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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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MAKAR v LUEDEY, 2013 ABQB 189 (MASTER WACOWICH)
Rules 1.4 (Procedural Rules), 1.5 (Rule Contravention, Non-Compliance and Irregularities), 3.27 (Extension of Time for Service), 11.27 (Validating Service) and 11.28 (Substitutional Service)

The Plaintiffs filed a Statement of Claim on January 28, 2011, seeking damages for personal injuries arising out of a motor vehicle accident that occurred on February 19, 2009. Plaintiffs' counsel took a number of steps to attempt to locate the Defendant in order to serve the Statement of Claim, including obtaining an Order to Extend the Time for Service to April 28, 2012 and an Order allowing for Substitutional Service by publication in the Edmonton Sun. Counsel for the Defendant's insurer was notified of the claim within 9 months of the accident and remained involved. The Defendant herself did not become aware of the claim until June 19, 2012.

The Defendant applied to set aside Substitutional Service. The Court considered: (1) whether there was sufficient evidence to establish that the Substitutional Service Order was sufficient, and if not, whether it should be set aside; and (2) whether the Court should grant an extension of time for service of the Statement of Claim if the Order for Substitutional Service was set aside.

The Plaintiffs had evidence that the Defendant's vehicle bore Nova Scotia license plates at the time of the accident, and had been advised by the insurer that the Defendant was likely in Nova Scotia. The Court found that as the Plaintiffs' best information was that the Defendant had returned to Nova Scotia, publication in the Edmonton Sun was not likely to be effective service, and it set aside the Order allowing for it.

In applying for an extension of time to serve the Statement of Claim, the Plaintiffs argued that the Court had inherent jurisdiction to waive irregularities, as well as specific authority under Rules 1.5 and 11.27 to cure a contravention of the Rules. The Court noted that courts "will generally take steps to cure a procedural defect as long as it does not cause substantial prejudice to the other party". It held that the test has been codified in Rule 1.4(4)(a) and made even broader the requirement that the steps taken to cure the irregularity must not cause "irreparable harm to any party". However, the Court noted that Rule 1.5 did not apply because Rule 3.27 specifically addressed the issue in question.

The Court found that there was no prejudice to the Defendant. The Plaintiffs had proven that the insurer had early notice, only 52 days had passed since the renewal period expired, the Plaintiffs made every reasonable effort to locate the Defendant and there was no evidence of prejudice. In the result, the Court granted relief under Rule 3.27.

TL v ALBERTA (CHILD, YOUTH AND FAMILY ENHANCEMENT ACT, DIRECTOR), 2013 ABCA 211 (O'BRIEN, WATSON AND McDONALD JJA)
Rules 2.9 (Class Proceedings Practice and Procedure) and 4.14 (Authority of Case Management Judge)

Three counsel were participating as Class Counsel to the Representative Plaintiffs in a Class Action. One of the counsel brought an Application to the Case Management Judge requesting directions from the Court due to differing views as to the authority of the Representative Plaintiffs to settle the Class Proceedings.

As a result of the Application, the Case Management Judge appointed two of the three Class Counsel and removed the remaining Class Counsel.

The decision of the Case Management Judge was then appealed. The Court of Appeal held that the Order of the Case Management Judge was an interim step authorized by Rules 2.9 and 4.14. Further, the Order was tailored to deal with the immediate situation and deference was owed to the Case Management Judge. The Appeal was dismissed.

FRYDMAN v PELLETIER, 2013 ABQB 225 (KENNY J)
Rules 3.2 (How to Start an Action) and 3.72 (Consolidation or Separation of Claims and Actions)

The Applicant brought an Originating Application seeking a declaration that shares in the subject corporation were held in trust for him by the Respondent. The Applicant further alleged that the Respondent engaged in conduct that was oppressive or unfairly prejudicial to him and the corporation. The Respondent brought a Cross-Application to have the matter consolidated with another Action in which a number of Parties, including the Applicant, brought an Action against the Respondent and the corporation for damages related to alleged fraudulent activity.

The Respondent argued that the Applicant should not have proceeded by way of an Originating Application. The Respondent argued that, pursuant to Rule 3.2(2)(a), an Originating Application is only proper where there is no substantial factual dispute. The Respondent argued that many factual issues were in dispute, and that Discovery, Questioning and a Trial were necessary to determine the facts. As such, the Respondent argued that the Court should convert the Originating Application to a Statement of Claim. Justice Kenny rejected this argument and held that an Originating Application was appropriate. All evidence was before the Court on the relevant issues, and the evidence was not going to improve in the context of a Trial.

The Respondent further argued that the two Actions should be consolidated. Pursuant to Rule 3.72, the Court has discretion in determining whether the consolidation of Actions is appropriate. Justice Kenny held that there

were a number of factors to consider with respect to consolidation, including: whether there were common claims, disputes, and relationships between the Parties; whether consolidation would save time and resources; whether Trial time would be reduced; whether one Party would be seriously prejudiced by having two Trials together; whether one Action was at a more advanced stage than the other; and whether consolidation would delay the Trial of one Action causing serious prejudice to one Party. The risk of inconsistent verdicts would also be a reason for consolidation. Upon reviewing all of the factors, Justice Kenny was satisfied that there was no reason to consolidate the two Actions. Her Ladyship held that the Court had enough information to decide the issues raised in the Originating Application, and that consolidation would only cause delay. Moreover, there were no common issues of fact or law between the two Actions, and consolidation would only have the effect of leaving the share issue unresolved until Trial, causing prejudice to the Applicant.

