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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. Our website, www.jssbarristers.ca, also features a Cumulative Summary of Court Decisions which consider the Alberta Rules of Court. The Cumulative Summary is organized by the Rule considered.

Below is a list of the Rules (and corresponding decisions which apply or interpret those Rules) that are addressed in the case summaries that follow.

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3.73	• SPARTEK SYSTEMS INC v BROWN, 2014 ABQB 526
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5.1	• APEX SAFETY APPAREL INC v KEL-TEK SAFETY APPAREL, 2011 ABQB 406
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7.3	• STONEY FIRST NATION v IMPERIAL OIL RESOURCES LIMITED, 2014 ABQB 408
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APEX SAFETY APPAREL INC v KEL-TEK SAFETY APPAREL, 2011 ABQB 406 (TILLEMAN J)
Rules 1.2 (Purpose and Intention of These Rules), 5.1 (Purpose of This Part), 5.3 (Modification or Waiver of This Part) and 15.6 (Resolution of Difficulty or Doubt)

In a Case Management dispute, the Defendants argued that the individual who swore the Plaintiff's Affidavit of Records should also be appointed as the Plaintiff's corporate representative for Questioning. The Plaintiff argued that an appropriate corporate representative for Questioning had been chosen.

Tilleman J. held that the Plaintiff had the right to appoint a representative pursuant to Rule 5.4. His Lordship stated that the appointment of the Plaintiff's corporate representative achieved the goals of proceeding with the Action in a timely and cost effective way pursuant to Rule 1.2(1) and (2) as well as Rules 5.1(1) and 5.3(1). Further, Tilleman J. observed that it was important that the Court be satisfied that the corporate representative be "fully informed and prepared for questioning".

Justice Tilleman also stated that, if there was any "doubt" or "difficulty" as to whether the new Rules applied to an existing proceeding, such as this one, then the Court could rely on its discretion under Rule 15.6 to confirm its decision to allow the Plaintiff's selection of corporate representative. His Lordship was clear that the overriding consideration in determining whether the former or new Rules applied under Rule 15.6 was to advance the goal of moving the litigation forward. Justice Tilleman held that the Plaintiff's selection of a corporate representative was both reasonable and *bona fide*, and the selection achieved the goals of proceeding in a timely and cost effective manner.

BANK OF MONTREAL v RAJAKARUNA, 2014 ABQB 415 (DARIO J)
Rules 1.2 (Purpose and Intention of These Rules), 1.4 (Procedural Orders), 6.14 (Appeal from Master's Judgment or Order), 7.2 (Application for Judgment), 7.3 (Summary Judgment) and 14.1 (Application)

The Appellant, the Bank of Montreal, appealed a Master's Decision dismissing its Application for Summary Judgment. The Respondents, Gaston Rajakaruna and Shirley Rajakaruna, Cross-Appealed the Master's Costs award and, for the first time, applied for Summary Dismissal.

The Appellant had sought Summary Judgment of its foreclosure Action. The Appellant argued that the Respondents' failure to pay a noise fine and a witness fee (in relation to a Residential Tenancy Dispute Resolution Hearing) constituted defaults, and thus foreclosure was an appropriate remedy. The Court held that, although further evidence was adduced, there was still insufficient evidence to establish that the witness fee was a charge that would fall within the scope of the mortgage. In relation to the noise fine, the Court held that, even if further evidence could be brought to validate the legitimacy of the noise fine, the Appellant could not rely on the noise fine to obtain foreclosure. The Appeal was dismissed.

The Court then determined whether the Master had erred in declining to award solicitor-client Costs to the Respondents. The Appellant argued that the Respondents did not obtain leave from the Master to Appeal the Costs award. The Court held that leave was not required as the Appeal did not relate only to Costs. However, the Court found no error in the Master's Costs award.

For the same reasons that the Appeal was dismissed, the Court held that Summary Judgment dismissing the Action should be granted. The Court held while there was arguably a triable issue, a Trial would not be proportionate and fair, and was not necessary for the adjudication of the claim. The Court held that the Appellant had two opportunities to bring the required evidence before the Court and had failed to do so.

The Application for Summary Dismissal was granted and Costs were awarded on the basis of Column 5 of Schedule C, as there had been an extraordinary amount of time spent litigating the matter in relation to the value of the claim involved.

HUERTO v CANNIFF, 2014 ABQB 534 (SHELLEY J)
Rules 1.2 (Purpose and Intention of These Rules), 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Defendant applied to have the Action dismissed for long delay, arguing that three or more years had passed without a significant advancement in the Action under Rule 4.33(1) and that the inexcusable delay had caused the Defendant significant prejudice under Rule 4.31. Shelley J. noted that Rule 1.2 is relevant to Rules 4.31 and 4.33 since it encourages parties to resolve claims cost-effectively, in a timely manner, and as early as practicable.

Shelley J. concluded that the Action should be struck for long delay. Her Ladyship observed that, upon an Application pursuant to Rule 4.33, the Court is tasked with determining whether there has been a "significant advance" which provides "meaningful" progress to the litigation in the past three years. This is a functional and qualitative analysis where consideration is given to the quality of the step and how it may be relevant to the action. If no significant advance is shown in the previous three years, Rule 4.33 mandates that an action be struck. The Plaintiff argued that significant advances were made when they provided a Supplementary Affidavit of Records, retained experts, and participated in related litigation outside Alberta. Shelley J. found that the Supplementary Affidavit did not add anything new, the expert information was not disclosed to the Defendant and the related litigation was not "inextricably linked" to the primary Action. None of the steps taken by the Plaintiff were significant advancements in the previous three years.

Justice Shelley noted that the legal rule for terminating an Action under Rule 4.31 is whether there is (a) an inordinate delay, (b) that the delay is inexcusable, and (c) that the delay is likely to cause serious prejudice. An inordinate and inexcusable delay is *prima facie* proof of serious prejudice under Rule 4.31(2). This presumption can be rebutted by a credible excuse. Having concluded that there had not been a significant advance in over six years, Shelley J. stated that there was an inordinate and inexcusable delay. The Defendant did not submit an excuse to rebut the presumption that there was serious prejudice. The Action was therefore struck out under both Rules 4.31(2) and 4.33.

ALBERTA TREASURY BRANCHES v CANADIAN EGG PROCESSING INC, 2014 ABQB 548 (MASTER SCHULZ)
Rules 1.2 (Purpose and Intention of These Rules), 1.7 (Interpreting These Rules), 1.9 (Conflicts and Inconsistencies with Enactments), 4.33 (Dismissal for Long Delay) and 9.21 (Application for New Judgment or Order)

The Plaintiff applied, pursuant to Rule 9.21, to renew a Judgment that it received in 2004. The Defendants argued that, since the Plaintiff did not undertake some form of collection every three years to enforce the Judgment, the Judgment should not be renewed pursuant to Rule 4.33. Master Schulz observed that Rule 1.7 provides that the meaning of the Rules arises from the text in light of the purpose and intention of the Rules as a whole, and within the context of a particular Rule. The Court held that the purpose and intention of Rule 4.33 is to determine whether what has been done in the Action moves it closer to Trial in a meaningful way. Rule 4.33 is intended to address the process to be followed before Judgment is obtained. Master Schulz stated that the purpose of Rule 9.21 is to expedite procedure and render it less expensive. It allows a simplified and expeditious approach to renewing a Judgment. The Rule is intended to address the process to be followed after a Judgment is obtained. Both Rules 4.33

and 9.21 demonstrate the principles encouraged by Rule 1.2. Master Schulz noted that, if Rule 4.33 applied to the renewal of a Judgment, the Rule would contradict s. 11 of the *Limitations Act*. Master Schulz held that Rule 4.33 has no applicability to Rule 9.21, and the Application to renew the Judgment was granted.

DEMB v VALHALLA GROUP LTD, 2014 ABQB 554 (JONES J)
Rules 1.2 (Purpose and Intention of These Rules), 5.2 (When Something is Relevant and Material), 5.5 (When Affidavit of Records Must Be Served), 5.6 (Form and Contents of Affidavit of Records), 5.7 (Producible Records), 10.52 (Declaration of Civil Contempt), 10.53 (Punishment for Civil Contempt of Court) and Civil Practice Note #4 (Guidelines for the Use of Technology in Any Civil Litigation Matter)

The Plaintiffs had concerns with the Defendants' document production, and applied for further and better production. The Application was successful and the Defendants provided further records, but the Plaintiffs were not satisfied, believing that the Defendants had breached the Order for further and better production. The Plaintiffs applied to strike the Defendant's Statement of Defence, a Declaration that the Defendants were in Civil Contempt, and Judgment in favour of the Plaintiffs. In the alternative, the Plaintiffs sought further and better production.

