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# RULES

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Jensen Shawa Solomon Duguid Hawkes LLP

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**Jensen Shawa Solomon Duguid Hawkes LLP is pleased to provide summaries of recent Court Decisions which consider the Alberta Rules of Court and commentary related to the Rules. The first issue of JSS BARRISTERS RULES is being circulated in paper format with the intention being to shift to electronic media for subsequent issues. If you have found the information contained herein to be useful and would like to receive additional issues of JSS BARRISTERS RULES, we ask that you visit www.jssbarristers.ca and subscribe to receive future issues of JSS BARRISTERS RULES online.**

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## RECENT COURT DECISIONS CONSIDERING THE RULES OF COURT

**ENVISION EDMONTON OPPORTUNITIES SOCIETY v. EDMONTON (CITY), 2011 ABQB 29**
**Rules 1.2 and 7.1(1)(a)**

The City of Edmonton applied to sever one of two questions in a Judicial Review of the City's decision to reject a Petition. The subject matter of the Petition was the closure of the Edmonton City Centre Airport, and the City Clerk reviewed the Petition and rejected it on two grounds: that it was filed outside the time limits specified by the *Municipal Government Act* and that it was not signed by the required number of electors.

The new Rules applied at the date of the severance Application, and the Court considered whether the new Rules changed the law with respect to severance, such that

a new test should apply to whether severance should be granted or whether the "exceptional case" test applicable under "old" Rule 221 continued to apply. The Court found that a significant change between the "old" Rules and the new Rules is that the new Rules add grounds for severance, while the "old" Rules authorized the Court to grant severance without setting out the specific grounds. The Court found that the differences between the "old" and new Rules were too stark to find that new Rule 7.1(1)(a) is a straightforward codification of the "old" Rule 221 "exceptional case" test.

The Court found that what should be considered in a severance application are the grounds and considerations actually laid out in Rule 7.1(1)(a), interpreted through the lens of Rule 1.2. While some factors are consistently relevant to the issue of severance, there is no defined list of which factors must be considered, and factors may be given less or more weight depending on the context of the case. The Court concluded that the "exceptional case" test is no longer the test in Alberta. Rather, the Court must view each Application for severance by first analyzing the three parts to the test in Rule 7.1(1)(a). If one of those tests is answered affirmatively, then the Court must determine if severance will meet the objectives of Rule 1.2. In carrying out its analysis, the Court must balance the ultimate goals as expressed in the Foundational Rules and determine if the remedy of severance is proportional. The Court allowed the Application by the City of Edmonton to sever the issues before the Court.

**NOWICKI v. PRICE, 2011 ABQB 133**
**Rules 1.1, 1.2 and 7.1**

This was an Application to sever liability related to three Actions, all arising out of the same collision, as well as an Application to have the liability portion of all three Actions heard together. The Applicant argued that Rule 7.1 does away with the old "exceptional case" test from the former Rules of Court, in favour of a more lenient analysis. Moen J. addressed the application of Rule 7.1 and referred to *Envision Edmonton Opportunities Society v. Edmonton (City),* 2011 ABQB 29. Moen J. followed the analysis set out in Envision, which provides that the Court must first look to Rule 7.1 and determine if the threshold is met for severance and then subsequently look at the case as a whole to determine whether the Foundational Rules for cost effectiveness and timeliness, among other things, would be met by the severance. Moen J. stipulated that, as in *Envision,* the test set out in Rule 7.1 is in three parts and those parts are disjunctive, meaning that there is a requirement that the Court find only one of them to move on to considering the impact of the Foundational Rules on a severance application.

Moen J. found that severing the liability issue would save expense, would dispose of all or part of the claim and would substantially shorten the Trial. Her Ladyship determined that the test for severance had been met. Moen J. then turned to the Foundational Rules, finding that severance of the liability portion of the three Actions would lead to the quickest means of resolving the claim and would encourage settlement of the damages portions of the Actions.

**M.E.L. v. B.J.L., 2011 ABQB 72**
**Rules 1.2(1) and 1.2(2)**

This family law decision dealt with an Application for parenting and custody, along with a contempt Application by the Applicant. Although the contempt issue would normally have been severed from the other issues, the Court referred to the Foundational Rules – Rules 1.2(1) and 1.2(2)(b) – which stress that claims should be resolved quickly and in the most cost effective way. Based on these Foundational Rules, the Court heard all issues together, because this was the most efficient use of both the parties' and Court's time.

**DONALDSON v. FARRELL, 2011 ABQB 11**
**Rules 1.2 and 3.68**

The Defendants sought to strike the Plaintiff's Statement of Claim pursuant to Rule 3.68 on the grounds that the claim constituted an abuse of process and that it did not disclose a cause of action.

The Court held that although Rule 3.68 is similar to former Rule 129, Rule 3.68 must be "viewed through the lens of

the foundational rule, Rule 1.2". Rule 1.2 provides that the purpose 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". The possible remedies identified by the Court in an Application to strike the Statement of Claim in this case were to strike the claim, grant an Order to amend it, or stay the Action until the outcome of another Action, which dealt with similar issues between similar parties, was resolved. The Court held that, in determining the appropriate remedy, regard must be given to Rule 1.2 and proportionality must be applied to the issues. In light of Rule 1.2, the Court held that the appropriate remedy was to strike particular portions of the claim which constituted an abuse of process. In regard to the argument that the Statement of Claim failed to disclose a cause of action, the Court held that the new Rules have not "modified or lessened the test for striking out pleadings" and the common law on "old" Rule 129 is equally applicable to Rule 3.68.