LUTZ v LUTZ, 2013 ABCA 159 (O'BRIEN, MARTIN AND BIELBY JJA)
Rule 3.2 (How to Start an Action)

The Appellant and Respondent were brothers who purchased a residential property together. The property was registered in Joint Title. The purchase was financed by a Mortgage co-signed by both brothers. The brothers lived together in the house for 7 years, but in 2006, one brother, Eric, moved out and stopped making payments on the Mortgage.

In 2011, the other brother, Lucas, filed an Originating Application to have the property transferred to him, as sole owner, without compensation. The Chambers Judge determined that Eric was not a joint tenant, and that he held his interest in the property as a bare trustee for Lucas. As such, the Chambers Judge held that subject to his release from liability under the Mortgage, Eric was obliged to transfer his interest in the property to Lucas without compensation. Eric appealed on a number of grounds, including that the Chambers Judge erred in making a Decision on a summary basis after determining that there was conflicting evidence on material facts which related to the credibility of the witnesses.

The Court of Appeal held that a resulting trust arises when Title to a property is in one Party's name, but the Party is under an obligation to return it to the original Title owner because he or she gave no value for the property. The Court held that Lucas had the onus of establishing that Eric never acquired an ownership interest in the property. Although most of the facts with respect to the property were in dispute, the Parties agreed that the money to purchase the property came from a Mortgage in the name of both brothers. The Court held that this was *prima facie* evidence that each brother acquired an ownership interest in the property, which would defeat any presumption of a resulting trust.

Rule 3.2(2) provides that proceedings may be commenced by Originating Application only where no substantial facts were in dispute. Given the conflicting evidence before the Chambers Judge, the Court held that it could not determine whether Lucas had discharged the onus of demonstrating that Eric never acquired an ownership interest in the property. Accordingly, the Court allowed the Appeal and remitted the matter to the Court of Queen's Bench, where it could proceed by way of a Statement of Claim or the Trial of an Issue.

OKOTOKS (TOWN) v FOOTHILLS (MUNICIPAL DISTRICT NO. 31), 2013 ABCA 222 (BERGER, SLATTER AND ROWBOTHAM JJA)
Rule 3.15 (Originating Application for Judicial Review)

Previously, the Appellants brought an Originating Application for a Declaration that a bylaw was void as it conflicted with an inter-municipal development plan. The Court applied Rule 3.15(2) and dismissed the Originating Application, as it was not brought within 6 months of the passing of the bylaw. The sole issue on Appeal was whether the six-month limitation period in Rule 3.15(2) applied to an Application under section 536 of the *Municipal Government Act*, RSA 2000, c M-26 ("MGA").

The Appellant argued that:

1. Rule 3.15(2) did not apply to a statutory remedy

(as opposed to judicial review); and

2. Rule 3.15(2) is inconsistent with the MGA, and the MGA takes precedence over the Rules of Court.

The first argument had two prongs:

1. The enactment of a bylaw is not a "decision or act" of a body; hence Rule 3.15(2) does not apply; and

2. An Application to declare a bylaw void is not an administrative law remedy which is subject to judicial review; rather, it is a statutory remedy for which there is no limitation period.

In relation to the first prong of the first argument, the Court held that a municipal council can only act by resolution or bylaw, and accordingly, the decision or act of a municipality is subject to Rule 3.15. In relation to the second prong, the Court cited *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2004 ABQB 651, and held that the limitation period applies to all types of challenges. With respect to the second argument, the Court held that the Rules of Court and the MGA did not conflict, and thus the limitation in the Rules of Court applied. The Appeal was dismissed.

LAMEMAN v ALBERTA, 2013 ABCA 148 (WATSON, BIELBY AND VELDHUIS JJA)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Crown in Right of Alberta ("Alberta") and the Attorney General of Canada ("Canada") brought an Application to Appeal the Decision of the Case Management Judge who declined to strike certain portions of a twice-Amended Statement of Claim. Alberta and Canada challenged the Case Management Judge's application of Rule 3.68 to the facts of the case.

The Action involved allegations of breaches of Treaty obligations by Alberta and Canada. It was alleged that the Treaty imposed obligations on Alberta and Canada to manage certain lands within Alberta to ensure that the members of the Beaver Lake Cree Nation ("BLCN") were able to exercise their rights to hunt, fish and trap. BLCN alleged that Alberta and Canada failed to discharge their responsibilities and, as such, its members could no longer exercise these rights in the manner anticipated by the Treaty. BLCN alleged that the situation resulted from the cumulative effect of various government authorizations of developments related to oil and gas, forestry, mining and other activities.

The Court held that the interpretation of a pleading is a question of law, subject to correctness, and whether a pleading discloses a cause of action is a question of law, subject to correctness. Otherwise, a Decision to strike a pleading is owed deference and will be reviewed against the standard of reasonableness.