Jones J. considered the requirements for production as set out in Rules 5.5 and 5.6, noting that the parties are required to exchange Affidavits of Records disclosing all records that are relevant and material to the issues in the Action, and are or have been under the party's control. Pursuant to Rule 5.2, a record is relevant and material only if it could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings, or to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings. Justice Jones set out the test for relevance and materiality considering prior leading authority and commented:

> *Mustard* tells us that facts must be "directly in issue", not merely facts which might "reasonably relate" to issues raised in pleadings. Only records which significantly help to determine one or more of the issues raised in the pleadings need be produced, not records which "could reasonably have some weight.

With respect to the declaration of Civil Contempt pursuant to Rules 10.52 and 10.53, His Lordship considered Civil Contempt in the context of patterns of delay and failure to adhere to Orders of the Court. Jones J. then reviewed the Defendants' production and the circumstances giving rise to the delays, and determined that the Defendants were not in contempt of Court, either for the delay in production or as a result of failing to provide a complete production as required by the Rules. Justice Jones also considered whether the Defendants were in contempt of Court for failing to provide their production in compliance with Rule 5.7. The Defendants had produced an entire hard drive, containing 83,000 electronic documents. The Plaintiffs did not take issue with the production of the hard drive but they objected to the excessive bundling and the manner in which it the contents of the hard drive were disclosed. The Court noted the purpose of the Rules as set out in Rule 1.2. Jones J. also noted that Civil Practice Note #4 contains guidelines for the use of technology. Jones J. stated that it is clear that a computer hard drive is not a document in itself and noted that bundling is permissible under the Rules; however, pursuant to Rule 5.7(2), the Records must all be of the same nature and the bundle must be described in sufficient detail to enable another party to understand what it contains. Further, Jones J. stated that, under the Rules, the Defendants have an obligation to disclose and produce those records that are relevant and material. Avoiding the costs associated with production is no excuse for non-production.

The Court found that the Defendants had not disclosed the relevant and material documents on the hard drive in accordance with the Rules. Justice Jones held that a further Supplemental Affidavit of Records was required. Jones J. declined to hold the Defendants in Civil Contempt or to strike the Statement of Defence.

LC v ALBERTA, 2014 ABQB 557 (GRAESSER J)
Rules 1.2 (Purpose and Intention of These Rules), 5.32 (When Information May Be Used), 5.33 (Confidentiality and Use of Information), 6.28 (Application of this Division), 6.29 (Restricted Court Access Applications and Orders), 6.30 (When a Restricted Court Access Application May be Filed), 6.31 (Timing of Application and Service), 6.32 (Notice to Media), 6.33 (Judge Assigned to Application), 10.49 (Penalty for Contravening Rules) and 10.50 (Costs Imposed on Lawyer)

The Plaintiffs sought to expand the scope of a proposed Class Proceeding in which parents and children were seeking damages arising out of the Director of Child Welfare's failure to file service plans for children under Temporary Guardianship Orders within the time required. The Certification Application was stalled by interlocutory proceedings. Counsel for the Plaintiffs, Robert Lee, applied for relief under Rule 5.33 before Justice Graesser as Case Management Justice to allow the Plaintiffs to rely on records and transcripts of Questioning produced in litigation involving other Plaintiffs suing the Alberta Government and Child Welfare authorities. The initial purpose for seeking this relief was so that Mr. Lee could rely on the records and Transcripts to avoid a Costs Award that had previously been issued against him personally as counsel for the Plaintiff. Mr. Lee believed the records and transcripts would assist him on justifying his actions that led to the personal costs award. The Plaintiffs also sought to use the records and Transcripts to support their Application for Certification as a Class Action.

In advance of the Rule 5.33 Application, the Plaintiffs filed a Brief which included 89 paragraphs relating to the claim of abuse of public office and other allegations of breach of duty. The Crown and the Public Trustee took great exception to the allegations and Mr. Lee withdrew the Application to Amend the Statement of Claim to include the impugned 89 paragraphs, but the Government sought Costs against Mr. Lee personally. Mr. Lee swore an Affidavit stating that the Government did not put forward any evidence regarding the accuracy or inaccuracy of the 89 paragraphs and sought relief from the implied undertaking in Rule 5.32 and 5.33 on the basis that the Government was the source of the documents he sought to use. Mr. Lee made a Cross-Application seeking Costs on an enhanced basis for having to defend himself against the Government's Cost Application. After the Application was set down, the Government advised that it was withdrawing its Cost Application against Mr. Lee. Mr. Lee continued his Cross-Application seeking Costs on an enhanced basis.

Graesser J. considered Rule 10.49, commenting that had the Government not sought Costs against Mr. Lee personally, Costs likely would have been in the cause, taxable by the Government at the end of the litigation in the event it succeeded or was otherwise entitled to Costs. Mr. Lee would not have incurred any Costs in defending himself from a potentially large claim for Costs. Enhanced Costs are and should be used as a consequence for bringing frivolous or vexatious claims. Enhanced Costs are also an appropriate consequence for litigation misconduct, either by the party or the party's lawyer. In some circumstances, the Court may order Costs payable to the Court itself.

While not specifically argued, Graesser J. found it appropriate to comment on two issues raised by the Application. The first issue was the element of confidentiality involved and the manner in which confidential documents and records were treated. The second issue was regarding a concern about use of confidential information without the implied undertaking having been waived. Graesser J. noted that confidentiality when records are sought to be used in litigation, is rare. The process for "secret" information to be used is found in Rules 6.28 to 6.32. The process for sealing a courtroom, restricting publication or otherwise limiting access by the public and the press to evidence used in Court proceedings is express, and requires notice to be given to the press. It must be filed, pursuant to Rule 6.33. Graesser J. stated that, in such a process, there is no need to attach exhibits to an Affidavit. The correct procedure to be followed when an Affidavit makes reference to a potentially confidential record is for the item or the document to be referenced, marked as an exhibit and made available on request to the other party. The exhibit itself does not become part of the public record. If the exhibit is ultimately used in Court, the

preservation of confidentiality is then provided for in Rule 6.30.

His Lordship was satisfied that Mr. Lee met the appropriate threshold for relief from the implied undertaking. Justice Graesser granted relief to use the requested documents and transcripts for the purposes of the Cost Application.

CHALIFOUX v GREENOUGH, 2014 ABQB 573 (CLACKSON J)
Rules 1.2 (Purpose and Intention of These Rules) and 3.68 (Court Options to Deal with Significant Deficiencies)

Pursuant to Rule 3.68 the Defendants sought to strike certain paragraphs of the Plaintiff`s Statement of Claim on the basis that the impugned paragraphs were, among other things, frivolous, irrelevant, argumentative, embarrassing, sensational, speculative, vague and conclusory. The Court noted that the onus was on the Defendants to establish entitlement to the relief sought. Clackson J. also stated that:

> … [t]he defendants must establish the ills claimed beyond a reasonable doubt. That is, I must be sure each of the impugned paragraphs violates rule 3.68 before I can grant any relief in relation to that paragraph.

After reviewing the impugned paragraphs, Clackson J. determined that they were not only proper, but necessary to the Plaintiff`s claim. The Court declined to strike any portion of the Plaintiff's Statement of Claim. However, the Court did note a deficiency in the Statement of Claim in that the Defendants could not determine from the pleading what event or events amounted to what actionable wrong, and which Defendants were claimed to be liable for having committed that wrong. Clackson J. stated that the pleading was vague as to cause of action and what defendant was responsible. The vaguery was contrary to Rule 3.68(c), as informed by Rule 1.2.

The Court ordered that the Plaintiff amend his Statement of Claim so as to identify the connections between the allegations made and the wrong claimed as it related to each Defendant.

CANADIAN NATURAL RESOURCES v SHAWCOR LTD, 2014 ABCA 289 (FRASER, CONRAD and WATSON JJA)
Rules 1.2 (Purpose and Intention of These Rules), 5.1 (Purpose of this Part), 5.3 (Modification or Waiver of this Part), 5.4 (Appointment of Corporate Representatives), 5.6 (Form and Contents of Affidavit of Records), 5.7 (Producible Records), 5.8 (Records for Which there is an Objection to Produce), 5.11 (Order for Record to be Produced), 5.14 (Inspection and Copying of Records), 5.16 (Undisclosed Records Not to be Used Without Permission), 5.17 (People Who May be Questioned), 5.30 (Undertakings), and 13.16 (Deviations from and Changes to Prescribed Forms)

This Appeal primarily reviewed Part 5 of the Rules relating to the content of an Affidavit of Records where a party claimed privilege. The Action was in respect of a claim for damages from Canadian Natural Resources Limited ("CNRL") having to replace a pipeline, designed and constructed by ShawCor Ltd. ("Shaw"), following a well blowout.

