THE PROPOSED NEW MODEL FOR SCHEDULING AND CASE FLOW MANAGEMENT IN RESPECT OF NON-CHILD PROTECTION FAMILY DIVISION MATTERS

The Court of Queen's Bench will be introducing a New Model for Scheduling and Case Flow Management in respect of non-child protection and family proceedings. The model is designed to enhance the capacity of all Manitobans to better access justice in the area of family law within a system that will be significantly less complex, less slow and less expensive. The New Model for Scheduling and Case Flow Management is expected to achieve that goal by ensuring that those cases that can be resolved will be resolved at the earliest point possible. Where otherwise contested matters cannot be resolved, the New Model will ensure that those matters are adjudicated within a predictable and finite period of time, mindful of what will be stable and consistent reference points or "meaningful events", which events will themselves be governed by clear, identifiable and predictable timelines.

This New Model for Scheduling and Case Flow Management in Respect of Non-Child Protection Family Proceedings, follows consistently and coherently from this Court's access to justice initiatives undertaken in the last number of years in other areas of the Court's jurisdiction. Those initiatives (encompassing new and comprehensive Practice Directions, rule changes and best practices) have introduced new and transformative models of scheduling and case flow management that have positively impacted the judicial service that this Court provides in the areas of civil litigation, criminal law and child protection. Those new models have correspondently provided new and better evaluative reference points and measurements for how well the Court is providing a service that better facilitates the public's access to justice.

It is hoped that scheduling pursuant to this New Model will commence in September of 2018, to then be implemented and published in the circulated 2019 rotas. The details with respect to some of the transition period will be clarified following further discussion and consultation.

It is understood that some of the approaches and practices contemplated in this model will require changes or adjustments in respect to some existing Queen's Bench Rules, Practice Directions, court forms and allocation of court resources. More specifically, some of those modifications and adjustments may involve Legal Aid Manitoba, Family Conciliation Services and the Master to name but a few. Simply put, whatever must be updated, and/or adjusted to make this model operational and successful will be attempted.

It would seem that both the Provincial and Federal Governments are, or will be, introducing fundamental changes to family law in legislation that has been, or will be, introduced. The Court of Queen's Bench and Family Law Practitioners must be prepared for that challenge. For example, Bill C-78 (*Divorce Act* amendments) has proposed changes that will require our court to change the way we administer aspects of family cases. Some of the changes in this New Case Flow/Scheduling Model can be seen as the first step to meeting our obligations under the new legislation. As it relates to the Provincial Government's initiatives, we are advised that they are currently contemplating an administrative model for family disputes. Whatever the nature of that model is, there will, by necessity, still be a role for the Court of Queen's Bench Family Division in the adjudication of certain family law disputes. The changes contemplated in this New Case Flow/Scheduling Model, are designed to provide a judicial service that can co-exist with any new initiative introduced by the Provincial Government.

Whether the changes are coming from the Federal Government and/or Provincial Government, it is clear that these proposals are being made in an era where an emphasis on access to justice is paramount. While the Court of Queen's Bench Family Division and its processes may be required to accommodate some change, it is important that I note that the Family Division would not be in the position to meet the challenges of today if the members of that Division had not done the hard work of establishing one of the most well-respected case conferencing systems in the country. I believe that under the New Case Flow/Scheduling Model, that system can continue to not only operate, but evolve and work even more effectively and more economically for the average Manitoba family.

The Parameters for the New Case Flow Scheduling Model

The New Model is formulated so as to ensure the following:

- A compatibility with the current child protection model and any future modifications to that model;

- An even more meaningful case conference regime governed by what must be a more rigorous enforcement of, and professional compliance with, Queen's Bench Rule 70;

- A direction that, following the first case conference, any of the subsequent two case conferences (if necessary) as contemplated by Rule 70 (or any additional/exceptional case conferences), will be scheduled before the seized case conference judge at 9:00 a.m. or 1:00 p.m. time slots. Any such subsequent case conference will only be scheduled with leave of the seized case conference judge. Notwithstanding the foregoing, mindful of trial readiness, this direction should be read as acknowledging the desirability and/or necessity of at least one further seized case conference prior to trial. Such a trial readiness case conference will be scheduled approximately 45 days from the trial date and can be scheduled as part of the seized Judge's rota.

