THE TRANSITION TO ALBERTA'S NEW RULES OF COURT

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October 2010

I. INTRODUCTION

The *Alberta Rules of Court* were implemented over 40 years ago on December 3, 1968. The incentive behind the upcoming changes to the Rules was to make the new Rules easier to understand, to reflect modern legal practice and administrative processes and to provide a clear and organized dispute resolution process that reflects the progression of a law suit. Ideally, the justice system will be easier to navigate as a result, not only for lawyers, but also for the insurance industry and even self-represented litigants.

The new *Alberta Rules of Court* will be proclaimed in force on November 1, 2010 (new Rules). Most of the substance of the old Rules remains, but once the new Rules are proclaimed, lawyers, court staff, the judiciary and insurance professionals alike will be interpreting and applying the new Rules. As such, all should be aware of the most significant changes in order to effectively manage files in the landscape of the new Rules.

II. ORGANIZATION OF THE NEW RULES

One of the more significant changes in the new Rules is that they have been completely re-organized and numbered differently in an effort to overcome a criticism of the old Rules not being organized in an orderly or logical manner and being difficult to navigate. The new Rules have now been arranged chronologically so that a person can navigate the rules according to the stage of litigation.

The new Rules are divided into 15 parts and 3 Schedules. To compare, the old Rules had 64 parts, 4 Schedules, and 5 Appendixes.

The 15 parts of the new Rules are as follows:

Part 1: Foundational Rules
Part 2: The Parties to Litigation
Part 3: Court Actions
Part 4: Managing Litigation
Part 5: Disclosure of Information
Part 6: Resolving Issues and Preserving Rights
Part 7: Resolving Claims without a Full Trial
Part 8: Trials
Part 9: Judgments and Orders
Part 10: Lawyers' Charges, Recoverable Costs of Litigation, and Sanctions
Part 11: Service of Documents

Part 12: Family Law Rules
Part 13: Technical Rules
Part 14: Appeals
Part 15: Transitional Provisions and Coming Into Force

Each Part is divided into sub-parts called *Divisions*, and then further divided into sub-sub-parts called *Subdivisions*. Part 1 covers the foundational rules and Parts 2 through 11 set out the procedure of the new Rules. The procedural rules are easily located and separated from the technical and foundational rules.

There are also now just 3 Schedules in the new Rules: Schedule A (Forms), sets out the forms prescribed by the Rules; Schedule B (Court Fees and Witness and Other Allowances); and Schedule C (Tariff of Removable Fees), which sets out the taxable costs of a legal action.

III. THE LITIGATION PROCESS UNDER THE NEW RULES

1. The Purpose and Intention of the New Rules

Part 1, the Foundational Rules, set out the underlying philosophy and explain the purpose and intention of the new Rules. The *purpose* of the Rules is to provide a means by which disputes can be fairly and justly resolved in a timely and cost-effective way.

The *intent* of the new Rules is to identify the real issues in dispute, facilitate the quickest means of resolving a claim at the least expense, encourage the parties to resolve the claim themselves, and to provide an effective, efficient and credible system of remedies and sanctions to enforce the rules, as well as orders and judgments. This means that once an action is commenced, parties must ensure they are using public funded court resources effectively and actively attempting to identify the quickest way to resolve a claim with the least expense.

The Foundational Rules also act as a base with which to interpret the new Rules. Undoubtedly, this section will be used to assist with clarification should the need arise.

2. Court Actions

Court actions are described in Part 3 of the new Rules. Part 3 includes rules on starting a court action; determining where the court action must be filed; the requirements and time limits for filing and serving a statement of claim, how a statement of defence is filed and served; how to make a claim against third parties and co-defendants; how to make a counterclaim; and what happens if there are sufficient deficiencies in litigation.

The old Rules allowed a claim to be commenced in a number of ways, by statement of claim, originating notice or petition. Under Part 3, there are now just two ways to bring an action: by way of statement of claim, or by a new document called an originating application. The statement of claim is still the default document and the petition no longer exists.