With respect to the issues of whether the Case Management Judge correctly stated the law on striking pleadings, the Court concluded that the Case Management Judge had declined to consider some of the Affidavit evidence tendered by Alberta and Canada. Affidavit evidence must be considered in Applications to strike, with the exception of Applications relating to Rule 3.68 (2)(b) – striking for want of a reasonable claim, in which case, Affidavit evidence cannot be considered. The Case Management Judge may have erred by not considering Affidavit evidence where the Application related to grounds other than as set out in Rule 3.68 (2)(b); however, the Court held that if there was such error, it was of no consequence.

The Court reached the same holding on the issue of whether the Case Management Judge erroneously refused to consider Affidavit evidence in support of the Application to strike.

The Court also considered the issues of whether: the Case Management Judge erred in declining to strike the portions of the current Statement of Claim which made factual allegations relating to the granting of the challenged authorizations; the Case Management Judge should have ordered further particulars in relation to the implicated seven Federal projects; the Case Management Judge erred in declining to strike allegations of a treaty right to

hunt, fish and trap on a commercial basis or on a basis other than for food; the Case Management Judge erred in refusing to strike the prayers for injunctive relief against the Crown; the Case Management Judge erred in refusing to strike the claim for damages for prospective actions; the Case Management Judge erred in refusing to strike the claim for ongoing Court supervision over the relationship and conduct of the parties; the Case Management Judge misinterpreted the law on fiduciary duty; and whether the Case Management Judge failed to provide adequate reasons for the Decision.

The Court dismissed the Appeals in their entirety.

VWW v WASYLYSHEN, 2013 ABQB 327 (MANDERSCHEID J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Plaintiff, a vexatious litigant, applied to the Court for permission to continue the Action and take certain steps in advancing her Claim. As part of the Order declaring the Plaintiff a vexatious litigant, the Plaintiff was required to apply to the Court with an Affidavit in support before being permitted to take any further steps. After reviewing the Affidavit in the context of the particular steps requested, the Court assessed the Plaintiff's present litigation strategy to determine whether it could be considered vexatious.

Justice Manderscheid found that the Plaintiff's actions disclosed a vexatious and frivolous litigation strategy intended to abuse Court processes. The Court went on to review the characteristics commonly associated with vexatious litigants and held that Rule 3.68(2)(c) authorizes the Court to dismiss an Action that is frivolous, irrelevant, or improper.

The Court found that the Plaintiff's Action possessed many features of vexatious litigation, including that the Plaintiff's present Action challenged conclusions already addressed in a different proceeding, contained sensational conspiratorial claims, and the Plaintiff had ignored prior Costs Orders. The Court held that these factors together provided a basis for dismissing the Action as frivolous and vexatious.

JORDAN v ALBERTA LAW ENFORCEMENT RESPONSE TEAMS, 2013 ABQB 330 (YAMAUCHI J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

A Constable of the Calgary Police Services was assigned to monitor the Plaintiff in relation to criminal harassment allegations. Fifteen months later, the Plaintiff sent an email to the Alberta Premier and certain individuals within the Alberta Maintenance Enforcement Program ("MEP"), which included allegations that the MEP caused suicides and murder-suicides. The Constable received a copy of the email and requested that the Integrated Threat and Risk Assessment Centre undertake a threat assessment with respect to the Plaintiff (the "Report"). Shortly thereafter, the Plaintiff was charged with criminal harassment. The Plaintiff commenced an Action alleging that the Report was defamatory and that the Defendants acted with misfeasance in the exercise of their public office duties. The Defendants applied for Summary Judgment dismissing the Plaintiff's claim or, in the alternative, for an Order striking the Statement of Claim.

With respect to the allegation of defamation, Yamauchi J. held that the Applicants were not required to demonstrate that the Report was not defamatory. Rather, they were only required to demonstrate that there was no genuine issue to be tried, and Yamauchi J. held that they discharged this burden. Yamauchi J. further held that the Plaintiff failed to meet his evidentiary burden to demonstrate that there was a genuine issue for Trial with respect to whether the Defendants had defamed him. Yamauchi J. granted the Application for Summary Judgment.

The Defendants argued in the alternative that the Court should strike the Claim pursuant to Rule 3.68, on the basis that the Claim was vexatious. The Plaintiff had commenced seven other Actions, arising out of the same facts, against various individuals and organizations. Relying on the reasoning in *McMeekin v Alberta (Attorney-General)*, 2012 ABQB 144, Yamauchi J. held that, although Summary Judgment had been granted, the Claim would also be struck pursuant to Rule 3.68. The Plaintiff's Claim was frivolous, vexatious and did not disclose a reasonable cause of action.

KOWCH v GIBRALTAR MORTGAGE LTD, 2013 ABQB 317 (MASTER SCHLOSSER)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

Prior to certification in a proposed Class Action, the Defendants brought an Application for Summary Judgment against the Plaintiffs. Master Schlosser considered whether a Master had the jurisdiction to hear a Summary Judgment Application in an Action intended to be certified as a Class Action. In considering jurisdiction, Master Schlosser stated:

> In this case there is no certification order and there has been no certification application. Until it is certified, a proceeding commenced as a Class Action does little else other than suspend the limitation period for the cause of action asserted in the proceeding (section 40). Until a proceeding is certified as a Class Action, there is nothing special about it and all of the other procedural rules prevail. The Act provides (section 41) that the Rules of Court apply unless they are inconsistent with a provision of the Act. There is no express inconsistency with hearing a Rule 7.3 or 3.68 application first. ... There is no reason a Master cannot hear a Summary Dismissal application prior to certification.