- The setting of a trial date at the first case conference which trial date must be set within 12–15 months of that first case conference;

- A direction that once it has been set down (as required) at the first case conference, no trial date will be adjourned without leave of the Chief Justice or his or her designate;

- A mechanism for triaging matters prior to the first case conference which, amongst other things, will prioritize matters that need be dealt with prior to the first case conference or soon thereafter. That triage may also assist in

determining whether, following an early determination or adjudication, a matter need proceed any further; and

- A re-examination of how and when protection order matters are processed and adjudicated in the Family Division.

The Objectives of the New Model

The proposed New Case Flow and Scheduling Model is designed and will be implemented to ensure that all reasonable efforts are made to resolve and/or dispose of those family disputes that can be resolved and are disposed of, as soon as possible, without the delays, complexity and costs associated with the current model of scheduling. It is believed that this objective can be realized with a greater emphasis and investment in judicial resources at the "front end" or "intake stage" where, under the New Model, following the much more consistent and closely-monitored screening process (where preconditions to triage must be met), a triage judge (and/or eventually, a case management judge) will be even better-positioned to take a more informed, active and interventionist approach with both counsel and the parties themselves.

Where matters cannot be resolved either earlier or at all, the New Model is designed to nonetheless ensure that those family proceedings flow through the system and receive the required adjudications within a reasonable, predictable and finite period of time. This objective will be realized by the setting of trial dates within 12-15 months of the first case conference, which case conference will normally be set within 30 days of the appearance at triage.

Meaningful Events and Their Disciplining Effects on Case Flow

Any efficient model of case flow scheduling must be able to identify the "meaningful events" which provide structure to the "flow" of a case in any given system. These meaningful events provide identifiable, predictable reference points which occur at different stages during a finite period of time. "Meaningful events" are those events during the life of the case that contribute substantially to the resolution of the case, even if, despite best efforts, the ultimate resolution requires an adjudication.

Uncertainty as to whether or when court events will occur, the failure of counsel to adhere to basic procedural prerequisites and preconditions, aimless appearances before judges on whom counsel rely for a form of judicial babysitting, counsel's reliance upon adjournments that enable late or limited preparation and the general disregard for the potential of pre-trial resolution events, are all examples of a case flow scheduling system that has inadequately identified, inadequately monitored or inadequately normalized meaningful court events. While it is not suggested that all of these deficiencies are present in the current system, there is room for improvement and more rigour.

Successful scheduling models, and certainly those that emphasize case management, require judges to consistently communicate the purpose, deadlines and possible outcomes of all stages or events of a proceeding, while at the same time, underscoring their importance to the overall progress of the case and the finite period of time during which that case is meant to flow through the system. Generally, whether it be in the area of civil, criminal or family proceedings, courts that have successful case management programs have implemented corresponding case flow or scheduling models that place a high value on identifiable and predictable meaningful events about which the judiciary continuously educates lawyers and litigants respecting their operation and purpose. It is with this in mind that the New Case Flow Scheduling Model attempts to emphasize what the Honourable Thomas Cromwell identified as the critical objective in any access to justice initiative: an emphasis on outcome over process.

Although an outcome in the legal context will always follow some sort of process, the clarity and discipline surrounding the identifiable meaningful events that guide the flow of cases, ensures the "process" is not an end in and of itself. To the extent that a process is inevitable and necessary, meaningful events ensure that the process remains as simple, fast and inexpensive as is reasonably possible.

As will be discerned from the framework of the model set out in this document, there are essentially five meaningful events that define this Model:

1. The obtaining of a date for an appearance at triage, following the satisfaction of the rigorously enforced preconditions or prerequisites for an appearance on triage;

2. The appearance at the triage forum where matters (or issues) may be resolved, where issues may be significantly narrowed and/or where the case conference is set (within 30 days of triage) perhaps in tandem with an urgent or prioritized motion in which event the motion would be heard 30 days prior to the first case conference and within 14-30 days of the triage appearance;

3. The attendance at the first case conference (usually set within 30 days of triage) at which time a trial date will be set;

4. The certification for trial readiness to occur and be noted no later than 45 days from the trial date; and

5. The trial date.

Despite the above five meaningful events that provide the identifiable, predictable and finite framework or spine for a family proceeding, it should be understood that there will obviously be, within this framework, contemplated segments for other events which segments will be available and situated at specifically-identified points in the case flow timeline (such other events could include subsequent case conferences, other emergent and/or interim motions, dispositive summary judgment motions and mediation).

Set out below is the proposed New Case Flow and Scheduling Model for contested family matters.