Rule 4.3 sets out the two categories of court actions under the new Rules, standard or complex. In deciding whether an action should be categorized as a standard or complex case, the parties or the court, as the case requires, must consider the following factors:

(a) the amount of the claim, the number and nature of the claims, and the complexity of the action;
(b) the number of parties;
(c) the number of documents involved;
(d) the number and complexity of issues and how important they are;
(e) how long questioning is likely to take;
(f) whether expert reports will be required and, if so, the time it will take to exchange reports and to question experts;
(g) whether medical examinations and reports will be required;
(h) any other matter that should be considered to meet the purpose and intention of the rules; and
(i) whether a third party claim has been or is likely to be made.

A statement of claim is now a prescribed form, and the new Rules provide that backers are no longer necessary for court documents to be filed.

3. Standard Cases

Unless the parties otherwise agree, most cases will follow the procedures of a Standard Case. It is open to the parties to change the stream of the litigation. If the litigation had been classified as a Standard Case at the outset, but later becomes more complex, the litigation can be classed as a Complex Case by the court or the parties to the litigation. A determination of whether the matter will be classed as Complex or Standard must be made in the early stages of litigation.

The parties must determine, within 4 months of filing a statement of defence, whether the case is Standard or Complex. If no agreement is reached, and the court does not otherwise order, the action will default to Standard.

4. Complex Cases

If the parties do decide that the matter is a complex case, they then have another 4 months to agree on a complex case litigation plan, and unless reasons are given in the plan not to do so, they must also perform the following tasks:

a) establish a date by which the real issues in dispute will be identified,
b) agree on a protocol for the organization and production of records,
c) set a date by which disclosure of records will be completed
d) set a date by which questioning will be completed,
e) set a date by which all experts' reports and rebuttal and surrebuttal expert reports will be served,
f) set a date by which reports of any health care professionals will be obtained, and
g) agree on an estimated date to apply for a trial date.

The complex case litigation plan provides the parties with the flexibility to set the expected timeframes for case management. Once the parties have agreed to the complex case litigation plan, or an amendment to the plan, the plaintiff will need to file and serve it on all parties.

5. Appeals

(1) Appeals from a Master

A significant change from the old Rules is that appeals from a Master will no longer be *de novo*, but will now be an appeal on the record. However, a Judge may permit new evidence to be heard if that evidence could not have been presented to the Master, and is significant enough that it could have affected the Master's decision.

If one wishes to appeal a decision of a Master, a Notice of Appeal must be filed and served within 10 days and must be returnable within 2 months after the judgment or order is entered or served.

(2) Appeals to the Court of Appeal

The Appellate Rules have not been finalized. As such, the old Rules still apply to appeals to the Court of Appeal.

IV. A BRIEF OVERVIEW OF THE NEW RULES

1. Service of Documents

All rules respecting service are now governed under Part 11. Service of Documents has been substantially changed by the new Rules.

(a) Commencement Documents

A statement of claim may still be served personally, but there is also the option to serve via "recorded mail". Recorded mail is defined in the Appendix as "a form of document delivery by mail or courier in which receipt of the document must be acknowledged in writing". The term "registered mail" is no longer used. In essence, so long as the recipient of the document signs to acknowledge delivery, this will suffice as service by recorded mail. Examples included registered mail or courier. A self-represented litigant may also accept service of the commencement document in writing. There are additional rules for service of commencement documents on litigation representatives, partnerships and corporations as well as other parties.

(b) Non-commencement Documents

For other non-commencement documents, the ambit of service is also wider than what was previously allowed under the old Rules. Non-commencement documents may be served in the following ways:

1) As a commencement document (personal service);
2) Electronically, by fax or e-mail to an address provided by the recipient (a confirmation of receipt is required);
3) By recorded mail. Service will be considered good where a confirmation is signed, or 7 days after the date when the mail was sent out; or
4) By a method agreed to by the parties.

With respect to electronic service, the rules specifically provides for service by electronic method if a party has specifically provided an address to which information or data may be transmitted. Service is considered to be effected when the sending electronic agent received confirmation of the successfully completed transmission.

“Electronic agent” is defined in the *Electronic Transactions Act*, and means a computer program or any other electronic means used to initiate an act or to respond to electronic information, records or acts, in whole or in part, without review by an individual at the time of the initiation or response.

When serving outside the jurisdiction an application for an order for service *ex juris* is no longer required. The Rules now provide that as long as there is a “real and substantial” connection between Alberta and the claim, the document may be served to any province or territory in Canada without an order. However, service outside of Canada will still require an order for service *ex juris*. Applications are still required for deeming service good and sufficient; requesting substitutional service; and for orders dispensing with service.

