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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.

1.2	• LIL DUDE RANCH LTD v 1229122 ALBERTA INC, 2014 ABQB 39
	• GRAMMER v LANGPAP, 2014 ABQB 74
	• PORTER v ANYTIME CUSTOM MECHANICAL LTD, 2014 ABQB 193
1.4	• RUE v ASSANTE WEALTH MANAGEMENT (CANADA) LTD, 2014 ABQB 109
2.24	• FIC REAL ESTATE FUND LTD v LENNIE, 2014 ABQB 105
3.2	• PATRUS v ALBERTA (WORKER'S COMPENSATION BOARD), 2014 ABCA 117
3.18	• FORT MCKAY FIRST NATION v ALBERTA (ENVIRONMENT AND SUSTAINABLE RESOURCE DEVELOPMENT), 2014 ABQB 32
3.19	• FORT MCKAY FIRST NATION v ALBERTA (ENVIRONMENT AND SUSTAINABLE RESOURCE DEVELOPMENT), 2014 ABQB 32
3.22	• FORT MCKAY FIRST NATION v ALBERTA (ENVIRONMENT AND SUSTAINABLE RESOURCE DEVELOPMENT), 2014 ABQB 32
3.27	• BROUSSEAU v JANZ ESTATE, 2014 ABQB
3.30	• 1400467 ALBERTA LTD v ADDERLEY, 2014 ABQB 85
	• TURNER v BELL MOBILITY INC, 2014 ABQB
3.56	• LIL DUDE RANCH LTD v 1229122 ALBERTA INC, 2014 ABQB 39
3.62	• VACCARO v TWIN CITIES POWER-CANADA, ULC, 2014 ABQB 56
	• ATTILA DOGAN CONSTRUCTION AND INSTALLATION CO INC v AMEC AMERICAS LIMITED, 2014 ABCA 74
3.65	• ATTILA DOGAN CONSTRUCTION AND INSTALLATION CO INC v AMEC AMERICAS LIMITED, 2014 ABCA 74
3.68	• HOOPP REALTY INC v AG CLARK HOLDINGS LTD, 2014 ABCA 20
	• 1400467 ALBERTA LTD v ADDERLEY, 2014 ABQB 85
	• MURPHY v CAHILL, 2014 ABQB 62
	• KNISS v STENBERG, 2014 ABCA 73
	• SOMJI v WILSON, 2014 ABCA 35
	• HAMILTON v ALBERTA, 2014 ABCA 103
3.74	• LIL DUDE RANCH LTD v 1229122 ALBERTA INC, 2014 ABQB 39
	• VACCARO v TWIN CITIES POWER-CANADA, ULC, 2014 ABQB 56
4.11	• VACCARO v TWIN CITIES POWER-CANADA, ULC, 2014 ABQB 56

4.22	• VACCARO v TWIN CITIES POWER-CANADA, ULC, 2014 ABQB 56
	• CHALUPA ESTATE v CHALUPA, 2014 ABCA 104
	• PORTER v ANYTIME CUSTOM MECHANICAL LTD, 2014 ABQB 193
4.24	• SHAW v SHAW, 2014 ABQB 165
4.29	• SHAW v SHAW, 2014 ABQB 165
4.31	• CABRERA v STEED, 2013 ABPC 361
4.33	• CABRERA v STEED, 2013 ABPC 361

5.1	• GRAMMER v LANGPAP, 2014 ABQB 74
5.2	• DOW CHEMICALS INC v NOVA CHEMICALS CORPORATION, 2014 ABQB 38
5.11	• DOW CHEMICALS INC v NOVA CHEMICALS CORPORATION, 2014 ABQB 38
5.13	• DOW CHEMICALS INC v NOVA CHEMICALS CORPORATION, 2014 ABQB 38
5.27	• RBZ CAPITAL CORP v PETROL ALCHEMY, LLC, 2014 ABQB 102
5.29	• SECURE ENERGY SERVICES INC v CCS CORPORATION, 2014 ABQB 107
5.33	• MURPHY v CAHILL, 2014 ABQB 62
	• SECURE ENERGY SERVICES INC v CCS CORPORATION, 2014 ABQB 107
5.35	• GRAMMER v LANGPAP, 2014 ABQB 74
5.37	• GRAMMER v LANGPAP, 2014 ABQB 74
5.41	• GORDON v TAYLOR, 2014 ABQB 11
	• MURPHY v CAHILLL, 2014 ABQB 62
5.42	• GORDON v TAYLOR, 2014 ABQB 11
	• MURPHY v CAHILL, 2014 ABQB 62
5.43	• GORDON v TAYLOR, 2014 ABQB 11
5.44	• GORDON v TAYLOR, 2014 ABQB 11