**L.C. v. ALBERTA (METIS SETTLEMENTS CHILD & FAMILY SERVICES, REGION 10), 2011 ABQB 12**
**Rules 1.2 and 4.1**

This was an Application to move litigation forward in a number of Actions for which certification as a Class Action was proposed. The analysis focused on whether a stand-alone Application could be made under Rule 1.2(3).

Graesser J. remarked that the only precondition to making an Application under Rule 1.2(3) would appear to be the existence of an Action, although in his view such an Application would be premature without the parties first having made efforts among themselves to identify the issues and to determine the quickest way to resolve the dispute at the least expense: see Rules 1.2(2)(a)-(c). Graesser J. also stated that Rule 1.2(3) contemplates that both substantive and procedural matters may be addressed. Because the Plaintiff had sought responses from the Defendant on a number of procedural and substantive matters, and because the Defendant's response was essentially non-responsive, the Court determined there was no procedural bar to bringing this Application. Graesser J. determined that in light of the obligations to comply with Rule 1.2, the Plaintiff was entitled to a meaningful response. His Lordship stated: "a meaningful response does not mean total agreement, but it does mean addressing each of the matters raised in an open and forthright way". Graesser J. defined "facilitate" in Rule 1.2(3)(a) as meaning "to render easier; to promote, help forward; to lessen the labour of, assist (a person)". His Lordship determined that this provision must be read in the context of Part 4: Managing Litigation and, in particular, Rule 4.1:

> 4.1 The parties are responsible for managing their dispute and for planning its resolution in a timely and cost effective way.

Graesser J. noted that scheduling and moving the matter forward is no longer primarily the obligation of the Plaintiff; that the Defendant must shoulder some of the responsibility for the Rule 1.2(1) obligations. Graesser J. concluded that Rule 1.2(3) is intended to facilitate creating an appropriate task list and moving the timeline towards completion.

**IGNITION ENERGY LTD. v. DIRECT ENERGY MARKETING LIMITED, 2011 ABQB 90**
**Rules 1.5(4) and 3.65**

The Applicant sought leave to amend its Statement of Defence and Counterclaim to include a claim for repudiation. The Respondent argued that the Applicant had made an irrevocable election to pursue specific performance or damages and could not now amend to add repudiation.

The Court first considered Rule 3.65, which gives the Court broad discretion to amend pleadings. Such broad discretion is subject to the Court's duty not to cure non-compliance when to do so would result in irreparable harm to a party under Rule 1.5(4). The Court noted that its discretion to amend pleadings recognizes the importance of accurate pleadings. In determining that the threshold required to allow an amendment is very low, the Court referred to *Balm v. 3512061 Canada Ltd.,* 2003 ABCA 98 for the proposition that: "[an] amendment should be allowed, no matter how careless or late, unless there is prejudice to the other side". The Court also referred to *Oregon Jack Creek*

*Indian Band v. Canadian National Railway Co. (Motion),* [1990] 1 S.C.R. 117 for the principle that, absent prejudice, only a "clearly and obviously invalid" amendment should be rejected. The Court allowed the amendments, reasoning that they were not "clearly and obviously invalid", since it could not be said for certain (with the incomplete evidence in front of the Court at that time) that the Applicant had made an irrevocable election to pursue specific performance and damages instead of repudiation.

**L.C. v. ALBERTA (METIS SETTLEMENTS CHILD & FAMILY SERVICES, REGION 10), 2011 ABQB 42**
**Rules 2.11, 2.14 and 2.15**

This Application involved the appointment of a Next Friend/ Litigation Representative. The Application was originally commenced under the "old" Rules. Ms. Lightning, the attorney for L.C., was an interested person who could have stepped forward and been self appointed as the Litigation Representative for E.M.P. pursuant to "old" Rule 58 or "new" Rule 2.14, but as she wanted to be paid and exempted from liability for costs, the appointment was required to be made by the Court. The Court noted that, under Rule 2.15, the Court clearly has the power to appoint a Litigation Representative in circumstances where a party requiring a Litigation Representative does not have one. The Court went on to state that:

> There is no requirement under old Rule 58 or new Rules 2.11(a) or 2.14(1) that the next friend be a parent or guardian of child. New Rule 2.14(1) dealing with litigation representatives speaks of an "interested person", although that term is not defined in the Rules of Court.

Interested person is a defined term in the *Adult Guardianship and Trustee Act* and the Court used the same definition. Ms. Lightning was clearly an interested person, but was potentially in a conflict position as she was the attorney of L.C. who was the parent of E.M.P. The Court, with reliance on case law relating to "old" Rule 58, decided that the appropriate Litigation Representative would be someone other than the parent/guardian of the child (which included the attorney of the parent).

**TOERPER v. HOARD, 2011 ABQB 85**
**Rule 3.37**

The Plaintiff commenced an Action against the Defendants seeking damages for breach of contract and breach of trust or fiduciary duty. A number of the Defendants were Noted in Default and the Statement of Defence filed on behalf of one of the Defendants was struck out pursuant to a prior Order of the Court, which also directed that the matter be set down for a Summary Trial for an assessment of damages.

Strekaf J. noted that Rule 3.37, which combines "old" Rules 142, 144, 147 and 152, allows for an Application to the Court for Judgment where a Defendant has been Noted in Default or where the Defendant's Statement of Defence is struck out. The Court held that Rule 3.37 allows for an assessment of damages to determine the quantum of damages, rather than liability for the damages which is deemed to have been admitted by the Defendant when it was Noted in Default or had its Statement of Defence struck. The Court also noted that Rule 3.37 has the same application as its predecessors and case law which interpreted the former Rules of Court would apply to this Rule.