Shaw applied for an Order that CNRL provide a further and better Affidavit of Records because CNRL had allegedly not disclosed all of the records in its possession in a number of critical areas. The main issue turned on disclosure of evidence relating to CNRL's testing and investigation of the pipeline after February 4, 2009, the date on which CNRL established a protocol to funnel all reports and communications to the legal department. It claimed that any records created after this date were subject to solicitor-client and/or litigation privilege. Shaw contended that CNRL made an improper "blanket" claim of privilege, failing to describe each record or privilege claimed. CNRL argued that the case of *Dorchak v Krupka* (1997), 196 AR 81 (ABCA) (*Dorchak*), remains the law with respect an Affidavit of Records, which does not require a description of the records claimed to be privileged. Shaw's Application was dismissed by the Case Management Justice and Shaw appealed.

The Court held that the Rules must, like a provision in a statute, be read in a grammatical, purposive and contextual manner. Doing so promotes access to justice, and is further

supported by the foundational purpose in Rule 1.2 and the intended purpose of Part 5, as expressed in Rule 5.1. The Rules reflect the cultural shift to create an environment promoting timely and affordable access to justice. This requires the Rules to be interpreted in a manner that maximizes the ability of opposing counsel or parties to resolve disputes over privilege and minimize the time and expense of taking further legal steps.

The primary Rules relevant to an Affidavit of Records are Rules 5.6, 5.7 and 5.8, and these must be read together. Rule 5.7 was intended to apply to all relevant and material records, even those a party objects to produce. Thus, in an Affidavit of Records, a party must number all records in a convenient manner and briefly describe them, regardless if there is a single record or a bundle. If a party objects to produce a *prima facie* producible record pursuant to Rule 5.8, it must identify the particular ground(s) of the objection with respect to each record or bundle in order to assist the other parties in assessing the validity of the claimed privilege. This means the party claiming privilege must do two things:

1. state the actual privilege being relied upon with respect to the particular record (or bundle); and

2. describe the record in a way that, without revealing information that is privileged, indicates how the record fits within the claimed privilege.

The Court also found support for this conclusion by referring to the format of Form 26 set out in Schedule A. While the format is not strictly binding, as per Rule 13.16, Form 26 provides a list of examples of privilege followed by a colon. This suggests that a party is expected to provide more detailed information once citing the privilege claimed.

The Court rejected *Dorchak* as authority on this issue because it was decided under a different set of Rules relating to disclosure, and those Rules have now been replaced. This new interpretation of the Rules regarding disclosure is also consistent with other jurisdictions and the evolving trend in Canada towards open disclosure.

CNRL suggested that it was unnecessary to require a description of the records claimed to be privileged because the Rules provide for several options in addressing whether privilege has been properly claimed. The Court rejected this suggestion, stating that the purpose of providing a brief description is to obviate the need to seek a remedy under these other Rules.

Ultimately, the Court held that CNRL's Affidavit of Records inadequately described the documents claimed to be privileged and directed CNRL to prepare a new or supplementary Affidavit in compliance with the Rules and its Order. With regard to the privilege claimed on reports of CNRL's testing and investigation of the pipeline after February 4, 2009, the Court held that the dominant purpose of creating these reports was not necessarily for litigation: the mere fact that a lawyer becomes involved is not automatically controlling. Without further information from CNRL in the Affidavit of Records as to what records were created and for what purpose, they could not fall within solicitor-client or litigation privilege.

1400467 ALBERTA LTD v ADDERLEY, 2014 ABQB 439 (VEIT J)
Rules 1.3 (General Authority of the Court to Provide Remedies), 1.4 (Procedural Orders) and 4.22 (Considerations for Security for Costs Order)

Upon the Defendants selling their business to the Plaintiffs, the parties executed non-compete, Alberta choice of law and choice of forum agreements and employment contracts as a part of the transaction. The Plaintiffs commenced an action against the Defendants, who resided in Saskatchewan, alleging that the Defendants had breached the non-compete agreements. The Defendants counterclaimed that the Plaintiffs breached the purchase and sale agreement by failing to pay the purchase price. The Plaintiffs applied for a Security for Costs Order and a Security for Judgment Order as against the Defendants, citing Rule 4.22 and 1.4(2)(e). The Plaintiffs argued that one of the corporate Defendants had incurred other significant secured obligations since the commencement of the litigation which would make it more difficult for the Plaintiffs to enforce a Judgment. Justice Veit noted that

Rule 4.22 clearly allowed the Court to order Security for Costs against the Defendant; this is so even where the Defendant failed to satisfy the specific factors mentioned in the Rule. However, such an Order was "far from automatic". The general rule is:

> … [A] plaintiff cannot call upon the defendant, even one resident out of the jurisdiction, to provide security for the plaintiff's costs.

Justice Veit commented that the language in Rule 4.22 and the prior Rule did not create a departure from the approach of the Canadian Courts for Security for Costs. The revision to the Rules was only required in order to explicitly accommodate situations in which a plaintiff or a defendant within the Province could properly be ordered to post Security for Costs. Using the factors in Rule 4.22, Her Ladyship concluded that it was not fair and just in the circumstances for the Defendants to pay Security for Costs. The Application for Security for Costs was dismissed.

Justice Veit also considered whether the Defendants were required to pay Security for Judgment, observing that prior Alberta case law had questioned whether Rule 4.22 properly applies in motions for Security for Judgment. Her Ladyship stated that it seemed clear that Rule 4.22 is limited to Security for Costs, but it was not necessary to decide the issue since the Plaintiffs had also applied under Rules 1.3 and 1.4. Justice Veit stated that Rule 1.4(2)(e) provided the Court with the authority to impose terms and conditions on parties who come before the Court, and authorizes the Court to order the payment of Security for Judgment. Her Ladyship noted that Security for Judgment is only ordered sparingly and in exceptional circumstances. Veit J. held that a Court can issue pre-Judgment preservation Orders including Orders requiring Defendants to post Security for Judgment where it is fair and just to do so. The Court must consider all surrounding circumstances when determining whether it is appropriate to make an Order for Security for Judgment. Justice Veit concluded that it was not fair and just in the circumstances to require the Defendant to post Security for Judgment and dismissed the Application.

GAUCHIER v REGISTRAR (METIS SETTLEMENTS LAND REGISTRY), 2014 ABCA 272 (VELDHUIS JA)
Rule 2.10 (Intervener Status)

The Gift Lake Métis Settlement ("Gift Lake") applied for Intervener status in an Appeal which touched on the interpretation of the role of the Registrar and Settlement Councils in terminating memberships of Metis settlement members. The Application was not opposed, but the Respondents requested that limits be placed on the nature and scope of the intervention. Veldhuis J.A. considered Rule 2.10 and noted that the granting of intervener status is discretionary and should be exercised sparingly. Her Ladyship cautioned that interveners should not be allowed to expand the lawsuit, delay proceedings or prejudice a party. Further, in an Appeal, interveners are not usually permitted to adduce additional evidence or raise fresh issues that are not supported by the record below. Veldhuis J.A., citing prior authority, stated that, in an Appeal, it is not suitable for an intervener to extend the argument from the Court below or the argument advanced in the Appeal. However, "an intervener may be permitted to argue a new point that is inextricably linked to an issue raised by the parties…".

Veldhuis J.A. emphasized that Gift Lake would be specially affected by the issue in the Appeal and granted Intervener status subject to conditions restricting the scope of argument and the time allotted for oral submissions.

FINK v TRAKWARE SYSTEMS INC, 2014 ABQB 512 (LEE J)
Rules 2.29 (Withdrawal of Lawyer of Record), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders), 11.15 (Service on Person Providing an Address for Service) and 11.21 (Service by Electronic Method)

The Plaintiff commenced an Action against the Defendants claiming three years of unpaid wages. Defendants' counsel filed a Statement of Defence, subsequently withdrew from the record and provided a last known address for the Defendants. The Plaintiff served an Application seeking Summary Judgment against the Defendants at the last known address and sent a copy of the Application by email. The Defendants did not appear at the Application,

and Plaintiff was successful. The Defendants appealed the Master's Decision on the grounds that service of the Application was improper, and there were outstanding triable issues. The Plaintiff argued there was no issue as to service given that Rule 11.15 allows for a non-commencement document to be served at an address for service that was provided by the party for the purpose of service. The Defendant Appellants argued that the provision of an address for service by a withdrawing lawyer is directly contemplated by Rule 2.29(1)(a)(i) which places great responsibility on the withdrawing lawyer to be diligent and to ensure that the address given is the best available address. The last known address provided by the Defendant Appellants' former lawyer was incorrect.