6.11	• MURPHY v CAHILL, 2014 ABQB 62
	• WINDSOR v CANADIAN RAILWAY LTD, 2014 ABCA 108
	• RBZ CAPITAL CORP v PETROL ALCHEMY, LLC, 2014 ABQB 102
6.14	• PARAMOUNT v AVENUE AH CONSTRUCTION GP CORP, 2014 ABQB 84
	• P BURNS RESOURCES LIMITED v LOCKE, STOCK & BARREL COMPANY LTD, 2014 ABCA 40

7.1	• SHREEM HOLDINGS INC v BARR PICARD, 2014 ABQB 112
	• LOFTHAUG v CANADIAN IMMIGRATION SPECIALISTS LTD, 2014 ABQB 115
7.3	• CNH CAPITAL CANADA LTD v HIGHWAY EQUIPMENT SALES LTD, 2014 ABQB 6
	• LAIRD v SWORD ENERGY INC, 2014 ABQB 13
	• PERREAL v KNIBB, 2014 ABQB 15
	• DINGWALL v DORNAN, 2014 ABCA 89
	• VACCARO v TWIN CITIES POWER-CANADA, ULC, 2014 ABQB 56
	• ORR v FORT MCKAY FIRST NATION, 2014 ABQB 11
	• LOFTHAUG v CANADIAN IMMIGRATION SPECIALISTS LTD, 2014 ABQB 115
	• P BURNS RESOURCES LIMITED v LOCKE, STOCK & BARREL COMPANY LTD, 2014 ABCA 40
	• WINDSOR v CANADIAN RAILWAY LTD, 2014 ABCA 108
	• ALLEN v RADEJ, 2014 ABQB 171
7.5	• ORR v FORT MCKAY FIRST NATION, 2014 ABQB 11

9.13	• SAMOILOVA v MAHNIC, 2014 ABCA
9.15	• SOMJI v WILSON, 2014 ABCA 35
9.16	• SOMJI v WILSON, 2014 ABCA 35
9.2	• ALBERTA (CHILD, YOUTH & FAMILY ENHANCEMENT ACT, DIRECTOR) v AR, 2014 ABCA
	• FIC REAL ESTATE FUND LTD v LENNIE, 2014 ABQB 105

10.13	• SHREEM HOLDINGS INC v BARR PICARD, 2014 ABQB 112
10.18	• SHREEM HOLDINGS INC v BARR PICARD, 2014 ABQB 112
	• MACPHERSON LESLIE & TYERMAN LLP v MOLL, 2014 ABCA 45
10.2	• STEINKE v HAJDUK GIBBS LLP, 2014 ABQB 34
	• ALBERTA TREASURY BRANCH v 14010507 ALBERTA LTD, 2013 ABQB 748
	• THORESON v ALBERTA (INFRASTRUCTURE), 2014 ABCA 31
10.20	• SHREEM HOLDINGS INC v BARR PICARD, 2014 ABQB 112
	• MACPHERSON LESLIE & TYERMAN LLP v MOLL, 2014 ABCA 45
10.26	• STEINKE v HAJDUK GIBBS LLP, 2014 ABQB 34
	• SHREEM HOLDINGS INC v BARR PICARD, 2014 ABQB 112
	• MACPHERSON LESLIE & TYERMAN LLP v MOLL, 2014 ABCA 45
	• ALBERTA TREASURY BRANCH v 14010507 ALBERTA LTD, 2013 ABQB 748
10.27	• STEINKE v HAJDUK GIBBS LLP, 2014 ABQB 34
	• SHREEM HOLDINGS INC v BARR PICARD, 2014 ABQB 112
	• ALBERTA TREASURY BRANCH v 14010507 ALBERTA LTD, 2013 ABQB 748
10.29	• FIC REAL ESTATE FUND LTD v LENNIE, 2014 ABQB 105
10.30	• FIC REAL ESTATE FUND LTD v LENNIE, 2014 ABQB 105
10.31	• RUE v ASSANTE WEALTH MANAGEMENT (CANADA) LTD, 2014 ABQB 109
	• ALBERTA TREASURY BRANCH v 14010507 ALBERTA LTD, 2013 ABQB 748
	• FIC REAL ESTATE FUND LTD v LENNIE, 2014 ABQB 105
10.33	• RUE v ASSANTE WEALTH MANAGEMENT (CANADA) LTD, 2014 ABQB 109
	• SHAW v SHAW, 2014 ABQB 165
10.41	• HAMILL v KUDRYK, 2014 ABCA 82
10.42	• GENGE v CENTRON RESIDENTIAL CORPORATION, 2014 ABQB 50
10.52	• FIC REAL ESTATE FUND LTD v LENNIE, 2014 ABQB 105
10.9	• ALBERTA TREASURY BRANCH v 14010507 ALBERTA LTD, 2013 ABQB 748