Proposed New Case Flow and Scheduling Model for Contested Family Division Matters

Step 1 Filing of Initiating Pleading

QB Rule 70.01 defines "initiating pleading" to include:

- Petition for Divorce
- Petition (FMA)
- Notice of Application
- Notice of Application for Guardianship
- Notice of Application to Vary
- Notice of Motion to Vary Final Order
- Statement of Claim

All of the above pleadings are filed in the Court of Queen's Bench but in most cases, they will not appear on the Triage List (and proceed before a Queen's Bench Judge) until the completion of certain preconditions/prerequisites as described below at Step 2 of this Model.

All matters, Petitions for Divorce, Petitions under the *Family Maintenance Act*, Notices of Application to Vary, Notices of Motion to Vary Final Order, Statements of Claim and Notices of Application to Set Aside Protection Orders, will proceed into the new triage stream for non-child protection matters. The sole exception will be Notices of Application for Guardianship which will NOT enter the court process through the Triage List. Rather, those matters will proceed through the Child Protection Intake List.

No matter will be placed on the Triage List unless and until the matter has been screened and certified as having satisfied the basic preparatory prerequisites that assist in making an appearance before a judge meaningful. The screening and certification will be done by Angie Tkachuk on her Tuesday list, which now becomes principally (although not solely) a Pre-Triage Screening List.

Step 2 Pre-Triage Screening List

- Following the filing of an initiating pleading and **prior to engaging in their first interaction with a judge**, the parties are encouraged and indeed expected to take the available and necessary steps to attempt resolution and, if resolution is not possible, to ready the matter for a meaningful first interaction with a judge.

- Put simply, the Pre-Triage Screening List will ensure that no matter will be placed on the Triage List unless and until the matter has been screened for and certified as having satisfied the prerequisites or preconditions for triage in preparation for interaction with a triage judge.

- In the case of counsel, this will require ensuring that the parties engage available resolution processes. For example, these include four-way discussions, mediation, For the Sake of the Children, parent coaching and other non-judicial processes. Should a custody/parenting issue be in play and should an assessment be required, the parties must proactively seek an order for an assessment as directed by the court. It is recommended that a Master give this direction. The obligation to seek such assessments at an early stage in cases involving child/parenting issues represents not just a precondition to an appearance on triage, it is also—given the staffing pressures and realities at Conciliation Services and the timelines attaching to this model—a practical necessity.

- For self-represented litigants, the provision of early and more information will be required regarding the New Scheduling and Case Flow Model through on-line, written and video materials and through such groups as the Legal Help Centre.

- Parties will be required to complete the necessary financial disclosure forms. This will include completing Forms 70D and adequate responses to any Demands for Financial Information that may have been served with or after the initiating

pleading. Any disputes about financial disclosure can and should be dealt with by the Master prior to taking up a judge's time at triage.

- Where there are property disputes, the parties must complete what will be a new form that will provide a more meaningful property accounting regarding assets, liabilities, what each party owes, why some assets are included and others are not, and why the parties remain apart. This new form should allow a judge (usually the triage judge) to eventually and more easily resolve these issues or direct a more focused and meaningful reference to a Master. This more focused reference will in turn allow a Master to complete an accounting in a timelier way.

- As a pre-triage prerequisite, a Triage Court Brief must be filed by each party. The Brief will set out the nature of the family dispute in the three main areas: custody, support (child and/or spousal) and property. All areas where the parties are in agreement will be identified as well as all areas where the parties are not in agreement. Each party will state their respective position on the areas of disagreement and their proposal on settlement of the issues.

- For the moment, the list of the identified preconditions may be fluid, given that, in the period leading up to and following implementation of the New Model, it may be determined that parties may be required to complete other and/or additional steps as necessary prerequisites to appearing on a Triage List.

- It is important to note that pleadings must be closed before appearing at the triage forum. The sole exception will be for those cases granted limited and temporary access to triage (as discussed below). Those cases will fall under the "Other – Emergent Circumstances" category.

Satisfaction of the above preconditions/prerequisites will be rigorously monitored at the Tuesday Pre-Triage Screening List. If any of

the above and perhaps still-to-be-identified prerequisites are not met, then the matter will not proceed past the Pre-Triage Screening List until the deficiencies are corrected. If, for example, services are outstanding, then the initiating party should seek an order from the Master for substitutional service. Once the deficiency is corrected, the matter can return to the Pre-Triage Screening List from which (upon completion of the prerequisites and/or the correction of the deficiencies) the matter will be permitted to proceed to the next available Triage List date.