**MANSON INSULATION PRODUCTS LTD. v. CROSSROADS C & I DISTRIBUTORS, 2011 ABQB 51**
**Rules 3.62(1), 3.65, 3.74, 7.1(1), 7.1(3) and 7.2**

Manson applied for preliminary determination of certain contractual issues, pursuant to Rule 7.1(3). Poelman J. determined that Rule 7.1(3) must be read in conjunction with Rule 7.1 (1) and that the Rule contemplates a two stage procedure, as under the "old" Rule 221(1). Rule 7.1(1) authorizes the Court to order a question to be heard, to define the question or issue and to give procedural directions. Rule 7.1(3) is premised upon there having been an Order under Rule 7.1(1) and an Application pursuant to Rule 7.1(3) alone will not be successful.

Manson also applied for Summary Judgment pursuant to Rule 7.2. Poelman J. stated that there is no material difference between "new" Rule 7.2(a) and "old" Rule 162 (Summary Judgment Applications based on admissions).

The authorities under the former Rule remain applicable for Summary Judgment Applications based on admissions.

Crossroads brought an Application to amend its pleadings pursuant to Rules 3.62(1) and 3.65 (amendment not adding parties) and 3.74 (amendments adding parties). Poelman J. noted that, generally, any pleading can be amended without regard to carelessness or lateness on the part of the party seeking to amend. This is subject to four major exceptions: *Canadian Deposit Insurance Corp. v. Canadian Commercial Bank,* 2000 ABQB 440, 269 A.R. 49 at para. 11; *Foda v. Capital Health Region,* 2007 ABCA 207 at para. 10. Those exceptions are:

(a) the amendment would cause serious prejudice to the opposing party, not compensable in costs;
(b) the amendment requested is "hopeless" (an amendment that, if it were in the original pleadings, would have been struck);
(c) unless permitted by statute, the amendment seeks to add a new party or a new cause of action after the expiry of a limitation period; and
(d) there is an element of bad faith associated with the failure to plead the amendment in the first instance.

Therefore, if no exception applies, the pleadings can generally be amended. Poelman J. noted that the principles are not premised on particular words in the old Rules. Rather, they arise from the function of pleadings before contemporary common law courts. Poelman J. added that the guidelines established by the authorities under the "old" Rules should inform the Court's discretion. In this case, the amendments were granted as the Application was early in the proceedings and there was no assertion of prejudice.

**FIRST CALGARY SAVINGS & CREDIT UNION LTD. v. PERERA SHAWNEE LTD., 2011 ABQB 26**
**Rule 3.68**

This case dealt with an Application under Rule 3.68 to strike a Counterclaim. Kent J. first noted that the parties agreed that the test for striking such a pleading is an onerous one. Her Ladyship then stated the law that applies to this issue: the Court must find that it is plain and obvious that the Plaintiff's claim discloses no reasonable cause of action in law. This determination, as stated in 3.68(3), is made without Affidavit evidence, which means the Court must assume that the allegations and facts in the Counterclaim are true. Kent J. noted the tension that exists in determining whether it is plain and obvious that no cause of action exists. On the one hand, the Court must give a liberal interpretation to the pleadings because striking them brings an end to the Action; on the other, the Court must apply the Rule as intended so that, if on the alleged facts there is no cause of action, the claim should be struck to avoid needless litigation.

**BARKER v. BUDGET RENT-A-CAR OF EDMONTON LTD., 2011 ABQB 123**
**Rules 3.68 and 13.18**

The Applicant sought to strike a paragraph from an Affidavit on the basis that it contained hearsay and a legal conclusion. The Affidavit was used in support of an Application to amend the Statement of Claim.

The Applicant relied on Rule 3.68(4)(a), which allows the Court to strike an Affidavit that contains frivolous, irrelevant or improper information. The Respondent relied on Rule 13.18, which provides for the inclusion of information in an Affidavit that is not based on the personal knowledge of the Affiant.

The Court considered Alberta case law that permits, in an interlocutory matter, evidence in an Affidavit that is based on information and belief. The Court also determined that the Application to amend the Statement of Claim was an interlocutory matter that would not finally dispose of the rights of the parties. The Court concluded that there was nothing in the impugned paragraph of the Affidavit that was frivolous, irrelevant or improper information. The Court allowed the paragraph to stand, but the weight that the paragraph was to be given by the Court was still to be determined.

**RIC NEW BRUNSWICK INC. v. TELECOMMUNICATIONS RESEARCH LABORATORIES, 2011 ABCA 10**
**Rule 4.29 and Schedule C**

The issue before the Court in this case was the appropriate costs award to be granted arising from the dismissal of an Appeal. The Respondents argued they were entitled to double costs arising from a Formal Offer of Judgment on column 4 or 5 of Schedule C. The Appellants argued that no monetary claim was advanced and as such Schedule C, Division 1, s. 1(4) of the new Rules was engaged, which reads in part:

> (4) Unless the Court otherwise orders,
>
> (a) when a remedy is given in a judgment or order other than in addition to the payment of money, or
>
> (b) when judgment is given for a defendant in an action in which a remedy other than or in addition to the payment of money is sought,
>
> costs **must** be assessed according to the higher of Column 1 of the tariff in Division 2 [The Tariff], and the scale that would have applied if the other remedy had not been given or sought.

The Court applied the new Rules and held that no remedy was sought nor given for the payment of money and as such the Appellants were correct. However, the Court noted that it retained a residual discretion regarding costs and ultimately departed from the direction provided in Schedule C, and awarded costs based on the circumstances of the Appeal, the importance of the outcome of the Appeal to the parties and the amount of money potentially involved.

