Common Contested Chambers' Applications
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FOREWORD

I have had an opportunity to present this paper a number of times over the last 30 years for both the Canadian Bar Association and the Legal Education Society of Alberta. This edition of the paper also includes precedents which are designed to be reflective of the *Alberta Rules of Court* that came into effect November 1, 2010. It is hoped that people will look at the contents of the paper for the relevant application with which they are dealing. Ideally, people should be able to do up their own court records for a court application based upon the paper, and can simply check the court records prepared as against the precedents.

This paper includes a discussion on the form of Application, Affidavit in Support of the Application, and Order (the words "Application", "Affidavit in Support" and "Order" are capitalized in the paper when these words are being used in the context of the actual form of Court documents to be used for any application as opposed to being used in a generic sense) required with respect to various applications, except in instances where the nature of the application makes the form of these records obvious. The applications addressed are the ones which I feel practitioners will run into most frequently. There is also a brief section at the end of the paper as to whether these applications should be brought before a Master or a Judge in Chambers.

The case law referred to here with respect to certain applications, is far from exhaustive. References to cases in this article are primarily for the purposes of addressing the question as to the form the Application, Affidavit and Order should take with respect to each application. Also, it should be remembered that Rule 6.3(2), requires that the Application be as set out in Form 27, state the grounds and material or evidence intended to be relied on, the statutory provision or rule that is being relied on in making the application, any irregularities complained of or objection relied on, as well as how the application is proposed to be heard or considered. The choices the Applicant has on the latter point can be found in Rule 6.9(1), with the most common choice likely being "in person, with one, some or all of the parties present". Although not stated in the body of the paper, each Application should recite all the materials that will be relied upon in support of the application. Rule 6.3(2) is designed to ensure that the Respondent on an application is not taken by surprise. Under Rule 6.6, the Respondent is under a similar obligation to not take the Applicant by surprise.

When dealing with a matter that is set up as a special application (see Civil Practice Note. 2, of Court of Queen's Bench Civil Practice Notes), in filing the Application, counsel are required to indicate an estimate of the time required for argument which should be placed prominently on the Application. My normal practice has been to place such an estimate of argument for all parties involved at the end of the Application document.

The requirements in relation to Affidavits as set forth in Rules 13.18 to 13.26 should be noted. Rule 13.19 states very specific requirements for Affidavits and requires that Affidavits be in Form 49.

On the issue of costs on any Chambers' Application, Rule 10.29 should be kept in mind as the general rule is that costs should be award against the unsuccessful party on an interlocutory application and that those costs should be paid forthwith by that unsuccessful party. Although not specifically stated in the body of this paper under each application as it would be repetitive to do so, generally the successful party should ensure that the Order granted on any Chambers' application

provides for costs in favour of their client on a specific column of Schedule C to the rules together with reasonable disbursements incurred in relation to the application.

In closing, I wish to recognize and thank four individuals without whose assistance this paper and the accompanying precedents would not have been possible. Lorene Klippert provided assistance in preparing 5 of the previous updates of this paper that precede this one. Sonya Lawrence has provided invaluable assistance in helping develop the new precedents for the various applications that needed to be prepared as a result of the rules that came into effect on November 1, 2010. The precedents provided with this paper would not have been possible without her efforts. Beamer Comfort has also provided great assistance by reviewing this paper and updating the case law referenced in this paper. Mary Kuchera, my assistant for the last 16 years, did the work that allowed me to get through all the redrafting and formatting of the text of the current edition of this paper.

Daniel T. Gallagher
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I. THE APPLICATIONS

1. Change of Venue (Rules 3.5 and 3.6)

The appropriate judicial centre for purposes of the action is established by either Rule 3.3, or in cases where the possession of land is claimed, Rule 3.4.

Notwithstanding these rules, the Court can order that the action be transferred to another judicial centre under Rule 3.5 or that the trial be held in any place specified by the Court under Rule 3.6 other than the judicial centre in which it is presently located.

Rule 3.5 indicates that the Court may transfer an action from one judicial centre to another if it is satisfied that it would be unreasonable for it to be carried on in the judicial centre in which it is located. "Unreasonable" has been held to mean a situation where there was no logical grounding and it did not make sense.[1]

The rules do not provide a test that the Court should use in granting an Order under Rule 3.6. Therefore, the test as to whether the trial should be held in any place other than the judicial centre in which the proceeding is located, likely will be based upon case law for change of venue applications under previous versions of the rules. Such test is based upon the balance of convenience of the parties and the witnesses, and not the convenience of counsel.[2] On the face of it, an application under Rule 3.6 appears to have a lower threshold than an application under Rule 3.5. However, one can expect that the basis and materials filed for an application under Rules 3.5 and 3.6 will be similar.