Master Schlosser held that it was appropriate that the Summary Judgment Application be heard and determined on its merits, prior to certification, and that a Master had jurisdiction. Master Schlosser further stated that, in deciding the merits of the Application, the Court did not have to "engage in an investigation into possible worlds which might contain class members whose claims might not be proscribed". Only the facts of the two Plaintiffs were relevant. The Application was granted, because the Claims were started out of time, and the Action was dismissed.

RAINVILLE v PONTIN, 2013 ABQB 256 (MARCEAU J)
Rules 5.1 (Purpose of this Part), 5.2 (When Something is Relevant and Material) and 5.17 (People Who May Be Questioned)

The Plaintiffs (Defendants by Counterclaim) brought an Application to compel the Defendants (Plaintiffs by Counterclaim) to answer Undertakings refused during Questioning. The Defendants (Plaintiffs by Counterclaim) filed a cross-Application to compel the Plaintiffs (Defendants by Counterclaim) to answer questions refused during Questioning. In determining whether or not the Undertakings and questions refused were relevant and material, Marceau J. relied on Rules 5.1 and 5.2. Further, Marceau J. relied on the Decision in *Suncor Energy Oilsands Limited Partnership v Propak Systems Ltd*, 2012 ABQB 789, at paras. 3-5, where Poelman J. outlined the test for determining the materiality of evidence:

> [3] In my view, most of the disputes between these parties over undertaking requests can be determined by basic principles and purposes of the discovery process, now called disclosure and questioning in our rules.
>
> [4] The questioning process in an action is fundamentally an inquiry into relevant facts. Further, questions may only seek facts of primary relevance (those directly in issue) or secondary relevance (from which the existence of primary facts may be directly inferred), not tertiary relevance (information that might lead to facts or records of secondary relevance).
>
> [5] Furthermore, rule 5.25 (1)(a) of the *Alberta Rules of Court* provides that "a person is required to answer only ... relevant and material questions." Under rule 5.2 (1)(a), "a question ...is relevant and material only if the answer to the question ... could reasonably be expected ... to significantly help to determine one or more of the issues raised in the pleadings." The Court of Appeal elaborated on that definition, as follows:
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> > The materiality of evidence refers to its pertinency or weight in relation to the issue it is adduced to prove: *Black's Law Dictionary*, (6th ed. 1990). Facts or documents may be relevant within Rule 186.1, but, either alone or in combination with other evidence, be of no significant help to the examining party in proving or disproving a

> fact in issue. As Slatter J. observed in *Weatherill Estate v.Weatherill*, (2003) 337 A.R. 180 (Q.B.), 2003 ABQB 69 at para. 17, "... relevance is determined by the pleadings while materiality is more a matter of proof ...". See also *Tolko Industries Ltd. v. Railink Ltd.* (2003), 14 Alta. L.R. (4th) 388, 2003 ABQB 349 at para. 6. (references omitted)

Marceau J. then determined on a case by case basis whether or not the objected to Undertakings or questions were relevant and material to the Action.

PARKER v HER MAJESTY THE QUEEN, 2013 ABQB 296 (ROOKE ACJ)
Rule 7.3 (Summary Judgment)

The Plaintiffs applied for Certification in a proposed Class Proceeding under the *Class Proceedings Act*. The Defendant (Alberta) made a cross Application for Summary Judgment on the basis that the Plaintiffs' claims were barred under the *Limitations Act*.

Associate Chief Justice Rooke, citing *Jackson v Canadian National Railway*, 2012 ABQB 652, confirmed that summary judgment is available on the basis of a limitations defence. Rooke A.C.J. stated that the test for Summary Dismissal is as follows:

(a) the applicant must show evidence that there is no genuine issue for trial; and

(b) if the applicant meets this burden, the responding party may bring evidence to persuade the court that there is a genuine issue to be tried.

Associate Chief Justice Rooke further noted that "[t]he defendant who seeks summary judgment must prove there is no genuine issue of material fact requiring trial and cannot simply rely on mere allegations or the pleadings". If the Defendant is able to prove this, then the burden will shift to the Plaintiff, who must either refute or counter the Defendant's evidence, or risk Summary Dismissal.

With respect to Summary Dismissal in the context of a limitations defence, Rooke A.C.J. cited *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2008 SCC 14, and stated that where a Claim "is barred by the operation of a limitation period, there is no genuine issue for trial".

After reviewing the *Limitations Act*, the relevant case law and the facts, Rooke A.C.J. granted Alberta's Summary Dismissal Application because the Defendant had established that the Plaintiffs claims were barred by the 10 year ultimate limitation period, and the Plaintiffs were not able to refute or counter the Defendant's evidence.