**SUN LIFE ASSURANCE COMPANY OF CANADA v. TOM 2003-1 LIMITED PARTNERSHIP #2, 2010 ABQB 815**
**Rule 5.12**

One of the primary issues dealt with by the Court in this Decision was the interpretation of Rule 5.12, relating to the Plaintiff's failure to serve its Affidavit of Records in a timely manner. Under former Rule 190, the double costs penalty for late filing of an Affidavit of Records was "intended to have a deterrent effect for parties who drag their feet". Although Rule 5.12 employs more discretionary language, as opposed to the more mandatory language of its predecessor, the Court held that "I do not think a late party will find comfort under the new Rules just because the new 5.12 is now discretionary". This arises from the purpose and the intention of the new Rules of Court which is to "include quickness in the resolution of a claim, timely communication, and efficiency including appropriate remedies and sanctions to enforce the rules". Similar to Rule 190, Rule 5.12 still provides that a party may avoid the costs penalties associated with the late provision of its Affidavit of Records if it is able to show "sufficient cause" for the delay. The Court held that the judicial interpretation of "sufficient cause" remains the same under the new Rules as the former Rules and requires "neglect that is excusable on sufficient grounds based on diligence of the party that has not been relieved by any other section of the *Rules,* or a statute, or a related Court ruling that may otherwise affect the disposition of the matter." In the circumstances of this particular matter the "filing party did everything it could but ran into extraordinary circumstances over which it had no practical control".

**HUNKA v. DEGNER, 2010 ABQB 716**
**Rule 5.18**

The Plaintiffs sought an Order permitting them to interview representatives of the Respondent's insurance broker and the Respondent's accountant, in relation to an Action alleging breach of contract and oppression against the Defendants. The accountant and broker each declined the Plaintiffs' requests for interviews on the basis that they could not participate without the consent of their client, which consent had been withheld. The Plaintiffs submitted that the information they sought to obtain from the interviews was relevant and material to the issues in the Action. They also took the position that there is no property in a witness. The Respondent agreed that there is no property in a witness, but contended that there was no authority for the Court to compel the Respondent to consent to the interviews. Further, the Respondent suggested that the proper procedure for Questioning was set out in Rule 5.18 of the *Alberta Rules of Court,* which provides that if relevant and material information cannot be obtained from

the examination of officers or employees of a corporation, the parties may agree, or the Court may direct, that the seeking party Question, under oath, a person who has provided services for the corporation.

Gill J. found that there is well established law that there is no property in a witness and that a party should not be able to interfere with another party's access to potential witnesses. However, in the circumstances, Gill J. found that the issues were more complex and concluded that the Application, if granted, would have the effect of circumventing the Respondent's refusal to consent and potentially of relieving the accountant and the broker of their perceived contractual or professional obligations. The Application was dismissed and the Plaintiffs were permitted to bring an Application under Rule 5.18 when and if deemed necessary.

**HALL v. WILLCOX, 2011 ABQB 78**
**Rules 5.33 and 6.8**

A Judgment Creditor applied for an Order that the Defendant was in contempt of two previous Orders to provide a Financial Report and pay $375.30 in costs. Additionally, the Applicant sought to use the transcripts from an Examination on the Defendant's Statutory Declaration in other proceedings. Graesser J. found that the implied undertaking of confidentiality under Rule 5.33 did not apply to a Cross-Examination on an Affidavit or Statutory Declaration. Rather, this type of questioning was akin to questioning under Rule 6.8 or "old" Rule 266, and Cross-Examinations on Affidavits are treated as being akin to testimony in Court to which the open Court principle applies. Graesser J. further commented that the new Rules did not change the difference between these types of Questioning. Rule 5.33 and the implied undertaking of confidentiality applied to the Affidavit of Records, records produced, Examinations for Discovery, undertakings on examinations and records produced arising out of the Discovery process. Cross-Examination on an Affidavit or Statutory Declaration is not subject to this implied undertaking. Graesser J. held that the Applicant did not need Court approval or an Order under Rule 5.33 to allow the use of the transcripts in other proceedings.

**ROYAL BANK OF CANADA v. PLACE, 2010 ABQB 733**
**Rules 6.5(2) and 6.14**

This was an Appeal by the Defendant of a Master's decision granting an Order Nisi and Sale of his house under a mortgage held by the Plaintiff. The Defendant was self-represented and raised a number of issues which he believed warranted an Appeal. However, the Defendant did not file a Statement of Defence to RBC's claim, was noted in default, and did not attempt to set aside the Default Judgment. The Defendant sought to obtain information from RBC in a "Demand for Disclosure", despite the fact that, under both the old and new Rules, the time for Discovery, Affidavits of Records and Questioning was long past. The Defendant also sought an adjournment from the Master in order to allow him time to get the requested information from RBC, which the Master refused.

In addressing the issue of the standard of review for Queen's Bench Justices reviewing Masters' decisions, Manderscheid J. held that, under the old Rules, the standard was "correctness". Manderscheid J. further held that the new Rules create a significant change given that an Appeal of a Master's decision is now on the record pursuant to Rule 6.14(3). His Lordship determined that an Appeal on the record suggests that the standard of review should be that of general appellate review as set out by the Supreme Court of Canada in *Housen v. Nikkolaisen,* [2002] 2 S.C.R. 235. The standard of review for questions of law is correctness. The standard of review for findings of fact and inferences of fact is palpable and overriding error. The standard of review on questions of mixed fact and law is overriding and palpable error, unless a clear error in principle is made with respect to the characterization or application, in which case the error may be an error of law subject to the correctness standard. With regard to the exercise of discretion, Manderscheid J. found that reasonableness is to be applied.

Manderscheid J. addressed which issues were properly before the Court, making reference to new Rule 6.14(3), which states that any Appeal of a Master's decision is on the record, and if the Judge permits, may also be based on new evidence that is significant enough that it could have

affected the Master's decision. Citing new Rule 6.14(5), Manderscheid J. stated that any new evidence sought to be admitted must be filed and served at least one month before the scheduled hearing date. As a Default Judgment was in place and no steps had been taken to overturn it, Manderscheid J. found that the Defendant was not permitted to raise allegations against a non-party, contest the validity of the contracts, or allege fraud in the Appeal. The only issue the Defendant was permitted to raise afresh related to the amount of damages owed to RBC.

