. These alternative dispute resolution mechanisms are outlined in Part 19 of the *Rules of Court*.

The benefits associated with the use of these alternative processes are many. The use of these processes can realize substantial savings in both time and expense. To the extent that these alternative processes do not require court time, the resolution of disputes can occur much more quickly than court based litigation. The settlement conference is more consistent with Inuit societal values than an adversarial confrontation in a trial environment. There is usually much higher client satisfaction associated with the settlement negotiated through a conference than that achievable from court based litigation.

Traditional case management is usually directed at larger, longer and more complex cases. It attempts to prepare the case for trial in the most efficient and cost effective way. JDR is usually directed at smaller cases. The judge may either act as a mediator in a settlement conference or may provide a non-binding legal opinion through the use of a mini-trial.

Part 19 is triggered by the appointment of a case management judge. The appointment of a case management judge can be done at the request of the parties or at the Court's own instance. The case management judge will direct the parties or their counsel to attend case management conferences as need dictates.

The case management judge is authorized to use any of the powers set out in Rule 284. There is no set procedure to be adopted. It is left up to the parties and the case management judge to adopt the procedure that is most appropriate to the issues in dispute.

The role of the judge in settlement conferences is that of an objective mediator. The judge will endeavor to keep the parties discussion focused on the issues in an atmosphere of reason and good will. Counsel and their clients may both participate in a settlement conference. If the parties themselves do not attend, counsel must have authority to make a binding settlement on their behalf.

In a mini-trial the judge gives a non-binding oral or written advisory opinion on the probable outcome of the case generally or on any specific issues to be determined at the trial. This type of procedure is suited to cases that involve areas of legal dispute where neither credibility nor facts are significantly in dispute.

A case management judge will not be assigned to conduct the trial of an action if he or she has participated in a mini-trial. While this policy does not address the judge's participation as mediator, it is likely that the judge or parties would be uncomfortable with the same judge also conducting a trial if an attempt at mediation is ultimately unsuccessful.

While the appointment of a case management judge usually occurs at the early stages of larger complex actions, settlement conferences and mini-trials will usually be requested after the parties have accumulated a solid evidentiary base. In mini-trials this would include an agreed statement of facts incorporating pertinent examination for discovery evidence that could be supplemented by unsworn viva voce evidence.

To better facilitate the use of alternative dispute resolution processes in Nunavut, the judges of this Court make the following provisions to complement Part 19 of the *Rules of Court*:

1. Any party to an action may request that a case management judge be appointed by the Senior Judge by filing with the Clerk of the Court a Request for Appointment of Case Management Judge in Form 44A. The party requesting the appointment must indicate whether they want traditional case management, mediation or a mini-trial.
2. The case management judge in consultation with the trial co-ordinator will set dates for any conference calls or meetings to determine the procedure to be followed at the mediation or mini-trial and will set the date for mediation or mini-trial and the timelines for the filing of briefs.

3. Unless otherwise ordered, all parties participating in the mediation or a mini-trial must file a mediation brief or mini-trial brief within the times set by the case management judge.
4. No trial date will be assigned without Counsel first confirming in writing that the use of alternative dispute mechanisms has been discussed by Counsel and considered by their respective clients.

## SCHEDULE A

### PART 19

### CASE MANAGEMENT CONFERENCES

#### *Definitions*

**281.** In this Part,

"case management" means the duties described in this Part in respect of an action or proceeding before it reaches trial.

"conference judge" means a judge designated under rule 282.

#### *Designation of judge*

**282.** The Chief Justice or senior administrative judge may designate

- (a) a specific judge to have responsibility for case management in respect of an action or proceeding; and
- (b) a specific judge, in addition to or as a substitute for a judge designated under subrule (a), to have responsibility for case management in respect of an action or proceeding.

#### *Direction respecting Conference*

**283.** The Court, on the application of a party or on its own motion, at any stage of an action or proceeding, may direct counsel for the parties and any parties to appear before a judge for a conference or conferences before trial for such purposes as

- (a) expediting the disposition of the action;
- (b) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (c) discouraging wasteful pre-trial activities;
- (d) improving the conduct of the trial through more thorough preparation; and
- (e) facilitating the settlement of the case.