ENCANA CORPORATION v ARC RESOURCES LTD, 2013 ABQB 352 (POELMAN J)
Rule 7.3 (Summary Judgment)

The Applicants each held leases from mineral owners giving the Applicants the right to explore for and produce natural gas. The mineral owners who granted the leases did not own title to coal. The issue to be determined was who held rights to produce coalbed methane on certain leased lands in light of recent amendments to the *Mines and Minerals Act*.

The Court noted that the test for summary judgment requires an Applicant to establish that it is "plain and obvious," or "clear," or "beyond real doubt," that the Action should be summarily dismissed or Judgment issued. The onus then shifts to the Respondent to show that there is a genuine issue for Trial. The Court found that "summary judgment should only be granted when the applicant has shown that there is no genuine issue of material fact requiring trial".

Relying on guidance from the Court of Appeal in *Tottrup and Clearwater*, the Court analyzed the issues raised in the applications before it. Justice Poelman found that the distinct issues of law regarding the interpretation of amendments to the *Mines and Minerals Act* could fairly be decided on the record before the Court, and granted Summary Judgment.

AIRDRIE (CITY) v SILVERCREEK DEVELOPMENT CORPORATION, 2013 ABQB 357 (MASTER HANEBURY)
Rule 7.3 (Summary Judgment)

The Defendant, Silvercreek Development Corporation, applied to strike the claim filed against it by the Plaintiff, the City of Airdrie, on the basis that it was filed outside of the limitation period allowed under the *Limitations Act*.

Silvercreek had the evidentiary burden of showing that there was no genuine issue of material fact requiring Trial and, in order to establish that, it had to be beyond doubt or plain and obvious that there was no genuine issue to be tried. Master Hanebury emphasized that the Justice or Master hearing the Application was not to assess the quality and weight of the evidence, as that was to happen at Trial, but had an obligation to conduct a careful review to determine whether there were undisputed facts sufficient to resolve the matter. The test for Summary Judgment was not whether the issue of law was "beyond doubt", but whether the issue of law could fairly be decided on the record before the Court.

In this case, section 3 of the *Limitations Act* was at issue, so the Court had to be satisfied that it was beyond doubt that the claim could not succeed on the basis of being time-barred by the criteria found in section 3(1). After considering the record before the Court, Master Hanebury noted that an assessment of the weight and credibility of the evidence presented by the City could not be made at this stage of the proceeding; it had to be made at Trial. In order for the Court to undertake the objective assessment necessary to determine what the City ought to have known in the context of determining whether it had the requisite knowledge required by the *Limitations Act*, further information was necessary. The Court had to find it plain and obvious or beyond doubt that the Action would not succeed due to the limitations defence; however, the evidence before the Court was not sufficient to summarily determine that the City ought to have known that the injury was attributable to the Defendant's failings, so the Application was dismissed.

Additionally, Master Hanebury observed that with the amendments to the Rules of Court, the Applicant was able to file further evidence upon Appeal and, as a result, the omission of the contextual evidence necessary to determine whether the City "ought to have known" of its injury was capable of being remedied.

ENERFLOW INDUSTRIES INC v SUREFIRE INDUSTRIES LTD, 2013 ABQB 196 (McCARTHY J)
Rules 7.6 (Response to an Application) and 7.8 (Objection to Application for Judgment by Way of Summary Trial)

The individual Defendant commenced employment with Enerflow in 2007. In 2008, Enerflow and the individual Defendant executed a non-compete agreement. The individual Defendant left Enerflow in 2011, accepting a position with the other Defendant, Surefire. Enerflow commenced an Action against the individual Defendant, alleging a breach of the non-compete agreement. Enerflow also named Surefire, alleging that it induced the individual Defendant to breach the non-compete agreement. Surefire and the individual Defendant brought an Application for Summary Trial of the matter. Enerflow objected.

The first issue was whether the Affidavit evidence of the Plaintiff should be allowed. The Plaintiff's evidence was filed before the Hearing, at some point after the 10 day period required by Rule 7.6, but before the 5 day period required by Rule 7.8. The Court concluded that the evidence was admissible, stating:

> Enerflow asserts that it did not at any time consent to the summary trial process; the Defendants do not dispute that assertion. Therefore, I think Enerflow may be taken to have objected to the summary trial process, with the result that Rule 7.8 is applicable to its response. As Rule 7.8(2) requires a respondent objecting to a summary trial process to file and serve "anything on which the objector intends to rely" 5 or more days before the hearing, the Williamson Affidavit was filed on time, albeit barely.

The next issue the Court considered was whether the Application should be adjourned pending Questioning. McCarthy J. determined that the Court does have

jurisdiction to permit a Summary Trial prior to Questioning. McCarthy J. cited *Discovery Ridge Development Corporation v Well International Holdings Corporation*, 2003 ABQB 406, as authority for when a Summary Trial can proceed prior to Questioning. McCarthy J. concluded that, the Defendants having offered to make themselves available, and the Plaintiff not having taken them up on that offer, the objection on this ground should be dismissed.