Between the date of the Appealed Decision and the Appeal, the Defendant filed three Affidavits. Under Rule 6.14(3), Manderscheid J. found that such evidence could be admitted if it is significant enough that it could have affected the Master's decision. However, the subject of the new Affidavit evidence was the issue of miscalculation and was never raised before the Master. Although Manderscheid J. found that permitting new evidence under R. 6.14 did not extend to permitting an Appellant to raise a new issue not before the Court below, given that the Defendant was a self represented litigant, Manderscheid J. exercised his discretion in considering the new issue and some of the new evidence.

Manderscheid J. also addressed whether the Master should have granted the Defendant an adjournment, concluding that the Master did not err in denying an adjournment. Manderscheid J. concluded that the Appeal should be dismissed and that costs should be awarded to RBC on a solicitor-client basis as provided for in the mortgage.

**SHENGLI OILFIELD FREET PETROLEUM EQUIPMENT CO. LTD. v. ASCENSION VIRTUAL GROUP LTD., 2010 ABQB 795**
**Rule 6.14**

The issue in this case was the procedure involved in an Appeal to a Justice of a Master's decision. The Appellant sought to introduce fresh evidence on Appeal to the Justice. The Appellant proposed that the hearing of the Appeal itself should deal with the whether the new evidence was admissible. The Respondent submitted that the Rules require that the admissibility of the evidence be determined prior to the hearing of the Appeal.

The Rule:

> **6.14(3)** An appeal from a master's judgment or order is an appeal on the record of proceedings before the master and, if the judge permits, may also be based on new evidence that is significant enough that it could have affected the master's decision…
>
> **(5)** The appellant must file and serve on the respondent to the appeal, one month or more before the return date scheduled for hearing the appeal,
>
> (a) the transcript of proceedings described in subrule (4)(c) or, if the transcript is not available at the time of filing, confirmation that the transcript has been ordered, unless the Court dispenses with the requirement for a transcript under subrule (4)(c),
>
> (b) any new evidence sought to be relied on, subject to the limitation described in subrule (3), and
>
> (c) any further written argument.
>
> **(6)** The respondent to the appeal must file and, within 10 days after service of the record of proceedings, serve on the appellant
>
> (a) any further written argument the respondent wishes to make, and
>
> (b) any new evidence sought to be relied on, subject to the limitation described in subrule (3).

Kenny J. determined that a literal reading of Rule 6.14 would require a two-step process: new evidence sought to be filed and relied upon at the Appeal could only be filed after it was determined whether it complied with the limitation set out in subrule (3). In other words, the literal reading would require a rather ineffectual process: first, a Judge would have to review all the material to decide if the new evidence met the test set out in the Rule; second, another Judge would decide the Appeal. Kenny J. determined that this could not have been what was intended by the Rule: a two-step process was not contemplated by the new Rule. New evidence is to be filed and served along with the rest of the material and it will be up to a Justice hearing the Appeal to determine if it meets the test set out in Rule 6.14(3). Kenny J. considered the dilemma facing the party that receives the fresh evidence

prior to the Appeal: should it Cross Examine on the new evidence prior to Appeal, thereby perhaps conceding that the new evidence would be relevant or admitted by the Justice at the Appeal? Or should it wait for the Appeal then seek an adjournment? Her ladyship did not foresee that the obtaining of an adjournment to address the new evidence would be very difficult.

**LEE v. LEPAGE, 2010 ABQB 829**
**Rule 6.14**

This was an Appeal from a decision of Master Hanebury regarding a reduction of allowed disbursement amounts for three experts' reports. Tilleman J. confirmed that an Appeal from a Master is on the record of proceedings before the Master. Tilleman J. noted that he may have constructed his reasons differently but that he would have reached a similar costs decision had he exercised his own discretion. The Master's Decision was not in error, let alone an overriding and palpable error, and the Appeal was dismissed.

**JANVIER v. 834474 ALBERTA LTD., 2010 ABQB 800**
**Rules 6.14 and 15.12**

The Defendants appealed a Master's decision which denied their Application for Summary Judgment.

Pursuant to Rule 15.12, the Court held that Rule 6.14, which provides for an Appeal from a Master to a Justice, applied to the Appeal before it. In making this finding, the Court noted that the law in Alberta for over 90 years had been that Masters' Decisions were considered *de novo* and no deference was given to a Master's Decision. However, Rule 6.16 "changes the way in which an Appeal Court is to consider an appeal from a decision of the Master." In particular "an appeal from a Master is no longer a hearing de novo. It is now an appeal on the record. As such, the standard of review of the decision of the Master must be determined before the Appeal Court considers the appeal on its merits". Accordingly the Court considered the different standards of review applicable depending on the issues that arise on Appeal and held:

> ...the standard of review on a decision from the Master on a question of law is correctness. The standard of review for facts accepted by the Master or factual inferences drawn by the Master from the evidence is reasonableness. The finding must amount to a palpable and overriding error. The imputed error must be plainly identified and must be shown to have affected the result. On a question of mixed fact and law, if that principle of law cannot be extricated from the question, then the standard of review is again one of reasonableness only to be interfered with if a palpable and overriding error can be shown. If the principle of law can be extricated from the question, then the standard of review on the principle of law is correctness.

As with other appellate reviews, the new Rules require the Court to engage in an analysis as to the appropriate standard of review, prior to considering the substantive merits of the Appeal itself on an Appeal from a Master.