Commencement documents must still be served within 1 year from the date of filing. The ability to apply for an extension can still be made, so long as the extension does not exceed 3 months and application to extend the claim is made prior to the one year expiry.

2. Defending an Action

The same type of document, a statement of defence, is used to respond to the statement of claim. The statement of defence is also now a prescribed form in Schedule A. The limitation periods for filing a statement of defence depend on where the defendant was served. A statement of defence must be filed within 20 days if the defendant was served in Alberta. This time period is 5 days longer than previously stipulated in the old Rules.

If the defendant was served outside of Alberta, but within Canada, a statement of defence must be filed within 30 days. If the defendant was served outside of Canada, the defendant has 2 months to file a statement of defence.

The increase in the time limit to serve a statement of defence is in keeping with the purpose and intent of the new Rules, for claims to be fairly and justly resolved. Although the increase is only 5 days, it provides time to retain counsel or obtain a written extension to the time to file a statement of defence from counsel for the plaintiff. The timeframes for defendants outside of

Alberta are generally in keeping with the timeframes that were stipulated on orders for service *ex-juris* under the old Rules.

3. Affidavits of Records

A Plaintiff will be obliged to serve an affidavit of records within 3 months of being served with the first statement of defence. This was similar to the old Rules which required service of the affidavit of records within 90 days from the filing of a statement of defence.

A defendant will have one month from the date of service of the plaintiff's affidavit of records to file their affidavit of records. This could greatly shorten the time frame defendants have to file and serve their affidavit of records and defence counsel and insurance professionals must be aware of this implication. A third party defendant will have 3 months from the date it files its defence. Of course, it is still open for counsel to agree, between themselves, to extend these time frames.

4. Disclosure of Information

Part 5 governs how information and records are disclosed to the parties in a litigation. examinations for discovery are now called "questioning". What used to be referred to as discovery of evidence and documents is now referred to as disclosure.

The undertaking process, which has been part of litigation in Alberta for many years but was never officially referred to in the old Rules, is now also included and specifically referenced in Part 5. Answers to undertakings are to be provided within a "reasonable time".

5. Questioning

Under the former Rules, questioning was called examinations for discovery. Discoveries were conducted orally and under oath. Pursuant to the new Rules, questioning may be done orally under oath, or through written questions. If through written questions, the answers will be provided by affidavit. Written questions may result in an expedited process as they may shorten the time a party has to wait before questioning can take place.

Parties must first file and serve their affidavits of records before they can question another party. The new Rules also set out a time limit for service of an appointment on the opposing party of at least 20 days before the questioning date.

The new Rules have expanded the scope of who may be questioned to include a person who has provided services to a Corporation.

6. Resolving Issues and Preserving Rights

Part 6 includes rules on applications made to the court for resolving issues that arise in the middle of litigation. Now, interlocutory matters are dealt with by filing an "Application" rather than a "Notice of Motion".

A notable change is the timeframe required for providing notice to the opposing side for Applications. Under the old Rules, 2 clear days notice was required. Under the new Rules, 5 days notice must be given.

There are now 3 methods of bringing an application before a judge or master:

(a) in person, with one, some or all of the parties present;
(b) by means of an electronic hearing if an electronic hearing is permitted under rule 6.10; and
(c) by a process involving documents only.

7. Dispute Resolution (ADR)

Alternative Dispute Resolution, or ADR, is now a compulsory step in litigation commenced by way of statement of claim. This does not apply, unless so ordered by the court, to litigation commenced by Originating Application. All parties must attempt to resolve their dispute through a dispute resolution process before obtaining a trial date. The court can waive the request for ADR in certain situations, for example, if the parties can show that they have already engaged in a form of ADR before litigation was commenced.

The same methods of resolving a claim without a full-blown trial have also been included in the new Rules under Part 7. That is, one can still apply to strike out pleadings; apply for summary judgment and request a summary trial.

8. Dismissal for Long Delay ("Drop Dead Rule")

The new Rules provide a much shorter time period with which an applicant can bring an application to dismiss the action. Under the old Rules, the time period was "5 or more years since the time that the last thing was done in an action that materially advances the action". Now, the court must dismiss an action when 2 or more years pass after the last thing is done that significantly advances the action.