The Court then considered whether this was an appropriate instance for Summary Trial. The Court cited with approval the nine factors to be used in making this assessment, as enumerated in *Duff v Oshust*, 2005 ABQB 117. After considering the relevant factors, the Court concluded that the Summary Trial should proceed, stating:

> I find that this matter is suitable for summary trial and I dismiss Enerflow's objection thereto. In arriving at this conclusion, I am mindful that Rule 7.8(3) provides that I *must* dismiss the objection if I am of the view that the issue or question is suitable for summary trial and that the summary trial will facilitate resolution of the claim *or a part of it*. As noted above, I find that, at a minimum, the enforceability of the Non-Compete Agreement can be determined in a summary trial process... [Emphasis in original]

SHREEM HOLDINGS INC v BARR PICARD, 2013 ABQB 257 (WAKELING J)
Rules 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review), 10.13 (Appointment for Review), 10.18 (Reference to Court), 10.19 (Review Officer's Decision), 10.20 (Enforcement of Review Officer's Decision), 10.21 (Repayment of Charges) and 10.26 (Appeal to a Judge)

Shreem Holdings Inc. ("Shreem") and Deepak Kumar filed a request, pursuant to Rule 10.13(1), for a review of charges levied by the Applicant law firm with respect to legal services. Shreem argued before the Review Officer that the law firm agreed to a fixed fee retainer, with the fee capped at $15,000. The Review Officer determined that a reasonable fee for the legal services provided was $65,429.50. However, the Certificate of Review stated that due to a paucity of evidence, no ruling had been made as to what amount was still owing to the law firm. The Certificate of Review also stated that Shreem and Mr. Kumar denied being liable for the accounts, and that the Review Officer did not rule on issues of liability.

The Applicant law firm brought an Application pursuant to Rule 10.20(1) for an Order directing that the Review Officer's Decision be entered as Judgment against Shreem and Mr. Kumar. Neither Party appealed the Certificate of Review.

Wakeling J. held that a Certificate of Review should not be entered as a Judgment if it did not have the effect of resolving the issues between the Parties. There is no utility in giving a Certificate of Review the status of a Judgment when it cannot be enforced. Rule 10.19, which sets out the issues a Review Officer may decide, does not provide that a Review Officer may adjudicate a claim that a lawyer agreed to accept a fixed fee, or determine the amount a client has already paid towards an account. It was not appropriate for the Court to enter the Certificate of Review as a Judgment against Shreem and Mr. Kumar because questions regarding the identity of the client, the fixed fee agreement, and the amount the client had already paid were in dispute. These unresolved issues in the Certificate of Review made its enforcement impossible.

Wakeling J. further held that although Rule 10.18(1) sets out the conditions under which a Review Officer may refer a question to the Court, it was unclear whether the Court had the jurisdiction to amend a Certificate of Review and delete the Review Officer's qualifications. Wakeling J. held the appropriate course for the Review Officer would have been to refer the unresolved issues to the Court pursuant to Rule 10.18(1)(a). However, in its current state, the Certificate of Review did not resolve the dispute between the parties. As such, Wakeling J. dismissed the law firm's Application and held that the Court should not exercise its discretion under Rule 10.20(1).

HOGARTH v ROCKY MOUNTAIN SLATE INC, 2013 ABCA 116 (O'BRIEN, SLATER AND ROWBOTHAM JJA)
Rules 10.29 (General Rule for Payment of Litigation Costs) and 10.31 (Court-Ordered Costs Award)

The entire Trial Judgment against the Appellant was set aside on Appeal. The Appellant applied for Costs of the Trial and the Appeal. The Court held that the general rule is that the successful Party is entitled to Costs. The Appellant was successful in having the Action against him dismissed and, as such, the Costs award made at Trial against the Appellant was set aside. Moreover, the Sanderson Order made at Trial, which required the unsuccessful Defendants to indemnify the investors for Costs, was also set aside with respect to the Appellant.

Further, the Court held that the Appellant was entitled to receive Costs with respect to pre-Trial steps and Trial for the period in which he was represented by counsel. At some points during Trial the Appellant was jointly represented with two unsuccessful Defendants. The Court held that the Appellant was only entitled to one-third of the Costs otherwise payable during the period of joint representation. The Respondents argued that the Appellant should not be awarded Costs because there was no evidence that he had paid his Trial counsel. The Court rejected this argument and held that the Respondents could not avoid Costs because of the state of accounts between the Appellant and his counsel.

The Appellant argued that he should receive Trial Costs for the periods in which he was self-represented. Under the former Rules, there was a presumption that self-represented Parties were not entitled to Costs. However, the new Rules provide that Costs can be awarded to self-represented parties where appropriate. Costs are intended to partly indemnify the successful party for the expenses of litigation. Costs can be used to encourage settlement, prevent frivolous litigation, and encourage economy during litigation. Awarding Costs to self-represented litigants raises difficult policy issues and could have the effect of encouraging litigation and discouraging settlement. Unless a Costs award would serve one of the policy reasons for which such awards are made, a self-represented litigant should not receive Costs. In the circumstances, the Court held that the Appellant was not entitled to Costs during the period in which he was self-represented.

The Respondents argued that the Appellant should not receive the Costs of the Appeal because he was not successful on all of the arguments raised. The Court held that a litigant is unlikely to be successful on every issue. Arguing every issue reasonably raised on the record cannot disentitle a litigant to Costs. As such, the Court held that the Appellant was entitled to the Costs of the Appeal.