11.17	• FIC REAL ESTATE FUND LTD v LENNIE, 2014 ABQB 105
11.20	• FIC REAL ESTATE FUND LTD v LENNIE, 2014 ABQB 105
11.21	• FIC REAL ESTATE FUND LTD v LENNIE, 2014 ABQB 105
11.25	• 1400467 ALBERTA LTD v ADDERLEY, 2014 ABQB 85
	• TURNER v BELL MOBILITY INC, 2014 ABQB
	• RBZ CAPITAL CORP v PETROL ALCHEMY, LLC, 2014 ABQB 102
11.31	• 1400467 ALBERTA LTD v ADDERLEY, 2014 ABQB 85
	• TURNER v BELL MOBILITY INC, 2014 ABQB

12.44	• OLSON v OLSON, 2014 ABCA 15
12.51	• OLSON v OLSON, 2014 ABCA 15

12.53	• CALVER v CALVER, 2014 ABCA 63
12.54	• ZAITER v ALATRACHE, 2014 ABCA 72
13.18	• PARAMOUNT v AVENUE AH CONSTRUCTION GP CORP, 2014 ABQB 84 • DINGWALL v DORNAN, 2014 ABCA 89
505	• JAMES v NORTHERN LAKES COLLEGE, 2014 ABCA 48 • CHALUPA ESTATE v CHALUPA, 2014 ABCA 104
515.1	• MORBANK FINANCIAL INC v FIELD, 2014 ABCA 3
538	• HAMILL v KUDRYK, 2014 ABCA 82

LIL DUDE RANCH LTD v 1229122 ALBERTA INC, 2014 ABQB 39 (MASTER ROBERTSON)
Rules 1.2 (Purpose and Intention of These Rules), 3.56 (Right to Counterclaim) and 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings)

The Plaintiff commenced an Action against the Defendant claiming default under a lease agreement as between the Plaintiff and Defendant, and regarding a dispute over who was entitled to fire insurance payments. The Defendant counterclaimed stating that there was a partnership between the parties and there were matters in dispute beyond the fire insurance issues; specifically, improvements made to the lands and a living arrangement agreement between the individual parties. Questioning in the Action had occurred and the Defendant (Plaintiff by Counterclaim) applied to amend the Counterclaim to add an individual who was not already a party to the Action as a Plaintiff by Counterclaim. The Defendant (Plaintiff by Counterclaim) also sought to amend the amount of damages.

Master Robertson noted the concordance of former Rule 93 and new Rule 3.56(1) both in form and substance. Master Robertson considered whether the law had changed in light of Rules 1.2 and 3.74, concluding that "neither the former Rule, nor the current Rule, admitted of the possibility of adding a stranger to the proceedings as a Plaintiff-by-Counterclaim". The Master observed that Rule 3.74(2)(a), which should be read in conjunction with Rule 3.56(1), was directed at making sure that a party added to an existing pleading as a Plaintiff is "consenting to being added". Master Robertson articulated the test for amending pleadings: an amendment should be allowed, no matter how careless or late, unless there is prejudice to the other side, and even that is no obstacle if it is required. Master Robertson set out the four major exceptions to the "classic rule" and noted that Rules 3.74(2)(b) and 3.74(3) establish three criteria to add a party:

1. The Application must be made by a party;

2. The Court must be satisfied that an Order should be made; and

3. There should be no prejudice that could not be remedied.

Master Robertson clarified that, with respect to the second criteria, justice must require the addition of the parties.

Master Robertson considered and dismissed the Defendant's (Plaintiff by Counterclaim) arguments that Rule 1.2 allowed the adding of a new Plaintiff by Counterclaim to make sure that the correct parties were before the Court and that Rule 3.56(1) should be "interpreted" to allow the addition of a stranger as a Plaintiff by Counterclaim.