**LINDNER v. CHITTICK, 2010 ABQB 819**
**Rules 6.14, 9.15 and 15.6**

The Applicant sought an Order to discharge an *ex parte* Order ordering the discharge and withdrawal of a restrictive covenant. The Application was originally brought under the "old" Rule 387(3), which allowed for a Master or Justice to vary or discharge an *ex parte* Order. However, when the Application was heard, the new Rules of Court were in effect and Rule 9.15(1) was the applicable Rule. The material difference between Rule 387(3) and 9.15(1), is that Rule 9.15(1) does not require notice to be provided to the other parties in the Action, whereas its predecessor required notice to "every person affected".

Prior to engaging in a substantive analysis, the Court considered whether the new Rules applied to the Application before it and held that an Application to discharge the Order fell within the description of an "existing proceeding" under Rule 15.1(a) of the new Rules as a "court proceeding commenced but not concluded under the former rules". In determining whether the new Rules should apply, the Court cited Rule 15.2(1) which

provides that the "new Rules apply to every existing proceeding unless otherwise stipulated". However, Rule 15.6 provides an exception to this Rule:

> ...where there is any doubt about whether the former or the new Rules apply, or any difficulty, injustice, or impossibility arises, the Court may make an order suspending the operation of a new Rule and substituting a former rule. In addition, Rule 15.12 provides that where the new Rule imposes "a new test, provide a new criteria or provide an additional ground for making an application", the new Rules apply in respect of applications made but not heard prior to the coming into force of the new Rules.

Insofar as the Application before it was concerned, the Court held that the new Rules governing an Appeal from a Master's Decision to a Justice did not apply. The Court found that the variation or discharge of an *ex parte* Order made by a Master under Rule 9.15(1) is not an Appeal within the meaning of Rule 6.14(3), since the Application could also be made before a Master. A finding that Rule 6.14(3) did apply to Rule 9.15(1) "would be to place limits on the parties' evidence which would not apply if they had made the application to a Master". However, the Court noted that if Rule 6.14(3) did apply it would use its powers of discretion under that Rule to permit the new evidence which was presented in relation to the Application to vary and discharge the *ex parte* Order. The Court held that if the new evidence was not admissible under Rule 6.14(3) it would have applied Rule 15.6 which allows the Court discretion to substitute the former Rule for the new Rule, and would have allowed the new evidence to be heard.

**HERITAGE STATION INC. v. PROFESSIONAL STUCCO INC., 2011 ABQB 18**
**Rule 6.14**

The analysis focussed on when it is appropriate for the Court to exercise its discretion to permit new evidence at an Appeal. Wilson J. concluded that the test for admissibility of new evidence in Rule 6.14(3) is in essence the same as that in R. v. Palmer (1979), 50 CCC (2d) (S.C.C.) – the test which governs the admissibility of new evidence before the Court of Appeal under Rule 516.2. That test is:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at Trial;
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the Trial;
> (3) The evidence must be credible in the sense that it is reasonably capable of belief; and
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at Trial, be expected to have affected the result.

Wilson J. stressed that the word "new" in Rule 6.14(3) was a clear signal that the proffered materials must truly be "new evidence", in the sense that they could not by due diligence have been adduced at the Chambers Application; in other words, they must be "recently discovered" or "recently made available".

**ANDRIUK v. MERRILL LYNCH CANADA INC., 2011 ABQB 59**
**Rules 6.37 and 10.33(2)(b)**

The Defendant applied to strike a Notice to Admit Facts served after the Plaintiffs filed a Statement of Claim pursuant to the *Class Proceedings Act*. The Defendant claimed that the Notice to Admit was premature and otherwise improper.

Martin J. held that the Application was to be determined under Rule 6.37 which deals with Notices to Admit and, in particular, Rule 6.37(8) which holds that, on Application, the Court may set aside a Notice to Admit. Martin J. further held that a failure to admit anything that should have been admitted is a specific matter that the Court can consider under Rule 10.33(2)(b) when asked to make a costs award. Unlike "old" Rule 230, Martin J. found that Rule 6.37(8) does not outline when a Court should set aside a Notice to Admit, leaving it to the discretion of the presiding Judge. Further, Rule 6.37(8) expressly states that a Notice to Admit can be used in "applications" as well as "originating

applications, summary trial or trial", and therefore, while a Notice to Admit may be useful to crystallize certain facts after Discovery and before Trial begins, it is also useful at other times.

**PONICH v. PONICH ESTATE, 2011 ABQB 33**
**Rule 7.1**

The Applicant sought the quantification of his claim against his late father's estate arising from the fact that he qualified as a "dependant" within the meaning of the *Dependants Relief Act.* The Respondents argued, and the Court agreed, that prior to a quantification of his claim, the Applicant was first required to prove that he was in fact a "dependant" pursuant to the *Dependants Relief Act.* In addition to arguing that the Applicant was required to prove that he was entitled to support from his father's estate prior to any quantification of his claim, the Respondents relied on Rule 7.1 in support of their argument that the determination of entitlement under the *Dependants Relief Act* should be severed from the issue of quantification. Pursuant to Rule 7.1, the Court determined that it had jurisdiction to sever the issue of entitlement from quantification. In reaching this conclusion, Veit J. held that Rule 7.1 "is considerably broader in scope than the Rules it replaces and explicitly authorizes the granting of orders designed either to dispose of part of a claim or to save expense". The Court also stated that consideration must be given to the underlying objectives of the new Rules of Court and Rule 7.1 "must be interpreted in light of the foundational rules, which themselves encourage adoption of processes that will allow fair trials to be held more quickly and more cheaply…". In light of these considerations, the Court ordered that the issues of entitlement and quantification should be severed.