The Plaintiff also argued that Applications to set aside Judgments or Orders due to improper service pursuant to Rule 9.15 should be heard within 20 days of the party being made aware of, or being served with, the Judgment or Order, unless the Court otherwise orders. Justice Lee extended the time to hear the matter pursuant to Rule 9.15(2). The individual Defendant, who was the sole director of the corporate Defendant, deposed that although he communicated with the Plaintiff's lawyer via email after his lawyer had ceased to act for him, the corporate Defendant was winding down its business and the email account was checked irregularly. The individual Defendant also deposed that he never authorized service to the email account as contemplated by Rule 11.21. Lee J. held that Rules 11.15 and 11.21 were applicable, and concluded that the Plaintiff conducted himself properly, in accordance with Rule 11.15, by serving the Defendants at the last known address for service, and emailing a copy to the email address that the Defendants had regularly used to correspond with counsel for the Plaintiff. Justice Lee observed that the test with respect to opening up Summary Judgments due to accident or mistake should be similar to Rule 9.15(3) (re: setting aside Default Judgments). In order to open up the Summary Judgment it was necessary to determine whether or not the Defendants had an arguable defence which would require a *de novo* hearing. Justice Lee directed a separate hearing of that issue on a future date.

SHELL CANADA PRODUCTS v SUNTERRA BEEF LTD, 2014 ABCA 243 (MARTIN, O'FERRALL and VELDHUIS JJA)
Rule 3.2 (How to Start an Action)

In 2005, Shell Canada Products and Shell Canada Limited ("Shell") and Rancher's Beef Ltd. ("Ranchers") entered into a purchase and sale agreement ("Agreement") for the SW quarter of a section of land owned by Shell. The Agreement required additional consideration to be paid to Shell if Shell sold any of the other three quarters in the section for an amount more than their previous appraised value, as long as those quarters were unimproved. In 2007, Rancher's sought creditor protection under the *Companies' Creditors Arrangement Act*. As part of the liquidation of assets, the caveat Shell registered against the SW quarter claiming an interest under the additional consideration clause was discharged from a portion of the lands in order to facilitate the sale of that portion to a third party. In return for the partial discharge, Ranchers confirmed that the additional consideration secured by the lien remained recoverable from the remaining lands. Sunterra Beef Ltd. ("Sunterra") purchased the remaining lands in the SW quarter subject to existing encumbrances. Shell sold the other quarter sections at a price higher than previously appraised and sought payment from Sunterra which Sunterra refused.

Shell brought an Originating Application pursuant to old Rule 410 (current Rule 3.2) seeking a declaration that Shell's lien was valid. The Chambers Justice held that Shell's vendor's lien was valid. Sunterra appealed the Chambers Judge's decision arguing, *inter alia*, that the Chambers Justice erred in determining that Shell's Application for a declaration was properly brought by way of an Originating Notice. Sunterra argued further that there was a factual dispute which required a trial. The Court noted that Rule 3.2 is similar to former Rule 410: an Originating Application may be used to commence an Action, but a Statement of Claim must be used if there is a substantial factual dispute. The Court held that there was no factual dispute; the dispute was over the interpretation of the additional consideration clause. The Appeal was dismissed.

MAMMOET 13220-33 STREET NE LIMITED v EDMONTON (CITY), 2014 ABCA 229 (CÔTÉ, O'BRIEN and VELDHUIS JJA)
Rule 3.15 (Originating Application for Judicial Review)

The Appellants appealed the Decision of the Chambers Judge dismissing their Application for Summary Judgment. The Action was commenced by the Respondents via an Originating Application seeking, *inter alia*, an Order striking an Edmonton municipal Bylaw. The Appellants argued that the Originating Application was not brought within six months and thus was barred by Rule 3.15. The Appellants further argued that the Chambers Judge erred in law in failing to follow *Okotoks (Town) v Foothills (Municipal District No 31)*, 2013 ABCA 315 (*"Okotoks"*) where the Court held that the passing of a municipal Bylaw "was a decision or act of a person or body" and thus was subject to Rule 3.15(2).

The Chambers Judge had referenced Okotoks and held that it was in direct conflict with *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City of)*, 2002 ABCA 131, reversed on other grounds 2004 SCC 19 (*"United Taxi"*). In *United Taxi*, the Court held that a limitation under the old Rules did not affect the Court's ability to determine if a municipality had the proper jurisdiction to enable legislation.

The Court of Appeal held that *Okotoks 2013* and *United Taxi* were not in conflict. *United Taxi* dealt with a void bylaw (ultra vires), while *Okotoks 2013* dealt with a voidable bylaw (intra vires). The Court held that this Action dealt with whether statutory preconditions were met and thus whether the bylaw was void; thus the limitation period did not apply and the Appeal was dismissed.

HARRISON v XL FOODS INC, 2014 ABQB 431 (ROOKE ACJ)
Rules 3.47 (Third Party Defendant's Options) and 3.68 (Court Options to Deal with Significant Deficiencies)

In a proposed Class Action, the representative Plaintiff sued the Defendant owner and operator of a meat processing facility located in Alberta, claiming that the Defendant's negligence lead to contamination of meat which caused the Plaintiffs to become seriously ill. The Defendant sued the Canada Food Inspection Agency ("CFIA") as a third party alleging that the food inspection processes were integrated with the Defendant's operation. The CFIA applied to have the Defendant's Third Party Claim struck out pursuant to Rules 3.47(b) and 3.68. Rooke A.C.J. considered whether the Third Party Claim should be struck out on the basis that the Claim did not disclose a cause of action. Rooke A.C.J. considered whether it was plain and obvious that the CFIA had any private law duty to the Plaintiff. His Lordship noted that the specific allegations in the Statement of Defence and the Third Party Claim were deemed to be fact for the purposes of Rule 3.47(b) and 3.68. His Lordship further stated that Rule 3.68 provides parties and the Court with a mechanism to limit or end Actions or Defences which have no possibility of success. The Rule allows a Claim to be struck, amended, to be the subject of Judgment or to be stayed. The threshold test under Rule 3.68(2)(b) is that a pleading must disclose no cause of action. His Lordship noted that Rule 3.68(3) dictates that no evidence is admissible for the purpose of determining whether a Claim should be struck. Rule 3.47(b) extended the application of Rule 3.68 to Third Party Claims.

Rooke A.C.J. stated that the test for a strike application is well established: an action or defence may be struck where it is "plain and obvious, or beyond reasonable doubt that the action cannot succeed"; and, pleadings should be considered in a "broad and liberal manner". His Lordship stated further that, in a strike Application, the pleadings that are the basis for the allegations are considered to be true with two exceptions: a fact is different from a "bald allegation" and an alleged fact may be rejected when it is absurd or highly implausible. The bar for a strike Application is set high to preserve a potential Action where possible. Pleadings must be read generously, and struck only if deficiencies cannot be corrected with amendments by the Court. In addition, radical defects are a basis to end lawsuits by striking, and Courts are required to err on the side of allowing novel claims to proceed. Using the principles and test for striking under the Rules, His Lordship considered whether it was plain and obvious that the CFIA had a private law duty to the Plaintiff class of meat consumers. Rooke A.C.J. utilized the deemed factual

foundation set out by the pleadings, which implied or stated that the CFIA was liable to the Plaintiff Class, to test whether the Defendant's Third Party Claim was hopeless and could not succeed.

Rooke A.C.J. concluded that it was not plain and obvious that the Defendant would fail as against the CFIA. Instead, there was a small potential for the Third Party Claim to be successful. His Lordship also held that CFIA owed no private law duty to the Plaintiff Class. Rooke A.C.J. also declined to grant a stay of the Third Party Claim against CFIA pending resolution of the Certification Application.

1356613 ALBERTA LTD v 1313675 ALBERTA LTD, 2014 ABQB 414 (JONES J)
Rules 3.62 (Amending Pleading) and 7.3 (Summary Judgment)

The Applicant applied for Summary Judgment of its claim. The Applicant also sought to amend its Statement of Claim, pursuant to Rule 3.62, to reflect the Respondent's change of name.

The Applicant and Respondent executed a bill of sale, which evidenced payment of $80,000.00 by the Applicant to the Respondent for the transfer of a commercial truck, purportedly owned by the Respondent. Events transpired leading to the determination that the truck had been stolen. The truck was turned over by police to an insurer. The insurer eventually transferred title of the truck to the Applicant for the additional sum of $49,550.00 paid to the insurer by the Applicant. The Applicant sought Summary Judgment for this amount, plus other expenses and losses it had incurred.