With respect to the proposed revisions to the claims in the Counterclaim, the Master stated that such amendments were frequently sought after Questioning when the real issues had been clarified. Master Robertson described these kinds of amendments as "housekeeping" and noted that Rule 1.2(2) contemplated such circumstances. Master Robertson dismissed the Application to amend the

Counterclaim by adding a further Defendant who was a stranger to the Action; however, the remaining proposed amendments revising the claims in the Counterclaim were allowed.

GRAMMER v LANGPAP, 2014 ABQB 74 (MASTER SMART)
Rules 1.2 (Purpose and Intention of these Rules), 5.1 (Purpose of this Part), 5.35 (Sequence of Exchange of Experts' Reports) and 5.37 (Questioning Experts Before Trial)

The Defendant sought the production of documents underlying Experts' Reports that were previously provided by the Plaintiffs. The Defendant argued that, because the Experts' Reports were produced, litigation privilege was waived and the underlying documents must be produced.

The Plaintiffs argued that there was an express reservation of privilege when the reports were provided and, relying on *Chernetz v Eagle Copters Ltd*, 2005 ABQB 712 (*"Chernetz"*), that litigation privilege continues to apply until the report is introduced into evidence at Trial.

The Court held that Rule 5.37 was applicable and consistent with *Chernetz*. Rule 5.37 allows the Court to direct that an expert be Questioned (and consequently documents underlying the report be disclosed) prior to Trial, in exceptional circumstances. The Court held there were no exceptional circumstances, and the Application was dismissed.

PORTER v ANYTIME CUSTOM MECHANICAL LTD, 2014 ABQB 193 (GRAESSER J)
Rules 1.2 (Purpose and Intention of These Rules) and 4.22 (Considerations for Security for Costs Order)

In a wrongful dismissal action against a Corporate Defendant, the Plaintiff attempted to force the other shareholders and directors to buy his shares. One of the individual Defendants applied for intervener status in order to defend the Action on behalf of the Corporate Defendant and to pursue the Corporate Defendant's Counterclaim against the Plaintiff. The stated purpose of the Application for intervener status was to avoid the expense of having two counsel defend the Action and pursue the Counterclaim. The Plaintiff argued that, if the individual Defendant was allowed to intervene, he should post Security for Costs because the corporation was without significant assets.

Graesser J. referred generally to the Foundational Rules, stating that they favored efficiency and economy in the pursuit of litigation. However, while economy is encouraged, it does not trump conflicts of interest. His Lordship observed that the Action was neither efficient nor economical since there had been significant delay in moving the Action forward, but a conflict would loom if leave were given to allow intervener status. It would inferentially allow the same counsel to defend both the individual Defendant and the Corporation as well as pursue a corporate counterclaim. In the result, Graesser J. held that the appointment of an intervener was not necessary and was premature since there was no indication that the corporation was unable to defend the Action and pursue the Counterclaim. Graesser J. noted that the requirement under the former Rules, that a Defendant who was seeking Security for Costs was required to swear that he had a defence to the Action, was no longer part of the Rules. The merit of the Parties' positions was a factor to be considered, but there were no longer any "magic words" necessary in an Affidavit in support of such an Application.

RUE v ASSANTE WEALTH MANAGEMENT (CANADA) LTD, 2014 ABQB 109 (ROOKE ACJ)
Rules 1.4 (Procedural Orders), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Plaintiffs commenced a prospective Class Action against a financial advisor and his employer for fraud and misappropriation of funds. The individual Defendant was also criminally charged for causing the death of one of his former clients; she died when the letter bomb the Defendant allegedly sent to her exploded. The individual Defendant applied for a stay of the proceedings in the potential Class Action pending the final determination of the criminal proceedings. In the alternative, the Defendant sought an Order directing that, pending the final determination of the criminal proceedings, there be

certain protections afforded to the Defendant with respect to Questioning related to the criminal proceedings. The Plaintiffs agreed to the alternative relief, but the Defendant appeared before the Court to request the stay in any case.

Associate Chief Justice Rooke considered the test for a stay where there are concurrent criminal and civil proceedings. His Lordship noted that the jurisdiction of the Court to grant a stay is provided for in the *Judicature Act* and the *Class Proceedings Act* and augmented by Rule 1.4(2)(h). Associate Chief Justice Rooke confirmed that a stay of proceedings was discretionary and not a matter of right. The test for the stay was: whether the pending criminal charges were sufficiently interrelated with the civil Action so that the Defendants would be prejudiced if the civil Action continued; and whether the Defendants could demonstrate that the stay would not cause an injustice to the Plaintiff Class. Associate Chief Justice Rooke held that, in all the circumstances, the Defendant did not meet the test for a stay which would require the Court to exercise its discretion, and the alternative Order which the Respondents agreed to adequately protected the Defendant. With respect to costs, Associate Chief Justice Rooke ordered that, since the Plaintiffs had effectively made an offer equal to what was granted, double costs were appropriate pursuant to the Rules of Court.

