

# Blakes Bulletin

## Litigation & Dispute Resolution

### New Alberta Rules of Court

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On November 1, 2010, the new *Alberta Rules of Court* (the New Rules) are scheduled to come into force, repealing the prior *Rules of Court* (the Old Rules) and ushering in a dramatic change to the procedural conduct of litigation in Alberta. The New Rules represent the most substantial change to the rules of procedure in Alberta in over 40 years. Although a number of the Old Rules still exist in the New Rules, the New Rules have been completely rewritten and renumbered. There is little in the litigator's procedural toolbox that will go unchanged. Everything – from critical deadlines to the format of pleadings – has undergone material change.

There are a number of New Rules that are relevant to corporate/commercial litigation. The following list represents only a brief summary of some of the changes in the New Rules:

#### 1. DISMISSAL FOR LONG DELAY – RULE 4.33(1)

Perhaps one of the most significant changes in the New Rules is the compressed time period for what has become known as the "Drop-Dead" rule. Under the Old Rules, the court was required to dismiss an action where five or more years had expired from the time that the last thing was done to materially advance the action. Under the New Rules, if two or more years have passed after the last thing was done that significantly advanced that action, the court, on application, must dismiss the action. This will have significant implications on plaintiff's counsel to advance the action in such a way as to prevent delay from being fatal to the action. Parties should note that there is a two-year "bridging provision" before this New Rule takes effect.

#### 2. MANDATORY DISPUTE RESOLUTION PROCESS – RULE 4.16(1)

Another significant development in the New Rules is the requirement for parties to engage in a mandatory dispute resolution process. The New Rules specifically provide that a trial date cannot be set by the court unless the

parties have engaged in a dispute resolution process, unless the court waives the requirement. A dispute resolution process includes a dispute resolution process in the private or governmental sectors with an impartial third party – for example, arbitration or mediation – or a judicial dispute resolution process (JDR) that allows a Justice to facilitate a resolution for the parties.

#### 3. STANDARD AND COMPLEX CASES – RULE 4.3(1)

The New Rules also require that *all* actions be categorized as either standard cases or complex cases. Factors that must be considered by the parties – or by the court – in making the categorization include, among others, the amount of the claim, the nature of the claim, the number of parties and the number of documents. If the parties cannot agree on the appropriate classification, or if the court does not order otherwise, within four months of the filing of the Statement of Defence, the action is deemed to be a standard case.

The classification of the case as either standard or complex has important implications for the management of the litigation. For example, with standard cases, the parties must, within a reasonable period of time, complete various steps in the action such as completing pleadings, participating in at least one of the dispute resolution processes in Rule 4.16(1) and applying for a trial date. For complex actions, the parties must, within four months of categorizing the action as complex, agree to a complex case litigation plan that requires the parties to establish specific guidelines for completion of steps in the action.

#### 4. APPEALS FROM MASTER'S JUDGMENT OR ORDER – RULE 6.14(3)

Under the Old Rule 500, an appeal from a Master's decision to a Justice was heard on a *de novo* basis and, accordingly, the Justice was not bound by the evidentiary record before the Master but could instead permit new evidence to be filed in the hearing. Under Rule 6.14(3), an appeal from a Master's judgment or order is an appeal on the record of proceedings before the Master, however, the Justice may permit new

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evidence if it is significant enough that it could have affected the Master's decision. As such, the presumption is that an appeal from a Master is now "on the record" of the court below, except where and if a Justice permits new evidence.

### **5. EVIDENCE OF CORPORATION'S EMPLOYEES – RULE 5.29(1)**

Evidence provided by a corporation's employee during examination for discovery is not binding upon the corporation unless it is adopted by the corporate representative as some of the information of the corporation. The New Rules specifically address the mischief that occurred under the Old Rules where a corporate representative would not accept the information of the employee because he or she disagreed with it. The New Rules specifically prevent a corporate representative from refusing to acknowledge the information of the corporation's employee on the basis that he or she simply disagrees with the employee or has a different version of events.

### **6. EXAMINATION FOR DISCOVERY OF EXPERTS – RULE 5.37(1)**

Under the New Rules, parties may agree or, in exceptional circumstances, the court may direct, that an expert be examined by a party adverse in interest. The questioning is limited to the expert's report and the court may impose limits on the scope and length of the examination of the expert. The evidence of the expert is treated as if it were the evidence of an employee of the party intending to rely upon it and thus, must be adopted by the corporate representative under Rule 5.29(1).

### **7. SERVICE OUTSIDE ALBERTA – RULE 11.25(1)**

The New Rules also change the Old Rules relating to service of a Statement of Claim outside Alberta. The New Rules differentiate between service of a Commencement Document – which includes a Statement of Claim, a Counterclaim and a Third Party Claim – outside Alberta but within Canada and service outside Canada. Under Rule 11.25(1), a court application is not required in order to serve a Commencement Document outside Alberta and within Canada. However, an application must still be made to permit service of a Commencement Document outside Canada.

### **8. NEW TIMELINES**

The New Rules contain a plethora of new timelines with which all litigants and their counsel should be familiar. Some of the most significant new timelines include:

- Rule 3.31(3). Filing and service of a Statement of Defence must occur within 20 days after service of the Statement of Claim in Alberta, or one month if the Statement of Claim is served outside Alberta but within Canada and two months if service is effected outside Canada – under the Old Rules, the time period was 15 days;
- Rule 5.5(1). A plaintiff must serve an Affidavit of Records within three months after the plaintiff is served with a Statement of Defence. The defendant must serve an Affidavit of Records within one month after the defendant is served with the plaintiff's Affidavit of Records – under the Old Rules, each party had 90 days from the service of the Statement of Defence; and
- Rule 6.3(1). An interlocutory application must be filed and served five days or more before the application is heard – under the Old Rules, it was two clear days.

It should be noted that under Rule 13.5(1), the parties are still free to agree to the extension of the foregoing timelines. In addition, the court may stay, extend or shorten any time period that is specified in the New Rules.

### **9. SECURITY FOR COSTS – RULE 4.22**

The Old Rules provided nine separate categories for when security for costs could be ordered, together with a general discretion of the court to order security for costs when it was just and reasonable to do so. In addition, the Old Rules provided for very specific criteria required in an affidavit in support of such an application. The New Rules, while still maintaining the discretion of the court to order security for costs, eliminate many of the previously stipulated categories for when security for costs will be ordered and replace those with four factors which the court can take into account, plus a catch-all of any other matters the court "considers appropriate to consider". Factors that the court may take into account include whether an Order to give security would unduly prejudice the plaintiff's ability to continue the action and its ability to pay the costs award.

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While this New Rule requires that the court consider the merits of the action in which the application is filed, there is no express provision in the New Rules specifying what an affidavit in support of such an application must contain, as was the case under Old Rule 594.

### 10. SERVICE BY ELECTRONIC METHOD – RULE 11.21(2)

The New Rules now specifically permit that all documents, other than commencement documents, may now be served via electronic means. This includes, for example, service of documents by email, provided that there is confirmation that the transmission is successfully completed. The New Rules reference the terms of the *Electronic Transactions Act*, including "electronic agent" which means a computer program or any other electronic means used to initiate an act or to respond to electronic information.

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