Notably, the parties made submissions on this Application without having the advantage of the Alberta Court of Appeal's decision in *Windsor v Canadian Pacific Railway*, 2014 ABCA 108. However, the parties were not invited to make new submissions in light of *Windsor* because, according to Jones J., it was "clear that under both the articulation of the summary judgment test as it existed when the parties appeared before me and as it exists after ***Windsor***, I cannot dispose of this matter on an Application for Summary Judgment". With respect to the new test for Summary Judgment, the Court confirmed that:

> … [W]hen deciding whether to grant summary judgment, the court "must examine the record to see if a disposition that is fair and just to both parties can be made on the existing record, in order to determine if there is any issue of merit that genuinely requires a trial."

After reviewing the facts of this case, the Court determined that this was not an appropriate matter for Summary Judgment, and dismissed the Application. The Court did, however, allow for the amendment to the Statement of Claim pursuant to Rule 3.62 as there was no opposition to the amendment.

SPARTEK SYSTEMS INC v BROWN, 2014 ABQB 526 (ROSS J)
Rules 3.65 (Permission of Court to Amendment Before or After Close of Pleadings) and 3.73 (Incorrect Parties Not Fatal to Actions)

The Defendant, Robert Brown ("Brown"), was the President, a director, and one of two largest shareholders of the Plaintiff, Spartek Systems Inc. ("Spartek") In 2004, Brown agreed to sell his interest in Spartek and executed a Share Sale Agreement on his own behalf and on behalf of his wholly owned company, the Defendant 1133098 Alberta Ltd ("113"). Spartek alleged that Brown, in a conspiracy with other Defendants, breached his contractual and other obligations to Spartek, including non-competition, non-solicitation of employees or clients, and protection of confidential information. 113 commenced a separate Action against Spartek claiming for monies allegedly owing under a promissory note issued pursuant to the Share Sale Agreement. The two Actions were consolidated.

Brown argued that the Share Sale Agreement should not be enforced as not all parties to the Agreement were parties to the Action. Justice Ross found no substance to the objection. Ross J. cited Rule 3.73(1)(b) which provides that "no claim or action fails because two or more parties do not join an action that they could or should have joined". In

accordance with Rule 3.73(2), where a judgment is entered in respect of the claims between the parties to the action, that judgment "is without prejudice to the rights of persons who are not parties to the action".

Spartek entered into a Settlement Agreement with the Defendants, Chris Holt ("Holt) and Carlos Claveria ("Claveria"). Spartek later continued the Action against Holt alleging that Holt breached his obligations under the Settlement Agreement. Justice Ross found no fundamental breach of the Settlement Agreement and concluded that Holt was protected from liability. Ross J. held that Holt and Claveria were co-conspirators who would have been liable but for the Settlement Agreement. Holt did not Counterclaim against Spartek seeking enforcement of the Settlement Agreement, but it was agreed by Spartek and confirmed by Justice Ross during Trial that the appropriate amendment to the pleadings was permitted without the filing of an Order, pursuant to Rule 3.65(4).

Justice Ross concluded that the Share Sale Agreement was valid and that Brown violated the non-solicitation and non-competition covenants. All of the required elements were proven regarding the conspiracy claims against Brown, Holt, Claveria, and the Defendant Terrence Matthews. Spartek proved damages for lost profits and replacement costs for employees who departed from Spartek as a result of the Defendants' unlawful actions and common design. Justice Ross also pierced the corporate veil between 113 and Brown. 113 received Judgment against Spartek pursuant to the promissory note. Because the corporate veil was pierced, Spartek was permitted to set off its Judgment against Brown from its liability to 113.

THOMSON v UNIVERSITY OF ALBERTA, 2014 ABQB 434 (SHELLEY J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Defendant, the Governors of the University of Alberta ("University"), applied to strike the Statement of Claim of the Plaintiff, Alan Thomson ("Dr. Thomson"), pursuant to Rule 3.68, on the basis that the Court lacked jurisdiction to hear the Claim relating to Dr. Thomson's employment. Dr. Thomson's Claim alleged that the conduct of the University constituted a repudiation of the employment agreement and amounted to constructive dismissal. The University argued that the collective agreement governing employment with the University contained a dispute resolution process, and as such the Court was not the proper forum.

The Court held that, on an Application under Rule 3.68:

(a) a pleading will not be struck unless it is plain and obvious the Action will fail;

(b) the Court must assume the facts in the Statement of Claim can be proved; and

(c) the Application must fail if there is a chance that the Plaintiff might succeed.

The Court held that the dispute must be resolved via the collective agreement and the comprehensive grievance and arbitration procedures therein. The Defendant's Application was granted.

LION CREEK PROPERTIES, LTD, LLP v SOROBEY, 2014 ABQB 495 (MASTER HANEBURY)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

The Plaintiff applied for Summary Judgment on its Claim and dismissal of the Counterclaim. The Claim was based on a Judgment granted in the state of Idaho for $122,551.17 USD, with interest thereafter at 5.25%. The Defendants had purchased a condo in Idaho and entered into a promissory note and deed of trust in favour of the Plaintiff to fund the purchase. The Plaintiffs could not pay the note when it expired, and could not pay the negotiated renewal balloon payment either. The condo was sold to the Plaintiff, and the Plaintiff received Summary Judgment, unopposed, against the Defendants for the deficiency. That Judgment became the subject of the Alberta Action.

Master Hanebury found that the Statement of Defense raised no genuine issue for Trial and granted Summary

Judgment in favour of the Plaintiff. The remaining question was whether the Defendants' Counterclaim raised any genuine issues for Trial, or whether it should be summarily dismissed. The Plaintiff argued that the Counterclaim was barred by *res judicata*, as the Claim could have been raised in the prior proceeding. Master Hanebury said it was unknown whether a claim based on the tort of intimidation, which was one of the claims made by the Defendants, properly belonged in the original lawsuit in Idaho, as the law there may be quite different. If the Claim did not properly belong there, then *res judicata* may not be applicable. Therefore, there was a genuine issue for Trial as to whether *res judicata* applied to bar the Claim in Alberta. Master Hanebury agreed with the Plaintiff that the Defendants' evidence was poor, but noted that the Application was not made under Rule 3.68 to Strike the Claim, but for Summary Dismissal under Rules 7.2 and 7.3. In such circumstances, the plaintiff bears the legal onus of showing that there is no genuine issue for trial. Accordingly, the Counterclaim for damages based on the tort of intimidation was not dismissed.

NASCHO ENTERPRISES LTD v EDMONTON (CITY), 2014 ABQB 569 (TOPOLNISKI J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

A developer and the City of Edmonton disagreed on whether a newly constructed apartment building needed to comply with statutory requirements for barrier-free access. One of the Applications before the Court was for Judicial Review and an Order requiring the City to issue variances for a building permit. However, since the Application had been commenced, the Government of Alberta had issued a relaxation of the statutory barrier-free requirements. Accordingly, the City argued that the current Application was now moot, and that it should be summarily dismissed. Madam Justice Topolniski agreed with the City that the developer's Application for Judicial Review was now moot.

In reaching its Decision, the Court applied Rule 7.3 and also considered the recent Supreme Court decision in *Combined Air Mechanical Services Inc v Flesch*, 2014 SCC 7. Topolniski J. stated that, if a Court is able to reach a "fair and just determination on the merits of a motion for summary judgment", there is no genuine issue requiring a Trial. The Court further confirmed previous case law, and held that the current test for Summary Judgment in Alberta is whether there is a reasonable prospect that the claim will succeed, and not whether it is plain and obvious that no claim is disclosed. Rule 7.3 is not confined to the "genuine issue for trial" test, but calls for a holistic analysis of whether the claim has merit.

The Court also considered Rule 3.68, and stated that the principle found in *Combined Air* is also applicable under Rule 3.68.:

> Rule 3.68(2)(d) permits the Court to strike a pleading if the commencement document or pleading constitutes an abuse of process.

Topolniski J. also cited *Reece v Edmonton (City)*, 2011 ABCA 238, and stated that an abuse of process is a context-specific principle to control misuse of the judicial system. Thus, asking a Court to judicially review a moot question constitutes an abuse of process.

The developer's Application for judicial review was dismissed and struck on a summary basis.