Emergent Cases at the Pre-Triage Screening Stage that Have not yet Satisfied the Prerequisites for Triage List

There are, from time to time, cases where extreme circumstances exist that require emergent court intervention: parental abduction, extreme violence, forced relocations, preservation of assets to prevent dissipation, etc. These issues may arise before the preconditions for triage have been satisfied. It is proposed that these cases be allowed into the Triage List under the "Other – Emergent Circumstances" category. They will, however, be closely screened so as to ensure that they meet the test for "emergent" as has been defined and discussed in relevant jurisprudence. As these matters will have not yet satisfied the prerequisites for triage, they will also be closely monitored to ensure that the motions are addressed expeditiously, following which they are returned with equal promptness to the pre-triage screening stage for the satisfaction of the triage prerequisites.

A party not having yet satisfied the preconditions for triage but who seeks immediate relief under the Emergent Circumstances category, will have the matter initially screened in a preliminary way by Ms. Tkachuk and either a triage judge or the duty judge to ensure the emergent nature of the matter. Assuming the matter is emergent, in most cases, the matter should go to the next Triage List. If, for reasons of absolute emergency, the matter cannot wait for the next list, it will be sent to the duty judge for a more immediate hearing.

The litigant applying for the emergent hearing (either without notice or on short notice) will need to certify:

- The situation involves an immediate risk of harm to self or child, serious factual situation which will result in loss of property, risk of child being taken to another country, etc.

- They will face hardship if they have to wait until other party responds and pleadings are closed to bring their motion for interim relief.

- It is in the "interests of justice" that their motion be heard without notice or on short notice.

- The litigant will undertake to complete services and file other prerequisites in due course.

To repeat, in the above emergent situations, following the adjudication of the issue that has been characterized as emergent, the matter will proceed no further until the parties attend through to the Pre-Triage Screening List to certify that the preconditions for triage have been met. Once at triage, the matter will proceed in the ordinary course as described below.

Step 3 Attending the Triage List

In most every **contested** case, the **first interaction with a judge will be on a Triage List**. The list incorporates the following features which reflect the Court's interest in moving the matter rigorously forward toward a timely and just resolution, disposition and outcome.

As noted, before being provided a date for and being permitted to appear on the Triage List, the prerequisites will be verified at the Pre-Triage Screening List.

The Triage List is in fact multiple lists running concurrently. The triage forum will likely consist of four judges operating four separate lists concurrently on the Monday of every week. The placement of the list on Mondays involves the most minimal level of disruption to the rota and accommodates the need to assign judges for trials, which hearings, in most cases, will start on Tuesdays.

With the exception of those matters appearing before a triage judge under the Emergent Circumstances category (where the prerequisites for triage would not yet have been met), once a matter has been screened and certified as ready for triage (with all the prerequisites having been met), parties will appear on the Triage List on one and only one occasion.

- This triage forum (consisting of the four judges and their separate lists) will sit once a week on Mondays from 9:00 a.m. to 4:30 p.m. The operational details of the lists can be explained as follows:

    1. From 9:00 a.m. to 10:00 a.m., all matters that have been resolved and where the parties wish to enter into a consent order, can have their matters heard during that first hour—9:00 a.m. to 10:00 a.m.—or 1:00 p.m. to 2:00 p.m. This one-hour time period at the beginning of the morning and the afternoon will only be for consent orders and other "five-minute-type hearings" (for example, motions to suspend maintenance enforcement).

    2. Counsel and the parties would appear for all other contested matters either at 10:00 a.m. or 2:00 p.m. So once all consent orders have been dealt with at the beginning of the list between 9:00 a.m. and 10:00 a.m. or 1:00 p.m. and 2:00 p.m., the matters beginning at 10:00 a.m. or 2:00 p.m. will be heard in order of seniority of counsel—counsel are expected to sort out the issue of seniority in the hallway and proceed into the courtroom when the clerk indicates that the next case is ready to be heard. Parties must be present where the matters can be dealt with as a default hearing that day.

    3. It is expected that each matter at triage appearing on a judge's list, will be set for an approximate period of time of 30 minutes. If one or more of the lists are proceeding more quickly and finishes early, it will be understood that

the judge operating that list could take on a matter from any of the other three lists.

- It is important to remember that the triage judge will have reviewed the Triage Court Brief (a precondition that must be satisfied at the Pre-Triage Screening List) and become familiar with the areas in dispute. A discussion with the parties and their respective counsel will occur in which resolution of each area will be canvassed.