FIC REAL ESTATE FUND LTD v LENNIE, 2014 ABQB 105 (GRAESSER J)
Rules 2.24 (Lawyer of Record), 9.6 (Effective Date of Judgments and Orders), 10.29 (General Rule for Payment of Litigation Costs), 10.30 (When Costs Award May be Made), 10.31 (Court-Ordered Costs Award), 10.52 (Declaration of Civil Contempt), 11.17 (Service on Lawyer of Record), 11.20 (Service of Documents, Other Than Commencement Documents, in Alberta) and 11.21 (Service by Electronic Method)

The Plaintiff commenced an action against three Defendants for non-payment of funds upon closing a real estate transaction. The Plaintiff mistakenly discharged its own caveat and the lands were transferred. The Plaintiff, upon discovering its mistake, applied for an Order requiring that the two individual Defendants immediately pay the funds into Court. The Order was served on Counsel of Record for both of the individual Defendants in accordance with the Rules. The Plaintiff applied to enforce the terms of the Order against one of the individual Defendants, which resulted in the freezing of that Defendant's accounts, and a warrant was issued to hold the Defendant in contempt. The Defendant learned of it and voluntarily came forward to deal with the matter, worked to comply with the terms of the Order and accounted for most of the funds received. The Plaintiff sought a declaration that the individual Defendant was in contempt of the Order and sought solicitor and client costs for the enforcement proceedings.

Justice Graesser considered whether the initial service of the Order had been effective. His Lordship noted that an Order is not a commencement document as defined in the Rules, nor is a Notice of Application, so service may be effective in a number of different ways. Justice Graesser reviewed Rules 2.24, 11.17, 11.20 and 11.21, and stated that it was clear from Rule 11.17 that subsequent documents in an action can be served on a Lawyer of Record. Justice Graesser clarified that Orders speak from pronouncement (Rule 9.6): appeal periods may in some cases not run until the formal Order or Judgment has been filed and served, but when a Justice makes an Order in Court, the Order is not "in limbo and ineffective" until the terms are completed and the Order filed and served. The Order is therefore "valid unless and until it is set aside or varied".

Justice Graesser considered Rule 10.52 pertaining to civil contempt. His Lordship reviewed the common law requirements for contempt and stated that the language of Rule 10.52 was clear: it is not necessary to prove that the person has actual knowledge of an Order; it is sufficient if the Order has been served in accordance with the Rules. Graesser J. opined that Rule 10.52(3)(a) has replaced the common law in Alberta. Justice Graesser considered the Defendant's argument that he did not know about the Order. Noting that the Rules allow for contempt to be found even in the absence of personal knowledge, Justice Graesser was satisfied that the Defendant had provided a reasonable excuse for not complying with the Orders, and even if the timing of events was suspicious with respect to the transfer of funds, suspicions were not a proper basis for a finding of

contempt. The individual Defendant was found not guilty of contempt.

His Lordship also considered whether solicitor and client costs were appropriate in the circumstances. The Plaintiff argued that they had been put to considerable expense to get compliance with the Order. Justice Graesser considered the provisions of Rules 10.29 through 10.31 and stated that costs were always at the discretion of the Court. Further, it was clear from Rule 10.31 that the Court has the jurisdiction to award a range of costs. His Lordship cited prior leading authority on solicitor and client costs pursuant to prior Rule 601(1). In the result, the fees and disbursements were payable by the Defendant on a full indemnity basis for those portions which related to the enforcement of the initial Order. Justice Graesser noted that it would be inappropriate in the circumstances to require the Plaintiff and its lawyers to justify "every bit of research and minute of time spent pursuing appropriate remedies".

PATRUS v ALBERTA (WORKER'S COMPENSATION BOARD), 2014 ABCA 117 (MARTIN, O'FERRALL JJA and NATION J (AD HOC))
Rule 3.2 (How to Start an Action)

Mr. Patrus, a manual labourer, lost his dominant left hand while operating a saw at work. The Workers' Compensation Board ("WCB") assessed him for temporary economic loss under the WCB compensation regime. The Decision Review Body of the WCB adjusted Mr. Patrus' temporary economic loss income based on the earnings of a video store clerk.