**MONTES v. AL-SHIRAIDA, 2011 ABQB 54**
**Rules 9.15 and 9.16**

The Defendant applied to set aside two separate Consent Judgments entered into between the Plaintiff and the Administrator of the *Motor Vehicle Accident Claims Act.* The Consent Judgments were granted by Justice Hillier in June of 2006. The requirement, pursuant to Rule 9.16, that the same Justice who heard the original Application hear the Application to set aside, was dispensed with as a result of a 4 ½ year delay between the date of the original Judgment and the Application to set aside -- Rule 9.15 allows the Court to set aside a Judgment made without notice to one of the parties, or following a Hearing at which a party did not appear because of a mistake.

The first Consent Judgment was not set aside due to the fact that the Defendant knew that he had been noted in default in 2002 but took no steps to set aside the noting in default for eight and a half years. The Consent Judgment was obtained in 2006. The Court found that the second Consent Judgment was not properly obtained. The Defendant had filed a Statement of Defence. Counsel for the Defendant had subsequently filed a Notice of Ceasing to Act which set out the address of the Defendant as "unknown". Neither the Plaintiff, nor the Administrator, took any steps to attempt to locate the Defendant. As a result, the Defendant did not receive notice of the Application for the Consent Judgment and it was a mistake by the Plaintiff and the Administrator not to either serve the Defendant or bring an Application for Substitutional Service or an Order dispensing with service. The Court stated that "two parties cannot simply consent to a Judgment striking out another party's Statement of Defence". The second Consent Judgment was set aside pursuant to Rule 9.15.

**BANK OF MONTREAL v. COCHRANE, 2010 ABQB 808**
**Rules 10.29, 10.31 and 10.33**

During the course of this Action, Kent J., as Case Management Justice, heard a number of interlocutory Motions, but declined to address the issue of costs on each of these Applications until guidelines were set into place to manage this complex litigation. Kent J. noted that although the new Rules of Court "do not change the principles that are applicable to a determination of the appropriate award of costs", they do require the Court to consider certain matters in more detail than the former Rules. The Court acknowledged that the general rule regarding costs remains that the successful party is entitled to costs (Rule 10.29) and also noted that costs remain in the Court's discretion (Rule 10.29(1)(a)). The Court then considered Rules 10.31 and 10.33 which establish various matters that the Court

may take into account when awarding costs, including "the degree of success, the importance of the issue, the complexity of the action, the conduct of any party, and whether the application was unnecessary, improper or a mistake". Kent J.'s decision suggests that the provision of costs and the analysis the Court must engage in prior to awarding costs has not been substantially changed by the Rules, however, the new Rules may require the Court to engage in a more detailed analysis, where such an analysis is warranted.

**GRANT v. GRANT, 2010 ABQB 735**
**Rule 10.32**

The issue before the Court in this case was the award of costs in "novel" cases. In response to the Applicant's submission that he should be entitled to costs of a Special Chambers Application as he was substantially successful, the Respondent proposed that no costs should be awarded because the issue before the Court was "novel".

The new Rules of Court provide that the novelty of a case may be a factor in determining the appropriate costs award, in the context of class actions. With respect to all other proceedings, the new Rules of Court do not expressly state that the general approach to costs should be departed from in novel cases. The common law remains the authority in this regard which provides that the successful party on a matter may not be entitled to costs if the issue before the Court is a "novel" one. The common law on this point provides "[i]n order to benefit from costs protection, a case must involve truly novel issues, not 'merely' ones which are fundamental".

**MAYOWSKI v. MAYOWSKI, 2011 ABQB 31**
**Rule 12.48**

This was a divorce Action in which the Plaintiff wife made an Application for Summary Judgment before the Case Management Judge. The issue before the Court was whether Summary Judgment was available in the circumstances. The Court concluded that, because this matter was an active Divorce Action, Rule 12.48 made it clear that Summary Judgment is not available.

**BAHCHELI v. YORKTON SECURITIES INC., 2010 ABQB 824**
**Rule 15.2**

This Appeal arose from an order from Master Laycock, granted in April 2010, dismissing the Plaintiff's Action pursuant to Rule 244.1 as nothing had been done to materially advance the Action in the previous five years. The Appeal was heard on November 1, 2010 and the first issue dealt with by the Court was whether the new Rules of Court applied to the Appeal.

The Court concluded that as a result of Rule 15.2(1) "[t]here can be no doubt that the new rules apply to the hearing of this appeal". The Court held that although former Rule 244.1 required nothing to have occurred that "significantly advanced" the Action, the change in terminology in the new drop dead rule, Rule 15.4(1), which requires nothing to have occurred which "materially advances" the Action, does not materially change the effect of the Rule.

> … I find there is no significant or material difference between the two rules which would affect the determination of this appeal. There can be no different result if a thing or step is found to have been "significantly advanced" than if that thing or step is found to be "materially advanced".

In addition to concluding that there is no significant difference between the old drop dead Rule and the new drop dead Rule, insofar as a determination of whether a step "significantly advances" or "materially advances" an Action, the Court also found that in this regard "the jurisprudence relating to the former 'drop dead' rule continues to be applicable to the new rule".

## COMMENTARY

**Managing Litigation**

The idea of "Managing Litigation" has been introduced by Part 4 of the new Rules. The parties themselves are responsible for managing their dispute and planning its resolution in a timely and cost effective way [Rule 4.1].

To fulfill this requirement, the parties must [Rule 4.2], among other things:

- In all matters, act in a way that furthers the purpose and intention of the Rules; and
- In all matters, engage in at least one Dispute Resolution Process ("DRP") (unless the Court waives this requirement).

The mandatory DRP requirement has been introduced to facilitate the quickest resolution of a dispute at the least expense, and to encourage the parties to settle as early as possible.