- The triage judge will have all of the newly amended powers of a case conference judge. Such amended powers will involve the enhancement of powers under current Rule 70.24 insofar as those current powers would be unduly limiting to the triage judge. Such amendments would also involve the stipulation that, while an order from a triage judge may be reviewable by a case conference judge, a case conference judge's order is reviewable only by the same case conference judge that granted the order.

- The gatekeeping dimension of the triage judge's function will require him or her to focus on resolving issues as early as possible, narrowing the issues that remain in dispute and prioritizing matters that require immediate adjudication prior to the first case conference either for reasons of urgency or proportionality (further explanation is provided below).

- If, while at triage, settlement of any of the disputed areas can be reached, then a consent order will be issued by the triage judge.

- There will obviously be cases where an issue or issues will remain unresolved after triage. Where an issue or issues remain unresolved and where the triage judge has determined that it is neither necessary nor proportionate to prioritize a matter for one and only one expedited urgent motion prior to the first case conference, the triage judge shall schedule that first case conference for a date within

approximately 30 days. Where the triage judge has determined that a still-disputed and contested issue (dispositive or otherwise) need logically be prioritized prior to the first case conference or, where in respect of a contested issue, immediate and urgent relief is sought and deemed by the triage judge to be justifiably in need of prioritization, the triage judge may set that urgent/prioritized matter down for adjudication within 14-30 days of the appearance at the Triage List. At the time of setting that urgent/prioritized matter down within 14-30 days, the triage judge must also set a date for the first case conference which must occur no later than 60 days of that one and only appearance at triage. In other words, where an urgent/prioritized hearing has been set as discussed above, the first case conference will occur 30 days following that urgent/prioritized hearing date.

- It should be noted that these urgent/prioritized hearings that are set down from the Triage List (following the earlier satisfaction at the Pre-Triage Screening List of the preconditions for triage) are not the same as those hearings that are set down under the "Emergent Circumstances" category. The latter category involves motions (discussed at page 10 of this document) where the parties are still at the pre-triage screening stage and where they require early and immediately-needed interim relief notwithstanding that the preconditions for triage have not yet been met.

- To summarize, where a matter has not been resolved at triage (in part or at all) and issues remain in dispute, the triage judge must do one of two things:

    1. Set the first case conference within 30 days of the triage appearance; and/or

    2. Set an urgent/prioritized hearing date prior to the first case conference in which an urgent/prioritized hearing date must be heard within 14-30 days of triage. When the emergent/prioritized hearing date is set at triage, the triage

judge must at the same time set the first case conference date for a date not beyond 30 days of the emergent/prioritized hearing.

- Given the prerequisite that before a matter appears at triage, the pleadings must be closed, default matters will not be dealt with on the triage list but will be dealt with by way of desk order. Requisite notice will be provided in writing earlier in the process and reaffirmed at the Pre-Triage Screening List.

- Given that the pleadings must be closed before an appearance on the Triage List, a party that does not appear risks having his or her matter disposed of by way of a "fast-track trial" on the Triage List. Again, requisite notice will be provided in writing earlier in the process and reaffirmed at the Pre-Triage Screening List.

- As mentioned previously, a new form will more clearly and in a more focused way, identify for the trial judge any property accounting issue. This property accounting issue must be addressed at the triage stage and any required reference to the Master must be made from triage. Where such a reference has been made to the Master, the triage judge is still required, as explained earlier, to set a first case conference date (within 30 days) while the matter is at triage on that day.

- As will be explained below, the Triage List will replace (with a couple of exceptions) most of the various existing Family Division Lists, including those characterized as "Uncontested Proceedings—Disposal without a Trial". The Triage List could replace for example what is currently the Uncontested List heard Tuesday mornings or alternatively, the List would be heard by the duty judge. As it relates to uncontested affidavit divorces and FMA orders, no changes are needed in this area. The current practice appears adequate with respect to uncontested matters.

- Given what is proposed below in relation to the appropriateness of guardianship matters being dealt with by Child Protection Intake Court System, the Uncontested Guardianship List appears no longer necessary.

- Notwithstanding that most of the existing lists will collapse into the Triage List, there are two areas that need not and should not go through triage. One is in respect of ISO matters, and the other is in respect of Hague Convention Applications. As it relates to ISO, no change is needed and these matters should not be part of the triage stream. Concerning Hague Convention Applications, any applications involving the return of children to other jurisdictions under the Hague Convention should continue to be handled by Notice of Application and assigned to a judge by the Associate Chief Justice. There is no need to go through triage.