CENTRAL ALBERTA RURAL ELECTRIFICATION ASSOCIATION LTD v FORTISALBERTA INC, 2013 ABQB 191 (VELDHUIS J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and Schedule C

In this case, the Court provided its Decision on Costs stemming from an unsuccessful Application for Leave to Appeal of an Arbitral Award. Veldhuis J. stated that the general rule for Costs, pursuant to Rule 10.29, was that the successful party is entitled to Costs. Veldhuis J. further relied on the factors outlined in Rule 10.33 for determining an appropriate value for Costs, and stated that the number of grounds appealed by the Applicants was considered an important factor. Since the matter did not have a monetary value attached to it, the appropriate Schedule C column was determined by considering the importance of the Appeal to the parties and the potential financial result a successful Decision would have. Because the matters were important, and a favorable Decision was estimated to have a value of at least $500,000.00 to each party, the Court held that Column 4 of Schedule C should apply. Veldhuis J. also held that the complexity of the matter justified granting Costs in the nature of an appearance before an Appeal Court. The Respondent was awarded Party-Party Costs in the amount of $12,750.00, pursuant to Column 4 of Schedule C.

1985 SAWRIDGE TRUST v ALBERTA (PUBLIC TRUSTEE), 2013 ABCA 226 (COSTIGAN, O'BRIEN AND MCDONALD JJA)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.47 (Liability of Litigation Representative for Costs)

The Appellants were the Trustees of the Sawridge Trust, who sought advice and direction from the Court with respect to changing the designation of beneficiaries under the Trust. The Chambers Justice, dealing with preliminary matters, noted that children who could be affected by the change were not represented by counsel and ordered that the Public Trustee be notified. Subsequently, the Public Trustee applied to be named as a litigation representative for potentially interested children. That Application, which was opposed by the Trustees, was granted. The Public Trustee was awarded advance Costs on a solicitor-client basis to be paid by the Trust, and was exempted from liability for any other Costs of litigation. The Trustees appealed the Order as it related to Costs and the exemption.

The Trustees argued that the Chambers Justice erred in awarding advance Costs on a solicitor-client basis and in concluding that the criteria set by the Supreme Court of Canada for awarding advance Costs did not apply. The Court disagreed, and held that the Chambers Justice correctly found that the criteria with respect to advance Costs did not apply. The criteria are applicable to adversarial situations in which an impecunious private party wishes to sue another private party or public institution, and wants the party to pay its Costs in advance. The Court held that such circumstances were not applicable in the case before it. The role of the Public Trustee, while perhaps not neutral, could not be characterized as adversarial. A wide discretion was conferred with respect to the granting of Costs under the Trustee Act, the appointment of a litigation representative pursuant to the *Rules of Court*, and in the exercise of *parens patriae*. The Court held that this discretion was sufficiently broad to encompass an award of advance Costs in the circumstances. As such, the Chambers Justice did not err in awarding advance Costs in these circumstances. The children's interests required protection and it was necessary to award advance Costs in order to secure the independent representation of the Public Trustee.

The Appellants further argued that the Chambers Justice erred in exempting the Public Trustee of any responsibility to pay Costs. The Court held that an independent litigation representative could be dissuaded from accepting an appointment if it were subject to liability for a Costs award. An exemption from Costs, while unusual, was not unheard of, and had been granted in other circumstances involving litigation representatives. In this context, the Court dismissed the Appeal.

HORIZON RESOURCE MANAGEMENT LTD v BLAZE ENERGY LTD, 2013 ABCA 139 (COSTIGAN, O'BRIEN AND ROWBOTHAM JJA)
Rule 10.48 (Recovery of Goods and Services Tax)

At Trial, one of the Defendants was awarded Double Costs because of a genuine Offer of Settlement pursuant to former Rules 169 and 170. The Trial Judge also awarded GST as set forth in a Bill of Costs which did not include a Certificate in accordance with Rule 10.48. The Plaintiff appealed the Award in the absence of the Certificate. The Court of Appeal noted that Rule 10.48 "is prefaced by the words 'unless the court otherwise orders'", and the Court had done so in this case.

DUROCHER v KLEMENTOVICH, 2013 ABCA 115 (CÔTÉ, WATSON AND SLATTER JJA)
Rule 12.36 (Advance Payment of Costs)

The Applicant appealed a Judgment following a Trial arising out of a high conflict divorce. The issues on Appeal involved parenting, child support and interim Costs. Prior to the Trial, the Case Management Justice ordered that the Respondent make an advance payment of $10,000 toward the Appellant's legal Costs on a "without prejudice basis, such Costs to be accounted for at the end of the trial"; however, the Respondent never made that payment. A Preliminary Costs Order under Rule 12.36 was presumptively an Interim Order designed to help the recipient finance the litigation. The Court of Appeal stated that these Orders differed from a Security for Costs Order,

in that the latter did not assist in financing the litigation, and only provided that if Costs were eventually ordered, there would be an ability to collect them. As a general rule, Advance Costs Orders were subject to adjustment when the costs of the Trial were actually determined. In this case, the Order stated that the Costs were to be accounted for at the end of the Trial and, as such, the Order did not represent a guarantee that the Recipient would ultimately be awarded the Costs of the Trial, nor did it set a floor or a ceiling on those Costs.