COMMUNITY FUTURES LESSER SLAVE LAKE REGION v ALBERTA INDIAN INVESTMENT CORPORATION, 2014 ABCA 232 (BERGER, MCDONALD and VELDHUIS JJA)
Rule 3.77 (Subsequent Encumbrancers Not Parties in Foreclosure Action)

The Appellant appealed a decision from the Court of Queen's Bench on the distribution of surplus funds after a foreclosure action. The foreclosure proceedings were brought by the Toronto Dominion Bank ("TD Bank") regarding a mortgage that ranked first on priority on title. The Respondent's encumbrance was in third position and the Appellant's interests flowed from an encumbrance occupying the fourth position on title. The Appellant argued that, because the Respondent had taken no action to collect the funds, the Respondent had not established an enforceable claim on the surplus funds.

The Alberta Court of Appeal affirmed the Decision of the Court of Queen's Bench and stated that the Respondent was not required to commence proceedings after TD Bank had commenced its proceedings within the limitations period. Further, as stated in Rule 3.77 and as is the practice in Alberta, there was no requirement for the plaintiff to make a subsequent encumbrancer a party to the claim unless possession is claimed from that subsequent encumbrancer. In this case, no such possession was claimed. Accordingly, the Respondent and other encumbrancers were entitled to "ride the coattails" of TD Bank and were not required to commence separate actions to enforce their interests.

GRAHAM v GRAHAM, 2014 ABQB 513 (LEE J)
Rule 4.22 (Considerations for Security for Costs Order)

The Plaintiff wife in a matrimonial Action sought an Order directing that the parties' rental property be sold and that the sale proceeds be held in trust as Security for Costs. The Defendant husband was living in the property and was receiving the rental proceeds since the matrimonial home had been sold by consent with the proceeds being held in trust by Plaintiff's counsel. The Defendant argued that his only source of income was the rental property, and selling it would seriously affect his ability to proceed with the litigation. Justice Lee considered the factors in Rule 4.22, noting that the husband had paid all previous Court Orders, and that, although the husband's financial circumstances were still unclear, he had assets in Alberta which acted as security. The proceeds from the sale of the matrimonial home were also still held in trust. As a result, pursuant to Rule 4.22(a) and (b), the Plaintiff had the ability to enforce Cost awards and the husband was not impecunious and had the ability to pay. With respect to the merits of the Action under Rule 4.22(c), Justice Lee held that, although the Defendant's outstanding property claims appeared "somewhat dubious", it would be premature to assume that the Plaintiff would be entirely successful. Finally, Lee J. noted that, under Rule 4.22(d), an Order for Security for Costs would prejudice the Defendant because a sale or lien disruption of the property would damage his ability to continue paying for the Action. Pursuant to Rule 4.22(e), the sale of the property would also result in the husband becoming homeless which would necessitate further expenses and would result in problems visiting with his children. Justice Lee noted the discretionary nature of the Rule and concluded that Security for Costs was not appropriate in the circumstances.

VANDER GRIENDT v CANVEST CAPITAL MANAGEMENT CORP, 2014 ABQB 542 (MARTIN J)
Rule 4.33 (Dismissal for Long Delay)

The Plaintiff applied to have his Claim certified as a Class Action to represent all investors who purchased units in a limited partnership which was formed to purchase and sell real property. The Defendant applied to have the Claims dismissed for long delay pursuant to Rule 4.33. Justice Martin noted that although the new Rules changed the language from "material" to "significant" advance, there was no substantive difference. Pursuant to Rule 4.33, the relevant period is three years prior to the date of the Application for dismissal. Her Ladyship observed that a number of events had taken place during the relevant time, but the key issue was whether they were significant within the meaning of Rule 4.33.

Justice Martin noted that recent case law sets out a functional approach that focuses on the substance of the steps taken. Martin J. held that there had been a number of significant advances in the Action, including the appointment of a Case Management Justice and regular Case Management meetings. In addition, Affidavits had been filed and Questioning on the Affidavits was conducted which led to an Application to compel answers to several contested Undertakings.

Martin J. rejected the Defendant's argument that steps taken to advance the matter to the Certification Hearing do not advance the Action itself within the meaning of Rule 4.33. The Rules are intended to apply to Class Actions wherever possible. The advancement of a potential Class Proceeding to the Certification Hearing constitutes advancement for the purposes of Rule 4.33, as it defines the nature of the Action and informs the parties of how a matter is going to proceed.

The Plaintiff's Application to proceed as a Class Action was

granted and the Defendant's Application to dismiss for long delay was denied.

SUN LIFE ASSURANCE COMPANY OF CANADA v TOM 2003-1 LIMITED PARTNERSHIP #2, 2010 ABQB 815 (TILLEMAN J)
Rule 5.12 (Penalty for Not Serving Affidavit of Records)

The Defendant brought an Application seeking a Costs penalty under Rule 5.12. The Application related to the Plaintiff's failure to comply with service of its Affidavit of Records in a timely manner.

The Plaintiff stated that, admittedly, its Affidavit of Records was late, but only by one week; that the late filing was through the inadvertence of Counsel; that there was no prejudice to the other side; and that there was no substantial delay or disruption to the litigation by the late filing.

The Defendant's position was simply that the Plaintiff was late and that Rule 5.12 is a strict rule, thus a double Costs award should issue. Tilleman J. reviewed Rule 5.12, specifically what was intended by the language of "sufficient cause". His Lordship noted that there was a difference between the mandatory language of the former Rule (Rule 190) versus the discretionary language of Rule 5.12. Justice Tilleman observed that sufficient cause meant a "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". His Lordship clarified that:

> Diligence means the filing party did everything it could but ran into extraordinary circumstances over which it had no practical control. Sufficient cause under Rule 5.12 will be a hard test to meet and certainly will never be captured by facts that suggest "oops, I forgot".

After reviewing the circumstances of this case, Justice Tilleman determined that double Costs ought to be awarded pursuant to Rule 5.12.

CORNELSON v ALLIANCE PIPELINE LTD, 2014 ABQB 436 (VERVILLE J)
Rules 5.34 (Service of Expert's Report) and 5.35 (Sequence Of Exchange of Experts' Reports)

The Plaintiff was the president and CEO of the Defendant corporation. He was terminated without cause and claimed payment in lieu of reasonable notice. The Defendant took the position that the Plaintiff had been paid all amounts to which he was entitled pursuant to the contractual terms applicable to his employment.

The Plaintiff advised the Defendant that he was objecting to the admission of certain experts' reports claiming that they were primary expert reports and that the Defendant had not provided a Form 25, in compliance with Rule 5.34. The reports were received at Trial subject to the Court's ultimate determination as to admissibility. The Plaintiff argued that the experts were presented by the Defendant as "fact witnesses" and no effort was made by the Defendant to qualify either one as an expert witness. Nevertheless, they purported to give opinion evidence in their reports and at Trial on the valuation issues before the Court. The Defendant took the position that these were not experts' reports within the meaning of Rule 5.34; rather, they were prepared in the regular course of business as part of the valuation process required under the Defendant's long term incentive plan ("LTIP"), and pre-dated the litigation.

After reviewing the circumstances, Justice Verville determined that the reports in question were obtained by the Defendant in the course of administering the LTIP for participants. They were admissible at a minimum to explain the basis upon which the Defendants arrived at the value per unit of the LTIP. The Court noted that the Plaintiff had not established any prejudice due to the manner and timing of notice and disclosure of these reports. As a result, the Court admitted the reports.

STONEY FIRST NATION v IMPERIAL OIL RESOURCES LIMITED, 2014 ABQB 408 (MAHONEY J)
Rules 6.14 (Appeal from Master's Judgment or Order), 7.3 (Summary Judgment) and 13.1 (When One Judge May Act in Place of or Replace Another)

The Applicants appealed a Master's Decision dismissing its Application to continue a royalties compensation claim against the Respondent. In summarily dismissing the Applicant's motion, the Master held that there was no genuine issue to be tried.

After the appeal had been heard, the presiding Justice, Justice Stevens, passed away. Pursuant to Rule 13.1, Chief Justice Wittman requested that Justice Mahoney take conduct of the matter. His Lordship contacted the parties, who confirmed that the matter could be fairly decided on the record. The Court recognized that, pursuant to Rule 6.14, an Appeal of a Masters' Decision was a hearing *de novo*.

The Court noted that, after the Appeal was heard by Justice Stevens, the test for Summary Judgment was revised by the Supreme Court of Canada in *Hryniak v Maudlin*, 2014 SCC 7. Previously the test was whether the case presented a genuine issue <u>for</u> Trial; post *Hryniak* the test is whether there is a genuine issue <u>requiring</u> a Trial. The Court also noted that *Hryniak* was decided under Rule 20 of the Ontario equivalent of the Alberta Rules of Court, which is broader than Rule 7.3. Nevertheless, in accordance with the Alberta Court of Appeal decision in *Windsor v Canadian Pacific Railway*, 2014 ABCA 108, the test in *Hryniak* has been adopted in Alberta.