The Application should under "remedy claimed or sought" state, in the case of Rule 3.5, that the action be transferred from the current judicial centre to another that is specified, and in the case of Rule 3.6, that the trial of the action take place in a judicial centre specified as opposed to the judicial centre in which the action is currently located.

The "grounds for making this application" under Rule 3.5, will be that it is unreasonable for the action to be carried on in the judicial centre in which it is currently located. The "grounds for making this application" under Rule 3.6 will be that the balance of conveniences of the parties and the witnesses at trial warrants that the trial of this matter take place in another specified judicial centre.

The Affidavit of the client filed in support of an application under Rule 3.5 or 3.6 might include some or all of the following:

(a) the general nature of the action, and perhaps where appropriate, the circumstances giving rise to the action, where the relevant events occurred, and if appropriate, where the subject matter of the action is located;

(b) where parties dealing with the subject matter of the action are located;

(c) a list of the likely individuals to be the subject to Questioning and the place where they reside or work;

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[1] *Siver v. Siver,* 2010 ABQB 755

[2] *Blue River Heavy Hauling Ltd. v. Cal-Van Auctioneering Ltd.* (1987), 87 A.R. 67, at 69 (M.Q.B.)

(d) a list of probable witnesses for the trial of the matter and where they reside, indicating beside each witness whom the Applicant may call, who that person is and providing a brief innocuous summary of the evidence they might contribute at trial;

(e) that all or most potential witnesses for the Plaintiff or the Defendant reside in a certain area;

(f) correspondence relating to a request for a voluntary transfer of the matter from one judicial centre to another as well as a statement that counsel for the Respondent has either declined to consent to a transfer of the matter to another judicial centre or has failed to respond to the request.

In doing any such list mentioned under (d) above, one must consider the consequences, including the consequence of including anyone on the list that one does not eventually call as a witness at trial. If one puts someone on the list and does not call that person at trial, the other side may try to use the reference in the Affidavit to the witness to ask for an adverse inference to be drawn by the Trial Judge or jury.

The Order granted under Rule 3.5 should state that the action be transferred from the judicial centre in which it is located to another judicial centre. An Order granted under Rule 3.6, should state that the trial in the action is to take place in a specified judicial centre and not in the judicial centre in which the action is currently located.

It should also be noted that change of venue applications may also have to be brought for non-compliance with Rules 3.3 or 3.4 that occurred when the action was originally filed by the Plaintiff. Generally, in cases involving such non-compliance, the granting of an Order directing the transfer of the action to the judicial centre contemplated by Rule 3.3 or 3.4 should be relatively obvious and involve a straight forward application to the Court.

2. Particulars (Rule 3.61)

Prior to the rule changes on November 1, 2010, it was felt that an application for particulars would be granted by the Court if it found that such particulars were necessary in order to enable the Applicant to file proper pleadings, assuming that the Applicant did not already have knowledge of these particulars.[3] In stating the latter point, it should be remembered that it is no objection to an application for particulars to simply say that the Applicant must know the true facts of the case better than the Respondent. The Applicant is entitled to know the outline of the case that the Respondent will try to make against him, which may be something far different than the true facts of the case. If the pleading as filed by the Respondent is not sufficient to allow the Applicant to know what case he must meet, he will be entitled to particulars.[4]

To a lesser extent, particulars also would be ordered so as to avoid surprise or to let the Applicant know the case that he has to meet at trial.[5] As the November 1, 2010 rules, like their predecessor, supply no criteria as to when particulars should be supplied, it can be expected that Rule 3.61 will be

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[3] *Physicians' Services Inc. v. Cass,* [1971] 2 O.R. 626; *Riske v. Kittlitz*, [1943] 1 W.W.R. 251 (Alta. S.C.T.D.); *Lougheed v, C,B.C.,* [1979] 3 W.W.R. 334

[4] *Stoney Tribal Council v. Pan Canadian Petroleum Ltd.* (2005), 54 Alta. L.R. (4th) 184, at para. 5 (C.A.)

[5] *Spedding v. Fitzpatrick* (1888), 38 Ch.D.410, at 413-14 (Eng. C.A.); *Anglo-Canadian Timber Products Ltd. v. B.C. Electric Co. Ltd.* (1960), 23 D.L.R. (2d) 656 (B.C.C.A)