The Appeals Commission upheld the WCB's findings that Mr. Patrus was employable, but rejected that Mr. Patrus was employable as a video store clerk. They remitted the matter back to the WCB, directing it to identify a suitable position for Mr. Patrus. Mr. Patrus appealed the Appeals Commission's Decision to the Court of Queen's Bench.

The presiding Justice at the Court of Queen's Bench held that Mr. Patrus had selected the proper avenue in appealing the matter. Mr. Patrus' grounds of Appeal raised extricable questions of law and were not suitable for Judicial Review. The Court held that even if the Appeal involved only factual issues, the saving provision in Rule 3.2(6) of the Rules of Court would apply to avoid denial of a remedy on the basis of a technical defect. Further, the presiding Queen's Bench Justice noted that he would have reached the same decision even if it was a Judicial Review. The Queen's Bench Justice, after reviewing the Appeal Commission's Decision, concluded that it would be appropriate to restore Mr. Patrus' benefits to the temporary total disability level and referred the matter back to the Appeal Commission for determination of Mr. Patrus' employability.

WCB appealed to the Court of Appeal, asserting that the Queen's Bench Justice lacked jurisdiction to hear the Appeal because Mr. Patrus' complaints with the Appeal Commission's Decision did not raise issues of law or jurisdiction. WCB claimed that the questions before the Queen's Bench Justice were questions of mixed fact and law from which no legal issues could be extricated.

The Court of Appeal specifically noted that the Queen's Bench Justice's statements that he would have invoked the saving provision in Rule 3.2(6) had he found a technical defect in that proceeding, and that he would have come to the same conclusion even if there had been a Judicial Review. The Court of Appeal held that the form of commencement was not relevant, as no one was prejudiced by the fact that the proceedings were commenced as an Appeal and, as such, the Queen's Bench Justice had jurisdiction to hear the Appeal.

FORT MCKAY FIRST NATION v ALBERTA (ENVIRONMENT AND SUSTAINABLE RESOURCE DEVELOPMENT), 2014 ABQB 32 (READ J)
Rules 3.18 (Notice to Obtain Record of Pleadings), 3.19 (Sending in Certified Record of Proceedings) and 3.22 (Evidence on Judicial Review)

The Applicant, Fort McKay First Nation (Fort McKay), in the context of an Application for Judicial Review, sought a preliminary Order for production of a further and better Record by the Minister of Environment and Sustainable Resource Development (ESRD) or, in the alternative, an Order allowing the admission of an Affidavit sworn by a member of Fort McKay (Mr. Stuckless).

Fort McKay had provided the ESRD with various documents relating to the decision under Judicial Review. The ESRD had included all of those documents as part of the Record. However, Fort McKay sought to have the ESRD produce further documents in the Record, on the basis that these documents had been provided to the ESRD during previous projects where the ESRD had made decisions in relation to the Applicant's land.

Fort McKay argued that because all of the documents provided to the ESRD in previous projects were in the possession of the ESRD, Fort McKay had a reasonable expectation that the ESRD would consider and review them in making the decision. As a consequence, it argued, these documents should be considered as having been filed within the meaning of Rule 3.18(2)(d).

The Court declined to adopt this interpretation. The documents referenced pre-dated the present dispute and were not provided to the ESRD in this proceeding. The Court noted that to accede to Fort McKay's position would make the process of determining what constituted the Record in a Judicial Review "exceedingly unwieldy and difficult".

The Court declined to use its discretion to allow the Affidavit of Mr. Stuckless to be entered into evidence to be reviewed by the Court on judicial review. Moreover, the Court noted that the onus lay with the party seeking to admit the documents to show their relevance, and determined that the Applicant had not made it clear why the documents in this Affidavit were relevant. The Court noted that a party seeking to adduce further evidence is required to edit and organize its materials.

BROUSSEAU v JANZ ESTATE, 2014 ABQB 136 (MASTER SCHLOSSER)
Rule 3.27 (Extension of Time for Service)

The Plaintiff, Laetitia Brousseau, applied for an extension of time for the service of a Statement of Claim. The Action arose out of a car accident. There were three passengers, all Plaintiffs, in one car, and the same law firm acted for all of them. Settlements were reached with two of the Plaintiffs, but not with Ms. Brousseau.

Prior to the filing of the Statement of Claim, the insurer indicated that there were no issues with coverage. Based on, *inter alia*, the representation that insurance would cover the accident, and that settlement had been reached with the other two Plaintiffs, the Court held that the exceptions to allow time for an extension of service found in Rule 3.27(1)(a)(ii) and (iii) were met. The Application was granted.