- As noted, in delimiting the ambit or the parameters of triage under this New Model, there are two additional areas that must be addressed: Guardianship Proceedings and Protection Order Set Aside Applications. The former should not proceed through triage whereas the latter should.

- Respecting Guardianship Proceedings, it is proposed that all private Guardianship Applications be dealt with in the Child Protection Intake Court stream. That is, the matter should appear on the Master's docket for up to 60 days to deal with the service and document issues. The matter would then be sent to the CP Intake for a judge to review and if it is uncontested, then the CP judge could pronounce the Guardianship Order at the Intake List. If the matter was contested, then a trial date would be set and the matter would proceed to a pre-trial and then a trial following the case flow of the CP model. Most guardianships come about due to a family's involvement with CFS. Most of the applicants are grandparents, extended family or foster parents. Thus, it would seem to make sense that such applications be dealt with in the CP Intake Court stream. Currently, the practice is

for those matters to appear in the Master's court on a Tuesday List and then set a case conference date. If there is already a CFS matter underway, the guardianship is tagged onto the CFS matter. But if the CFS matter is resolved, the guardianship is then loose and is dealt with at a case conference and then sent over for either a contested hearing on the monthly Uncontested Guardianship Docket or a trial date is set. So it is now proposed that all private Guardianship Applications be dealt with in the CP Intake Court stream. As a consequence, the Uncontested Guardianship List is no longer necessary.

- It is recognized that there are from time to time other applications under *The Child and Family Services Act* (objection to entry on the Child Abuse Registry, termination of permanent orders, no-contact with child) and those applications are currently referred by the Master directly to the current CFS case conference lists. This practice may continue subject to further input and review.

- As it relates to Protection Order Set Aside Applications, there are two types of set aside applications: the ones that are stand-alone applications and the ones that are included as part of a family court proceeding begun by a Petition. Both require Notices of Application. It is proposed that, in cases where the Notice of Application to Set Aside is the only matter before the court (no attached family proceedings), those applications be dealt with by the General Division, using the process already established in that Division. The fact that the applicant and respondent may be or may have been in a conjugal relationship, does not automatically require that the protection order matter be adjudicated in the Family Division. It is proposed that in cases where the Notice of Application to Set Aside is filed in tandem with *Divorce Act* or *Family Maintenance Act* proceedings, those cases be dealt with at the Triage List. In those cases, it would seem both logical and important that determinations of fact with respect to the issue of family violence be made early in the process and that they

be made before the Court addresses custody, access and property issues. Accordingly, when the protection matter comes to triage, if the triage judge cannot resolve the matter, then the Notice of Application to Set Aside must be fast-tracked to a hearing that must be set to occur within 30 days of the appearance at triage. The triage judge will engage actively with the parties in an effort to resolve the matter. Before setting the matter down, the triage judge will also conduct an expedited but focused pre-trial. If the matter cannot be resolved and must be set down for a hearing, that hearing which will be set down within 30 days, will not be set for more than one day. Given the nature of the governing test for Protection Order Set Aside Applications, considerations of proportionality and the comparatively more informal approach that should be taken in those hearings, a hearing of more than one day should be scheduled in only the most exceptional cases.

- When addressing Protection Order matters, the triage judge may also make referrals to Victim Services for safety planning and counselling awaiting the hearing.

Step 4 The First and Subsequent Case Conferences

- The first case conference, which will have been scheduled at triage, will not be terminated without the setting of a trial date within 12-15 months of that first case conference. In other words, the parties must leave that first case conference with a trial date. The setting of that trial date on the date of that first case conference is not subject to exception. If a party objects for whatever reason to the setting of a date, the date should nonetheless be set within the stipulated 12-15-month parameters and the party or parties can make an appointment to appear before me to make any relevant objections and submissions on the record. It should be remembered that this requirement will be well-explained and will be well-known to the profession as an unconditional component of this New Model. It is reasonable and expected that those parties who

anticipate, for whatever reason, requiring or wanting more time or a slower process, will opt to not enter the process at triage until they are ready and able to attorn to the timelines attaching to the New Case Flow Model.

- While the first and any subsequent case conferences prior to the final case conference occurring at the 45-day mark (i.e., 45 days prior to trial) will invariably address issues of trial readiness, the primary focus will be on resolution and, if and when necessary, the scheduling and adjudication of any interim motions. It is the final case conference (at the 45-day mark) which will be focused primarily on trial readiness.