In reviewing the materials, the Court first considered whether fair and just disposition could be made on the record. The Court agreed with the Master's Decision that the facts underlying the dispute were not at issue. The Court held that the resolution of the dispute turned primarily on issues of law and held that granting Summary Judgment in this case was a proportionate, expeditious and less-expensive means of achieving a just result.

The Court disagreed with the Applicant that it should be granted standing to maintain this Action and held that the Applicant did not produce reliable evidence establishing an issue of merit requiring a Trial. The Court dismissed the Appeal.

AT FILMS INC v AT PLASTICS INC, 2014 ABQB 422 (BURROWS J)
Rule 7.3 (Summary Judgment)

The Plaintiff applied for Summary Judgment. The Plaintiff and Defendant entered into contracts for, *inter alia*, the provision of plastic resins from the Defendant to the Plaintiff. An explosion occurred in the Defendant's facilities and the Defendant was not able to supply the Plaintiff with the product. The Plaintiff purchased the product from other suppliers and sought damages for the difference between what it had to pay the other suppliers, and what it would have paid to the Defendant pursuant to the contract. The Plaintiff also sought damages for its equipment that was damaged as a result of the explosion interrupting the electrical supply.

The Defendant argued, *inter alia*, that the *force majeure* clauses in the contracts were applicable. The Defendant argued that the explosion happened from peroxide warming and exploding from a liquid state, and the Defendant was not aware that an explosion from the liquid state could occur. The Defendant was only aware that an explosion could occur from peroxide warming into a vapour state. Thus, as the Defendant was not aware that this type of explosion could occur it could not guard against it, and the force majeure clause was applicable.

Between the date of the hearing and the date of the Judgment, the Alberta Court of Appeal issued the decision in *Windsor v CPR*, 2014 ABCA 108 (*"Windsor"*). The Court held that *Windsor* amended the Summary Judgment test in Alberta.

The Court found that there was uncertainty as to whether the explosion constituted a *force majeure* or not, and that the evidence presented revealed a genuine issue of fact which required resolution by Trial. The Application was dismissed and Costs were awarded to the Defendant.

WOOD BUFFALO HOUSING & DEVELOPMENT CORPORATION v FLETT, 2014 ABQB 537 (GOSS J)
Rule 7.3 (Summary Judgment)

The Plaintiff commenced an Action against the Defendants alleging that a fire in their multi-residential building was a result of the Defendants' negligence in constructing the building. The Defendants applied for Summary Dismissal of the Action pursuant to Rule 7.3(1)(b), on the basis that the Plaintiff's claim was barred by a contractual waiver, and by virtue of the *Limitations Act*, RSA 2000, c L-12. Justice Goss observed that, in Alberta, a Defendant may apply for Summary Judgment on the ground that there is no merit to the claim or part of it.

Goss J. considered prior authority, and noted that the test for a Summary Judgment Application pursuant to Rule 7.3(1)(b) had recently changed due to the Supreme Court of Canada decision in *Hryniak v Mauldin*, 2014 SCC 7. The more recent test adopted by the Alberta Court of Appeal, following *Hryniak*, encouraged the Court to take a more holistic view on whether the claim had merit, and Rule 7.3 "is not confined to the test of 'a genuine issue for trial' found in the previous rules". Nevertheless, Her Ladyship held that the bar remains high on a motion for Summary Judgment, and the onus remains with the applicant to establish that there is no merit to a claim. If the applicant discharges their burden, the onus then shifts to the respondent to show that there is arguable merit to the claim. There is no genuine issue requiring Trial only where the Court is able to make the necessary findings of fact and has the ability to apply the law to the facts.

Justice Goss denied the Application for Summary Judgment because there were genuine issues for Trial in relation to both the claim for negligent misrepresentation, as well as with respect to Section 7(2) of the *Limitations Act*.

NG v FLORENCE, 2014 ABQB 531 (VEIT J)
Rules 9.2 (Preparation of Judgments and Orders) and 10.52 (Declaration of Civil Contempt)

The Plaintiff previously applied for and obtained an Order to distribute the proceeds of the sale of property equally between herself and the Defendant as co-owners. The Plaintiff then sought a declaration of civil contempt and an accounting when the Defendant did not comply with the Order. The Defendant applied to dismiss the Applications for contempt and accounting. Justice Veit dismissed the Application for civil contempt since the Plaintiff had failed to provide the proposed form of Order to the Defendant for review for the requisite 10 days pursuant to Rule 9.2(2)(c). Further, the form of Order that was filed did not accord with the Chambers Judge's Order. The Plaintiff's Application for accounting was also dismissed because the home had already been sold and an accounting was required prior to the sale.

TANG v MUWAIS, 2014 ABQB 511 (GRAESSER J)
Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.26 (Appeal to Judge) and 10.27 (Decision of Judge)

A Review Officer reduced the fees of a lawyer who sought to have two accounts taxed against her former client. The reduction was due to ongoing delays in the scheduling of Questioning. The lawyer appealed pursuant to Rule 10.26. Justice Graesser reviewed the factors set out at Rule 10.2 with respect to the reasonableness of legal fees. Graesser J. noted that the hourly rate appeared reasonable given the lawyer's years of experience and seniority; however, His Lordship observed that the result which was achieved in the litigation is an appropriate factor to consider under Rule 10.2(f). In considering the history of the matter, what was accomplished and at what cost, Justice Graesser held there was no palpable and overriding error on the part of the Review Officer. The reductions on the accounts were appropriate given: (i) the delay in the pace of litigation, (ii) the absence of any meaningful results and (iii) the excessive efforts expended by the lawyer in comparison to the difficulty and complexity of the tasks undertaken. The Appeal was dismissed and the Review Officer's Decision was confirmed.

SAMSON CREE NATION v O'REILLY & ASSOCIÉS, 2014 ABCA 268 (CÔTÉ, O'BRIEN and VELDHUIS JJA)
Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.5 (Retainer Agreements) and 10.10 (Time Limitation on Reviewing Retainer Agreement and Charges)

The Appellant sought to litigate approximately 20 years of paid legal bills. At the relevant time, the old Rules were in force; however, the Court referenced the equivalent new Rules in the Decision. The Appellant argued, amongst other things, that lawyers' accounts are not a simple matter of contract, and a Court could assess the reasonableness of fees on a *quantum meruit* basis. The Court rejected this argument and, after noting the newer provisions in Rules 10.2 and 10.5, held that a retainer contract is binding, and that the new Rules specifically outline that a lawyer may charge on an hourly basis.

Former Rule 647 expressly allowed the Court to extend the six-month time limit for the taxing of legal accounts, and the Court held that new Rule 10.10 implicitly does so as well, as it does not exclude the general time extension Rule in the Rules of Court. However, the Court held that the *Limitations Act*, RSA 2000, c L-12 was applicable to all accounts over two years old. The Court noted that the Queen's Bench Justice reviewed the case law for relevant criteria related to extending Rule 647's deadline, and found that almost every one of the facts favoured the Respondent's position that the time limit should not be extended. The Court observed that, with some minor exceptions, neither party contended that the list of criteria or approach taken was incorrect. The six-month deadline was not extended by the Court, and the Appeal was dismissed.

KOOPMANS v JOSEPH, 2014 ABQB 395 (GRECKOL J)
Rules 10.19 (Review Officer's Decision) and 10.26 (Appeal to Judge)

The Plaintiff appealed a Provincial Court Decision dismissing the Plaintiff's Civil Claim against a lawyer and law firm. The Plaintiff sought a refund of legal fees paid and damages equivalent to the amount that the Plaintiff alleged he would have received from the Energy Resources Conservation Board had the Defendants properly represented him.

The Provincial Court Trial Judge determined that the issue of legal fees had already been decided by a Review Officer pursuant to Rule 10.19, and that Rule 10.26 provided an appeal period of one month from the Review Officer's Decision. The Plaintiff did not appeal the Review Officer's decision to a Justice of the Court of Queen's Bench, so the Trial Judge determined that the process had been taken to conclusion and there was no jurisdiction to consider the Application for return of legal fees.

However, Justice Greckol found that the Provincial Court Trial Judge conflated the issue of quantum of legal fees and the question of incompetence or breach of contract by the Defendant, leading to return of legal fees as a remedy. Her Ladyship held that a Review Officer deals with quantum, not questions of incompetence or breach of contract. The issue was therefore whether the legal fees should be returned because of incompetence or failure to provide services promised. Justice Greckol found that the legal services were not provided in a timely and cost effective fashion. The Appeal was allowed and the Plaintiff was awarded $4,254.23 in damages for the return of legal fees, and was also awarded his Costs.