In all cases the parties must consider and engage in one or more DRPs, unless the Court waives that requirement [Rule 4.2(e)]. Part 4 does not apply to an Action brought by Originating Application, unless agreed to by the parties or the Court so orders.

**Standard or Complex Cases:**

If the parties do not agree within 4 months of a Statement of Defence being filed as to whether an Action is "Standard" or "Complex", and if the Court does not otherwise order, the action will be considered as a Standard Case [Rule 4.3(3)]

If the Action is a Standard Case (and unless the parties otherwise agree or the Court otherwise orders, and subject to matters arising beyond the control of the parties) the parties must, within a reasonable time considering the nature of the action, among other things: …

(a) Engage in a dispute resolution process (unless waived by the Court) [Rule 4.4].

**Mandatory Dispute Resolution Processes ("DRP")**

In all matters, "Standard" or "Complex", the new Rules require the parties to engage in at least one DRP, unless this requirement is waived by the Court in limited circumstances [Rules 4.2 and 4.16(2)]. Parties to an Action must, jointly and individually during that Action, periodically evaluate DRP alternatives to a full Trial, with or without assistance from the Court [Rule 1.2(3)(b)].

An impartial third person in the private sector can act as a mediator [Rule 4.16(1)].

A Trial date cannot be set unless the parties have participated in at least one DRP, or the Court has waived that requirement or Discoveries are complete under the old Rules by November 1, 2010 [Rules 8.4(3) and 15.3].

**Comment on Mandatory DRP**

A disadvantage of the requirement for at least one DRP before an action can proceed to trial is of course the problem of delay and cost.

On the other hand, there are considerable advantages to engaging in a DRP.

(a) In many cases, effective mediation will result in the resolution of the action, and avoid the expense of further proceedings.
(b) Early mediation will often eliminate tangential issues and save costs by narrowing the scope of the litigation.
(c) Mediation also operates as an opportunity for both sides to evaluate their own positions, and those of their opponents.
(d) Use of a private mediator will avoid the time-cost of waiting for the availability of an appropriate JDR judge.
(e) A clear benefit of the new requirement for at least one DRP in every action is that neither side will bear the disadvantage of "blinking first" by suggesting mediation. It is often remarked that the party suggesting mediation is conceding vulnerability - that concession will no longer have to be made.

The effort required to prepare for mediation is not insignificant. However, irrespective of the outcome that effort is never wasted. Preparation for mediation doubles as preparation for other steps such as Discovery and Trial preparation.

With the increased volume of matters which will now have to be referred to DRP, the pressure on the Courts - already heavily burdened with JDR requests - will be extreme.

An **impartial third person** in the **private sector** can act as mediator. (New Rule 4.16(1)).

Two of the partners at JSS Barristers, Sabri M. Shawa and Robin Camp, are available to act as impartial third person mediators under Rule 4.16(1).

**Sabri Shawa 403-571-1527 shawas@jssbarristers.ca**
**Robin Camp 403-571-4318 campr@jssbarristers.ca**

## ABOUT JSS BARRISTERS

JSS Barristers acts for substantial corporate entities, public bodies and individuals, but takes pride in its advocacy on behalf of each one of its clients. The firm provides a full range of litigation counsel to parties involved in a wide spectrum of businesses and industries.

The firm's lawyers litigate in, among others, the areas of business law, banking and financial services, product liability, tort, natural resources, securities, regulatory tribunals, bankruptcy, insurance, professional negligence, serious personal injury, employment and commercial trade secrets and proprietary information.

The lawyers at JSS Barristers come from widely divergent backgrounds, and have considerable experience as Trial advocates. They have appeared at all levels of the Courts of Alberta and Canada, as well as before regulatory bodies such as the Alberta Securities Commission, the Energy and Utilities Board, and the Law Society of Alberta. The lawyers at JSS Barristers have developed successful practices dealing with mediations, arbitrations and other alternative dispute resolution processes.

We have the depth and experience to represent sophisticated clients in complex and multi-party litigation. At the same time, we provide attentive service to smaller corporate clients and individuals involved in the litigation process. Our clients deserve and receive the highest level of representation.

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## OUR LAWYERS

**Rob Armstrong**
armstrongr@jssbarristers.ca 403-571-1525

**Beth Aspinall**
aspinalle@jssbarristers.ca 403-571-4315

**Erin Baker**
bakere@jssbarristers.ca 403-571-0744

**Raymond Bastedo**
bastedor@jssbarristers.ca 403-571-1547

**Geoffrey Boddy**
boddyg@jssbarristers.ca 403-571-0739

**Robin Camp**
campr@jssbarristers.ca 403-571-4318

**Andrew Culos**
culosa@jssbarristers.ca 403-571-1524

**Bryan C. Duguid**
duguidb@jssbarristers.ca 403-571-0746

**Matthew J. Epp**
eppm@jssbarristers.ca 403-571-1538

**Kajal Ervin**
ervink@jssbarristers.ca 403-571-0745

**Emily Grier**
griere@jssbarristers.ca 403-571-1546

**Robert Hawkes**
hawkesr@jssbarristers.ca 403-571-1544

**Oliver Ho**
hoo@jssbarristers.ca 403-571-1529

**Carsten Jensen, Q.C.**
jensenc@jssbarristers.ca 403-571-1526

**Maureen McCartney-Cameron**
cameronm@jssbarristers.ca 403-571-0740

**Stacy Petriuk**
petriuks@jssbarristers.ca 403-571-1523

**Gavin Price**
priceg@jssbarristers.ca 403-571-0747

**Darren J. Reed**
reedd@jssbarristers.ca 403-571-1516

**Sabri Shawa**
shawas@jssbarristers.ca 403-571-1527

**Glenn Solomon, Q.C.**
gsolomon@jssbarristers.ca 403-571-1507

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