- That final case conference will occur approximately 45 days prior to the scheduled trial date but it must be scheduled by counsel or the parties by contacting Ms. Sharon Wolbaum no later than three months prior to the trial. There will be cost consequences for any failure (by counsel or the parties) to schedule the final case conference pursuant to the stipulated timelines.

- If counsel or the parties choose to certify by form their readiness for trial, there will be no necessity for the scheduling of the final case conference. If counsel or the parties certify by form their trial readiness and it turns out that they are not ready, there will again be the risk of cost consequences.

- Given that the last case conference is focused primarily on trial readiness, the final case conference will be undertaken by the judge who presided at the earlier case conferences except in unusual circumstances or rota impossibility.

- Pursuant to Rule 70, there are to be, subject to exceptional circumstances, no more than three case conferences. Under the New Model, the first and if necessary, final case conference focused on trial readiness will be scheduled as part of the rota on Tuesdays, Wednesdays or Thursdays, the three days on which, in every week, three judges are scheduled for

case management. If a seized case conference judge wishes to convene one or more case conferences subsequent to the first case conference but prior to the final case conference (occurring 45 days prior to trial), that subsequent case conference(s) must be scheduled by the seized case conference judge at a 9:00 a.m. or 1:00 p.m. time slot.

- Under the New Model, in most cases, best practice will require that the case conference judge adjudicates any interim motions that arise between the first case conference and the trial date. In some cases, the case conference judge may, for reasons of proportionality and fairness to all the parties, refuse permission to have the motion brought and adjudicated before trial. The case conference judge will be best-positioned to understand the issues in dispute and by extension, will be in the best position to provide preliminary and non-binding feedback (mindful of the principle of proportionality) in respect of the viability and necessity of prospective motions. Similar feedback from the case conference judge is expected in the course of resolution discussions as it relates to the realities, the strengths and the weaknesses of each party's position. While a case conference judge will make it clear that any adjudicated motion that is permitted to be brought will be one that is decided on the evidentiary record following formal submissions and <u>not</u> pursuant to informal but necessary feedback at the case conference, the mere participation of a case conference judge discussing possible resolution or the respective appropriateness of a motion (on the basis of proportionality or first impression strengths and weaknesses), does not inevitably or inexorably lead to the inability of that judge to impartially hear a contested motion on the basis of bias, real or apprehended.

- Given what the governing jurisprudence has reaffirmed is the "presumption of impartiality" (a presumption which, according to the governing jurisprudence, is not easily displaced) and the rigours of the test for recusal more generally, that

jurisprudence, balanced against the principle of proportionality, suggests that it will be in rare cases that a judge offering an informal opinion will cross the line requiring recusal. That said, in those isolated cases where the case conference judge determines on the basis of the objective test that he or she cannot decide impartially or be perceived as being able to decide impartially, recusal is an option. It should not, however, be an option reflexively invoked and it should only be invoked upon the application of the rigorous and governing test for reasonable apprehension of bias. See for example *Wewaykum Indian Band v. Canada*, 2003 SCC 45; [2003] 2 S.C.R. 259; *Kalo v. Manitoba (Human Rights Commission)*, 2008 MBQB 92; *R. v. Trunzo*, 2012 MBQB 211. Separate from considering the rigours of the test as set out in the jurisprudence, and what should follow in most cases from the "presumption of impartiality" and from an appreciation for the seriousness and the "solemnity of the judicial oath", the capacity of the case conference judge to hear motions as an exercise in proportionality must also be seen through the prism of the Supreme Court of Canada's transformative analysis in *Hryniak v. Mauldin*, 2014 SCC 7; [2014] 1 S.C.R. 87. In *Hryniak*, the Court confirms that the proportionality principle can now act as a touchstone for access to justice. In *Hryniak*, the Court also endorsed "the involvement of a single judicial officer throughout" (at para. 78).

- Despite the option of recusal, it should go without saying that the objective of realizing a proportionate approach to the number and nature of motions brought between the first case conference and the trial, will require a degree of collegial consistency and comity. The collegial consistency and comity relates to educating the profession that, in most cases, motions (or the prospect of a motion) brought after the first case conference up and until trial, will be closely scrutinized and assessed for their proportionality and, where brought, those motions will be heard by the case conference judge.

- As noted earlier, amendments to the powers of the case conference judge will stipulate that a case conference judge's order is reviewable only by the same case conference judge who made the order.

- In light of the screening that will have taken place prior to triage, and at triage, and given the opportunities to bring certain emergent and prioritized motions before and after triage (but before the first case conference), it is not expected that the motions arising after the first case conference will be many. With the relatively early trial dates set at the first case conference, the realities of time and costs suggest that on any proportionality assessment, many motions subsequent to the first case conference will not always be easily justified.