1400467 Alberta Ltd v Adderley, 2014 ABQB 85 (VEIT J)
Rules 3.30 (Defendant's Options), 3.68 (Court Options to Deal with Significant Deficiencies), 11.25 (Real and Substantial Connection) and 11.31 (Setting Aside Service)

The Applicant applied to strike out the Respondent's claim under Rule 3.68(1) for two reasons. First, the Applicant submitted that the Respondent did not have a reasonable cause of action in Alberta (Rule 3.68(2)(b)). Second, the Applicant submitted that the Court had no jurisdiction over the Respondent, a corporation incorporated and operating in Saskatchewan (Rule 3.68(2)(a)).

In assessing the Applicant's position on Rule 3.68(2)(b), the Court reviewed former Rule 129 and current Rule 3.68(2)(b). Justice Veit noted that former Rule 129 had previously been interpreted and considered as though the Rule had included the word "reasonable". The Court further held that there was no difference in principle between the assessments made under the current Rule and the former Rule.

Determining if there was a reasonable cause of action under Rule 3.68(2)(b) required a summary analysis. The Amended Statement of Claim explicitly alleged that the Defendants conspired to solicit its clients and induce its employees to join the Applicants. The Amended Statement of Claim also alleged that the employment contracts were made in Alberta. Based on the above, the Court held that it was reasonable to conclude that a reasonable cause of action in Alberta existed.

The Court then determined whether it had territorial jurisdiction to deal with the Application. The Court acknowledged that dealing with territorial jurisdiction

disputes, for constitutional reasons, required more than a summary analysis (*Greenbuilt Group of Companies Ltd v RMD Engineering Inc*, 2013 ABQB 297). The Court took two routes to determine the issue of territorial jurisdiction: attornment and conflicts of laws.

By failing to avail itself of the processes outlined in Rules 3.30 and 11.31, by filing a Defence on the merits of the claim, and by taking other steps in the proceedings, including bringing the current Application, the Court held that the Applicant had attorned to the jurisdiction of the Court.

To prove a real and substantial connection under Rule 11.25(3)(b) and 11.25(3)(c), the contract had to relate to, or be made in and governed by, the law of Alberta. From the Amended Statement of Claim, and from the employment contract, it was clear to the Court that the Applicant's contract related to Alberta. It was also clear that, not only was the non-compete contract governed by Alberta law, Alberta was the choice of forum. The Court held that, although the Applicant was not a signatory to the contracts in question, its links to its principal established the required connection. Overall, the Court held that it had jurisdiction *simpliciter* to deal with the Respondent's claim.

Finally, the Court considered whether it should exercise its rights to rule on this matter. *Forum conveniens* did not have to be determined for two reasons. First, the Respondents gave the Applicants no notice on this issue. Second, the Court held that it would be inappropriate to deal with the matter without assistance from the parties on the important legal issues. For the above reasons, the Court did not determine the *forum conveniens* issue on this Application.

TURNER v BELL MOBILITY INC, 2014 ABQB 36 (Lee J)
Rules 3.30 (Defendant's Options), 11.25 (Real and Substantial Connection) and 11.31 (Setting Aside Service)

The representative Plaintiff commenced a proposed Class Action against several communications and wireless companies in respect of overcharging for roaming fees in various provinces. The Action had not yet been certified, but two of the Defendants, Saskatchewan Telecommunications and Saskatchewan Telecommunications Holding Corporation (collectively "SaskTel"), applied to dismiss the Action on the basis that the Courts of Alberta lacked jurisdiction over SaskTel with respect to the claims against it. Justice Lee considered whether SaskTel's Application to dismiss was made under the wrong Rules and it was only entitled to an invalidation of service, and whether the Courts of Alberta had jurisdiction over the claim.

SaskTel was served with the Plaintiff's Statement of Claim at its head office in Saskatchewan. The Plaintiff argued that SaskTel could only seek an invalidation of service, not a dismissal of the Action under the Rules. Justice Lee noted that SaskTel was not restricted to seeking an Order to set aside service of the Statement of Claim under Rule 11.31. Justice Lee concluded that the Plaintiff's argument was without merit: SaskTel had made a clear Application challenging the Court's jurisdiction, and had cited all of the applicable Rules for the specific relief that it sought.