Notwithstanding the Respondent's ultimate success, the Trial Justice ordered that he pay Costs of $5,000 and directed that the unpaid amount of $10,000 be deleted from the Maintenance Enforcement records. The Appellant argued that the Trial Justice granted the Respondent "a reduction to the interim costs awarded"; however, the interim payment was never awarded to the appellant. Because it was specifically stated to be without prejudice, and was to be accounted for at Trial, the Court of Appeal upheld the Trial Justice's award to the Appellant for $5,000 and stated that it logically followed that the original, unpaid $10,000 amount should be deleted from the calculations.

CALDWELL v CALDWELL, 2013 ABCA 126 (O'FERRALL JA)
Rule 12.59 (Appeal from Divorce Judgment)

The Applicant sought an extension of time to file his Notice to Appeal in relation to a child and spousal support Order. The Court held that the deadline to file the Notice of Appeal was 30 days from the time the Order was made. The Court applied the requirements outlined in *Cairns v Cairns*, [1931] 4 DLR 819, for granting an extension to the time to Appeal; being whether:

(a) the Applicant had a *bona fide* intention to appeal and there were special circumstances which excused or justified not filing the Notice of Appeal by the deadline;

(b) the Respondent had been prejudiced; and

(c) the Applicant had taken the benefit of the Judgment.

The Court accepted the Applicant's evidence of his intentions. The Court also accepted that the delay in filing was because the Applicant and his counsel believed that portions of the Order were still unresolved. The Court held that there was no evidence of any specific prejudice, and that the Applicant had not taken the benefit of the Judgment, but had been paying the support as ordered. The Application was granted.

ALBERTA (JUSTICE AND ATTORNEY GENERAL) v ECHERT, 2013 ABQB 314 (BROWN J)
Rule 13.18 (Types of Affidavit)

The Minister of Justice and the Attorney General of Alberta applied for an Order forfeiting certain restrained property to Her Majesty the Queen in Right of Alberta. The Application was supported by an Affidavit from a Constable in the Drug and Gang Enforcement Unit of the City of Edmonton Police Service. The Court expressed concerns about the quantity of hearsay evidence. At paragraph 34, Justice Brown stated that:

> … the Minister must put his best foot forward. Here, he has not done so …

The Court cited Rule 13.18, holding that the Court could only rely on information and belief where the source of the information and belief was disclosed, and only in respect of information which the deponent expressly claimed to believe. The Court held that a generic attribution of all information in the Affidavit to documents and other peace officers was insufficient for the purposes of Rule 13.18. The Court noted that the Affidavit also failed to express a belief in significant portions of the information contained therein. Accordingly, the Court held that the Affidavit in question did not meet the requirements of Rule 13.18, and could not assist the Minister in discharging his burden.

ALLEN v UNIVERSITY OF LETHBRIDGE STUDENTS' UNION, 2013 ABCA 176 (PAPERNY, O'BRIEN AND O'FERRALL JJA)
Rule 515.1 (General Appeal List)

The Respondent, University of Lethbridge Students'

Union, made an Application for an Order dismissing the Appeal filed by the Appellant, Rhonda Allen, for want of prosecution. The Appeal was from an Order made by a Queen's Bench Justice declaring the Appellant to be a vexatious litigant and prohibiting her from instituting any further proceedings without leave of the Court. The Appellant's Notice of Appeal and Appeal Record were both filed; however, no Factum was filed even though the Appellant was required to do so within sixty days of the preparation of the Appeal Record, pursuant to Rule 538(1).

The Court noted that Rule 515.1(8) provides that a Civil Appeal may be dismissed for want of prosecution by the Court at any time before or after six months from the date when a Notice of Appeal is filed. The Court considered *Wong v Chambers*, 2011 ABCA 278, at para. 5, which set out relevant factors that the Court may consider on an Application to dismiss an Appeal for want of prosecution. These factors include:

- The length of the delay, and the adequacy of any explanation;
- The merits of the Appeal;
- Whether previous rulings about timelines and prosecution of the Appeal have been breached;
- Whether indulgences regarding the prosecution of the Appeal have previously been granted;
- Any prejudice to the other party; and
- Whether the Appeal is just one component of a larger manifestation of improper litigation.

The Court noted that it had received no adequate explanation from the Appellant for her delay in filing a Factum and the Appellant's conduct as a litigant militated against granting any indulgence by way of an extension of time. The Court was also not satisfied that the Appeal was meritorious. The Respondent's Application was granted and the Appeal was dismissed.

MATTY V RAMMASOOT, 2013 ABCA 170 (BERGER JA)
Rule 524 (Security for Costs)

The Respondent had been successful at Trial, a family law matter, receiving a favourable Order and Costs. The Applicant appealed, and sought to have filing deadlines extended and, if granted, to be permitted to file a Factum in excess of the length allowed by Practice Note J (12 pages). The Respondent sought Security for Costs.

The Court held that the dilatory nature of the Appeal warranted Security for Appellate Costs. If the Order for security was not complied with, the Respondent's Application was, without more, dismissed. If the Order for security was complied with, the Appellant could proceed with the Appeal and file a 12 page Factum.