- If, for whatever reason, following the setting of a trial date, the parties contend they are not ready for trial, any adjournment request will be scheduled before the Chief Justice or his or her designate. Any and all other requests for adjournments leading up to the trial will be made to the Chief Justice or his or her designate.

Other Events or Proceedings Occurring Between the First Case Conference and the Trial

- It need be remembered that, in most cases, the first case conference will be available and will occur within 30 days of the appearance on triage. In addition, it should be remembered that it is at that first case conference that the trial date is set and the finite period for the proceeding is formalized. Accordingly, the most focused and efficient use of judicial time and resources for such things as mediations and dispositive summary judgment motions will occur only after the first case conference, by which time initial discussions and the setting of the trial date will have taken place. Once the trial date has been set, that date will act as a reference point for assessing not only the proportionality of any proposed dispositive or non-dispositive motions, but also, the trial date will

provide a further impetus for serious and focused settlement discussions (and/or mediation). "Ordinary" interim motions between the first case conference and trial should be relatively infrequent. Although some dispositive (summary judgment) motions may be attempted, under the New Model, in most cases, if a dispositive motion was that necessary and clear, the motion would have been so assessed at triage or by way of a scheduled prioritized motion set down from triage.

- Insofar as the Extended Case Conference (ECC) is occasionally used in the Family Division, such an option under the New Model might be first considered and scheduled at triage. In that event, the scheduled ECC would be considered the first case conference which would mean that a trial date would be set at that ECC if the matter was not completely resolved.

Step 5 The Trial

- Given the rota considerations that follow from the New Case Flow Scheduling Model, most trials will now be commencing on Tuesday. Multi-day trials will be typically set for segments of four, eight or, exceptionally, 12-day periods (or otherwise) depending upon the time requirements as assessed at the first case conference.

- If a matter settles in the 45 days prior to trial, then the parties may either submit the order to the case management judge or the duty judge to have the Final Order/Judgment pronounced. No further meeting with the case management judge is required. Trial dates can then be cancelled by the judge who signs the Final Order/Judgment. If the matter settles the day of trial, it is expected that the trial judge will pronounce the Final Order/Judgment.

- Where, at any point up to the actual commencement of the trial, for whatever reason, a party seeks to adjourn the previously set trial, such applications will be heard by the Chief Justice or his or her designate.

- Where an application for adjournment occurs once a trial has commenced, although the application will be adjudicated by the trial judge, notice of the application should be brought to the attention of the Office of the Chief Justice by letter, from the party moving for the adjournment.

- It cannot be overemphasized how, in a new model for case flow scheduling, the integrity of the model and its timelines and time standards depend upon a consistent and constant approach to monitoring and measuring compliance with those timelines and time standards. Any credible and successful new model of case flow scheduling—particularly where case management plays a significant role and where there is a need and desire for adjudications within a reasonable, predictable and finite period of time—requires firm trial dates and an accompanying strict controlling and monitoring of adjournments.

- Court events must be seen as meaningful; this is particularly the case with trial dates. The involvement of the Chief Justice in respect of adjournments of trial dates underscores this point. The requirement that applications for the adjournment of trials (prior to trial) be made to the Chief Justice or his or her designate, has been in place for many years in respect of Queen's Bench criminal proceedings. It is now also the practice employed in every other domain of the Court's work where a New Case Flow/Scheduling Model has been introduced—including all civil proceedings and Child Protection matters. In an era where access to justice is properly pursued in a context where judicial resources are scarce, absent good cause, trials, like all court events, should occur as scheduled. The profession's knowledge that the Chief Justice or his or her designate is overseeing most adjournments as a result of his or her interest and concern for not only the integrity of the case flow scheduling model, but also, in respect of the use and allocation of previously-scheduled judicial and court resources, reminds counsel that trial readiness is not negotiable and trial dates are precious and usually firm.

- Just as it will be important under the New Model to evaluate the nature and number of adjournment applications coming before trial, it will be equally important for administrative reasons, to know when and how matters (however rarely) are being adjourned following the commencement of trial. Such information will be critical, not only to ensure consistent approaches, but also, as part of a general compilation and assessment of statistics respecting the New Case Flow Scheduling Model and the extent to which its objectives are being realized.

Variation of Final Orders

- In the case of any applications to vary final orders, such proceedings will begin at triage, where the matter will be processed through the appropriate and applicable steps of this New Model.