#### *Powers of conference judge*

**284.** (1) The conference judge may consider and take action with respect to

- (a) the possibility of settlement of all or any of the issues in the action or proceeding;
- (b) the formulation and simplification of the issues;
- (c) the necessity or desirability of amendments to pleadings;
- (d) the possibility of obtaining admissions of fact and of documents that will avoid unnecessary proof, agreements regarding the authenticity of documents and advance rulings from the Court on the admissibility of evidence;
- (e) the possible use of extra-judicial procedures to resolve the dispute;

- (f) the disposition of pending applications;
- (g) the need for adopting special procedures for managing a potentially difficult or protracted action or proceeding that may involve complex issues, multiple parties, difficult legal questions or unusual problems with proof;
- (h) the question of liability;
- (i) the amount of damages, where damages are claimed;
- (j) the advisability of directing a reference or the trial of an issue;
- (k) the advisability of appointing a court expert;
- (l) the date for trial; and
- (m) any other matter that may aid in the disposition of the matter.

(2) The conference judge may

- (a) adjourn a conference from time to time;
- (b) set a plan or schedule for the completion of any steps by a party or parties in preparation for trial;
- (c) direct the parties to attend a mini-trial;
- (d) direct that experts who may have been retained by the parties confer, on a without prejudice basis, to determine those matters on which they agree and to identify those matters on which they do not agree;
- (e) direct that all interlocutory applications be brought before the conference judge;
- (f) order the parties to file any documents or written briefs for the use of a conference; and
- (g) make any other order giving directions as may seem necessary or advisable with respect to the conduct of the proceeding.

*Duties of Solicitor*

**285.** Unless otherwise ordered, the solicitor representing a party at the conference shall be the solicitor who will represent the party at the trial and that solicitor shall, before the trial, obtain instructions from the party regarding the solicitor's authority to make admissions and agreements in respect of all matters that the solicitor reasonably anticipates will be discussed at the conference.

*Order reciting action taken*

**286.** The conference judge may make an order reciting the action taken at a conference and that order shall control the subsequent course of the action unless modified by a subsequent order.

**287.** The conference judge may make an order for costs but, in the absence of an order, the costs of a conference are in the discretion of the trial judge.

*Failure to obey order, attend or prepare for conference*

**288.** If a party or party's solicitor fails to obey an order made under rule 283, 284, 286 or 287, no one appears on behalf of a party at a conference, a party or party's solicitor is substantially unprepared to participate in a conference or a party or party's solicitor fails to participate in good faith in a conference, the conference judge, on application or on his or her own motion,

- (a) may make such order with respect to the failure as the judge considers just, including any order in the nature of civil contempt; and
- (b) shall, in lieu of or in addition to any other order, require the party or the party's solicitor or both to pay any reasonable expenses incurred because of any noncompliance with this Part, unless the conference judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

*Telephone or other communication*

**289.** The conference judge may direct that all or part of a conference be held by telephone or by closed-circuit or satellite television communications.

*Conference judge not seized*

**290.** The judge who presides at a conference or who otherwise has responsibility for case management in respect of an action or proceeding is not seized of the action or proceeding and the trial may be heard by that judge or any other judge.

*Trial judge may hold conference*

**291.** The trial judge may hold meetings after the conference, before or during trial, as may assist the judge in the disposition of the action or proceeding.

*Mini-trial*

**292.** (1) Where the conference judge directs that the parties attend a mini-trial, the parties shall attend before a judge *in camera* and the judge shall, after hearing submissions, give a non-binding advisory opinion on the probable outcome of the trial or any issue to be determined at trial.

(2) The proceedings of the mini-trial and any advisory opinion given shall not be disclosed to the trial judge except with the consent of all parties.

(3) The judge who conducts the mini-trial in respect of an action or proceeding may not be the trial judge.

This practice directive comes into force on June 1, 2012.

Issued this 24<sup>th</sup> day of May, 2012 at the direction of the Judges of the Nunavut Court of Justice.

Mr. Justice R. Kilpatrick  
Mr. Justice E. Johnson  
Mr. Justice N. Sharkey  
Madam Justice S. Cooper  
Mr. Justice A. Mahar  
Madam Justice B. Tulloch