SG v JPB, 2014 ABQB 418 (JONES J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court–Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

In a prior Application, the Plaintiff appealed a private guardianship Order granted to the family who fostered the Plaintiff's child and sought private guardianship of the child herself. Justice Jones affirmed the Provincial Court Decision and directed the parties to make written submissions with respect to Costs.

Justice Jones first noted that, generally, the unsuccessful party should not expect to receive an award of Costs against the successful party. Rule 10.29 provides that a successful party to an Application is entitled to a Costs

award against the unsuccessful party, subject to the principle that the Court has wide discretion to award Costs under Rule 10.31. Rule 10.31 confers general discretion to award Costs, taking into account the factors specified in Rule 10.33. Rule 10.33(1) provides an enumerated list of factors that the Court may take into consideration in making a Costs award. Further, Rule 10.33(2) provides that the Court may consider, *inter alia*, conduct of the parties which unnecessarily lengthened or delayed the Action, noncompliance with the Rules or an Order, and whether a party has engaged in misconduct.

The Plaintiff took the position that, despite being unsuccessful in the Appeal, Costs should be assessed against the Director of Child and Family Services and the foster parents. The Director challenged the Plaintiff's position, noting that there was no authority to support a finding of special or unusual circumstances which would justify Costs against the Director. The Director did not advance a claim for Costs against the Plaintiff.

The foster parents took the position that the expected outcome would be for the Court to award Costs in favour of a successful party; they disputed the Plaintiff's assertions of misconduct. The foster parents sought Costs for their guardianship Application and for the Appeal.

Counsel for the child submitted that the Court of Queen's Bench retains the authority to make a Costs award pursuant to both section 93 of the *Family Law Act* section 2(1) of the *Court Rules and Forms Regulation*. In addition, Rule 10.33(1)(a) supports the position that the foster parents should receive their Costs because they were entirely successful on Appeal. In addition, the foster parents' decision not to make oral submissions on the Appeal operated to shorten the proceedings which engaged the provisions of Rule 10.33(1)(f). Further, 10.33(2)(d) was engaged against the Plaintiff because of unnecessary or improper Applications. As such, Counsel for the child asserted that the child's best interests were served by a Costs award in favour of the foster parents.

Justice Jones accepted the arguments of the Director, the foster parents and Counsel for the child. His Lordship held that it was appropriate to award Costs in favour of the foster parents based on their success in the matter. No Costs were assessed in favour of or against the Director.

CLARKE v SYNCRUDE CANADA LTD, 2014 ABQB 430 (MACLEOD J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Plaintiff, Clarke, was unsuccessful in a wrongful dismissal Action against the Defendant Syncrude. Although, the Defendant proved just cause for the Plaintiff's termination, the Plaintiff obtained a Judgment against the Defendant in respect of his stock options where were found to have been undervalued. On this basis, and on the basis of alleged misconduct of the Defendant throughout the course of litigation, the Plaintiff applied for Costs.

Justice Macleod noted that the Court has wide discretion in ordering Costs, particularly under Rules 10.29, 10.31 and 10.33. Rule 10.29 provides that a successful party is entitled to a Costs award against an unsuccessful party. This general rule applies where a party is substantially, if not totally, successful in a proceeding. Likewise, a plaintiff who succeeds in an action but recovers only a portion of the amount claimed will usually be considered successful and thus entitled to Costs. The Court may consider the amount claimed and the amount recovered in making a ruling on Costs under Rule 10.33(1)(b). The Rules expressly state that the Court may consider the results of the Action and the degree of success of each party, as well as the apportionment of liability: Rule 10.33(1)(a) and 10.33(1)(e).

While the Plaintiff was successful in obtaining a significant Judgment against the Defendant, he was not substantially successful in the Action when viewed as a whole. The most significant issue in the Trial was just cause and the Plaintiff was not successful on that point. In discussing the relevant legal principles, Justice Macleod set out the various factors in Rule 10.33(2) which the Court may consider in deciding whether to impose, deny or vary an amount in a Costs award. This Rule and the cases make it clear that the conduct of a party in a proceeding may affect the Court's

discretion to award Costs. If a successful party has engaged in misconduct, the Court may deny Costs or require the party to pay the Costs of an unsuccessful party. Macleod J. was not satisfied that the Plaintiff's case fell within the rare and exceptional circumstances that would justify an award of solicitor-client Costs. However, Macleod J. was concerned about the pattern of late production of clearly relevant documents by the Defendant. Justice Macleod found this an appropriate case to apportion Costs and directed that each party calculate its Costs of the litigation in accordance with Column 4 of Schedule C of the Rules, including taxable disbursements. The Defendant would be entitled to recover two-thirds of its amount against the Plaintiff, and the Plaintiff would be entitled to recover one-third of its amount against the Defendant. The two amounts would be set-off against each other and the Defendant would have Judgment against the Plaintiff for the balance.

ENOCH CREE NATION v PRUE, 2014 ABQB 445 (JERKE J)
Rules 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Defendant alleged that the Plaintiff failed to obtain a band council resolution authorizing the commencement of the Action and so the Action should be dismissed. At Questioning the Defendant obtained an Undertaking from the Plaintiff that any resolution authorizing commencement of the Action be identified. The Undertaking was not answered and a series of Court Applications, including Contempt Hearings, ensued. At a Special Chambers Hearing, the Plaintiff claimed that there was a band council resolution, so Jerke J. directed the Plaintiff's counsel to provide it by the next morning. The Plaintiff's counsel did provide it, but claimed privilege on the document so it was sealed. At the continuation of the Special Chambers Hearing, Plaintiff's counsel disclosed for the first time that there was no resolution as at the date the Action was commenced. The Defendant immediately sought Costs on a full indemnity, solicitor-client basis.

Justice Jerke observed that Rule 10.31 permits the Courts to order one party to pay another party Costs in accordance with the Rules of Court. Consideration is first given to the factors in Rule 10.33. Solicitor-client Costs are appropriate where misconduct occurs during a legal proceeding. There is much discretion afforded to the Court when awarding full indemnity Costs on the basis of party misconduct; however, such awards are reserved for rare and exceptional or unusual circumstances. Justice Jerke found the conduct of the Plaintiff reprehensible, an attempt to delay or hinder the proceedings, or an attempt to deceive or defeat justice. The failure to answer the Undertaking was an effort to conceal material information, and in the face of a finding of contempt the Plaintiff provided a misleading answer. Justice Jerke found this to be one of the rare, exceptional, or unusual cases where an award of Costs on a full indemnity basis was warranted.

DIROM v FURGESON, 2014 ABCA 261 (MCDONALD JA)
Rule 12.71 (Appeal from Decision of Court of Queen's Bench Sitting as Appeal Court)

The Applicant sought leave to appeal a Decision of the Court of Queen's Bench sitting as an Appeal Court under the Family Law Act, pursuant to Rule 12.71. The Respondent had successfully appealed a Provincial Court Decision to the Court of Queen's Bench and had obtained the reinstatement of a shared parenting arrangement. The Appellant sought to Appeal the Queen's Bench Decision to the Court of Appeal.

Justice McDonald reviewed the test for leave to Appeal, stating that the Applicant must show that:

(a) there is an important question of law or precedent;

(b) there is a reasonable chance of success on appeal; and

(c) the delay will not unduly hinder the progress of the action or cause undue prejudice.

Upon review of the facts, His Lordship determined that the Applicant met the test for Leave to Appeal and Leave to Appeal was granted.

MONARCH LAND LIMITED v CIBC MORTGAGES INC, 2014 ABCA 257 (WATSON JA)
Rule 516 (Chamber Orders)

The Plaintiff Respondent, Monarch, applied to the Court of Appeal for an Order directing the Defendant Appellant, CIBC, to file a replacement Factum which excluded certain paragraphs, and to file a replacement Extract of Key Evidence excluding certain pages. Monarch alleged that CIBC's Factum constituted an inappropriate introduction of new evidence on Appeal. Monarch applied for direction, pursuant to Rule 516, regarding whether a single Justice of Appeal may edit the contents of a Factum.

Justice Watson noted that Rule 516 was soon to be replaced, and considered prior authority. His Lordship stated that the editing of a Factum could be a procedural function which would enable a single Justice to make a determination. However, a single Justice should be wary that the editing of a Factum may substantively impact the Appeal such that the determination of whether to edit the Factum would amount to a final determination of an issue. In those circumstances, a single Justice, if not required to decide, should defer to a panel because the effect of editing is too significant to be considered "incidental to an appeal". Justice Watson was satisfied that the issue should be deferred to the panel who would hear the Appeal since it was not appropriate for a single Justice to edit the Factum or supporting material.

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