This puts an onus on the plaintiff to ensure that the action is moving forward so as to not be caught by the much shorter drop-dead rule. Likewise, parties will be able to push for a dismissal of an action much sooner if there is no movement on the action.

For those matters where no steps have been taken prior to implementation of the new Rules, the Transitional Rules apply. At Rule 15.4 the new Rules contain a bridging provision where the court must dismiss a matter if, after coming into force of the new Rules, 2 years has elapsed since the last thing was done to significantly advance the action <u>or</u> if 5 years has elapsed since the last thing was done to significantly advance the action, whichever comes first.

As an example, where a matter has had nothing done to significantly advance it for 4 years at the time the new Rules come into force, the party will not be forced to add 2 years to that time once the rules come into force, but rather, may apply once the 5 years elapses if it is sooner. Of course, there are still provisions with respect to agreements for delay, stays and adjournments which will affect any delay.

9. Trials

Trials are governed under Part 8 of the new Rules. Prior to being allowed to schedule a trial date, the parties must provide a certificate indicating that they have performed all the necessary prerequisites, including participating in at least one of the dispute resolution processes. The acceptable dispute resolution processes are described in Part 4:

(a) a dispute resolution process in the private or government sectors involving an impartial third person;
(b) a Court annexed dispute resolution process;
(c) a judicial dispute resolution process;
(d) any program or process designated by the Court

As well, parties must now confirm to the court that they are ready to proceed to trial via a prescribed form entitled “Confirmation of Trial Date”. This must be done 3 months or more before a scheduled trial date. Parties must also verify or modify the estimated number of witnesses and trial time. If neither party confirms the date, it will be cancelled.

Pre-trial conferences will no longer be required to obtain a trial date. The Transitional Rules allow for matters in which Examinations for Discovery have been completed under the old Rules, to be set for Trial under the new Rules without the need for any dispute resolution process to have been engaged in.

10. Judgment

The new Rules require that a draft judgment or order is prepared within 10 days from the pronouncement of the judgment or order. Additionally, within 10 days after service of the draft, the party must either approve or object to the draft order or judgment.

The old Rules had a lengthier time period, up to one year after pronouncement, to file an order, however, under the new Rules, the order or judgment must be entered and filed within 3 months of pronouncement, unless the court orders otherwise.

V: TRANSITION

Part 15 governs the transition from the old Rules to the new Rules. Specifically, Rule 15.2 states that the new Rules apply to any existing proceeding (a court proceeding commenced but not concluded under the former Rules). Further, orders or judgments that were made under the old Rules will be considered to be made under the new Rules, and have the same effect as if they had been made under the new Rules.

VI. SELF REPRESENTED LITIGANTS

The new Rules specifically reference Self Represented Litigants in Rules 2.22 and 2.23 and state that individuals may represent themselves unless otherwise provided for in the Rules.

In addition, the court can permit another person to assist the Self Represented Litigant (SRL) in any manner and on any terms the court considers appropriate (also referred to as a "McKenzie friend"). Assistance may be in the form of quiet suggestion, note-taking, support or addressing the needs of the SRL. The person giving assistance may not contravene the *Legal Professions Act*. This essentially means that they cannot act as an advocate for the SRL and cannot make representations on their behalf. As well, the new Rules specifically state that the assistance given cannot be disruptive and is not allowed if it does not meet the purpose and intention of the Rules.

VII. INTERPRETATION

The new Rules are meant to be written in plain-language and easy to understand. Any interpretation should refer to the Foundational Rules set out in Part 1. That is, the meaning of the Rules should be interpreted in light of the purpose and intention of the rules, and in the context in which the rule applies. The headings of the new Rules may be considered to interpret the meaning of the Rules.

As the Rules are new, any prior case law will be of little relevance, and little assistance in interpreting the meaning of the new Rules.

VII. CONCLUSION

The new Rules are meant to provide parties with the means for timely and more efficient resolution of issues. How this will actually work in the field of insurance litigation remains to be determined, as there will certainly be some issues that will need to be further defined through application to the courts. Yet, the possibility of more timely resolution of claims is a bright light on the horizon of this new landscape.