With respect to jurisdiction, SaskTel argued that, although it was extra-provincially registered in Alberta, it had not carried on business in Alberta since early 2006; therefore the Alberta Courts could not be seized of the Action. Justice Lee restated Rule 11.25(3), noting the consistency of the underlying analytical framework for a real and substantial connection and the provisions of the Alberta Rules. With respect to the first branch of the test under Rule 11.25, His Lordship rejected the use of damages as a presumptive connecting factor as determinative of whether the Court had jurisdiction. His Lordship held that the Alberta Court did have territorial competence and jurisdiction in the case on the basis that the Claim involved over 4,000 resident Albertans who may have been unlawfully charged system access fees by SaskTel.

With respect to the second branch of the test, Justice Lee considered the SaskTel contract which contained a choice of law clause which, SaskTel argued, presumptively removed any connecting factor to Alberta. The Plaintiff countered that the choice of law clause should not be conflated with a choice of forum clause which mandated proceedings in a particular jurisdiction. The Justice observed that leading Supreme Court case law suggested

that Courts would assume jurisdiction over every aspect of the case for fairness and efficiency. Justice Lee applied this principled approach and concluded that, due to a variety of presumptive connecting factors, the Alberta Court had territorial competence and was capable of applying Saskatchewan law in the instant case.

With respect to the third element, Justice Lee agreed that the Plaintiff had misstated the test. Justice Lee analysed whether the place of sale was material, and how modern business activities affected the notion of place of sale. Justice Lee determined that SaskTel was likely "carrying on business" in Alberta, and agreed with the Plaintiff that residency status was of "minimal consequence to the question of jurisdiction" in the case at bar.

With respect to the final branch under Rule 11.25, Justice Lee emphasized the clarity of Rule 11.25(3)(i): that the consideration of whether a Defendant is a "necessary and proper party" is related to ascertaining the real and substantial connection to a jurisdiction. Justice Lee confirmed that this factor could be examined as a presumptive connecting factor for the purpose of a jurisdictional analysis. His Lordship stated that, though the proposed Class Action did not automatically provide the Court with jurisdiction, the "specter of commonality" of the claims against SaskTel and the other defendants made SaskTel a necessary and proper party to the Action.

In the result, Justice Lee found that the Courts in Alberta had territorial competence or jurisdiction over SaskTel. Briefly considering whether the Court should decline to exercise its jurisdiction, Justice Lee noted that the Defendant had not raised the issue of *forum non conveniens* and had not argued that the Statement of Claim constituted an abuse of process pursuant to Rule 3.68(2)(d). Justice Lee left open whether SaskTel could utilize that argument in the future. The Application to dismiss the Action as against SaskTel was denied.

VACCARO v TWIN CITIES POWER-CANADA, ULC, 2014 ABQB 56 (NIXON J)
Rules 3.62 (Amending Pleading), 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings), 4.11 (Ways the Court May Manage Action), 4.22 (Considerations for Security for Costs Order) and 7.3 (Summary Judgment)

The Plaintiff was employed as a trader by the Defendant, Twin Cities Power-Canada, ULC ("TC Canada"), by way of an employment contract. He was terminated from his employment without cause. The other Defendants, collectively, Twin Cities USA ("TC USA") were related to TC Canada.

There were four Applications before the Court: (1) TC USA applied for Summary Dismissal of the Action by the Plaintiff for damages for wrongful dismissal; (2) the Plaintiff applied to amend its Pleadings; (3) the Plaintiff sought an Order for Security of Costs against TC USA and TC Canada (collectively, the "Defendants"); and (4) the Plaintiff sought Security for Judgment against the Defendants.

TC USA applied for summary dismissal of the Action on two grounds. First, TC USA submitted that the issue was res judicata. Second, TC USA submitted that it was not the Plaintiff's employer and thus the argument was without merit and could not succeed.

The Court recognized that Rule 7.3 of the Rules of Court provided for Summary Judgment when there was no merit to a claim. As a general rule, outstanding Applications to amend Pleadings are resolved before considering a Summary Judgment Application on its merits (Condominium Corp No 0321365 v 970365 Alberta Ltd, 2012 ABCA 26). However, leave to amend will not be granted if the claim could be successfully struck, such as if the claim was res judicata (Alberta Treasury Branches v Opsteen, 2012 ABCA 153).

Based on the above, the Court first determined whether the Application was res judicata. The Court held that the previous Summary Judgment entered against TC Canada as the Plaintiff's employer did not constitute a finding that the

Plaintiff had only one employer. It also did not preclude a finding that TC USA or any of the proposed new Defendants would also be liable as an employer. The Court dismissed the Application of TC USA for Summary Judgment sought on the basis of res judicata.

In determining if amendments to Pleadings should be allowed, the Court relied on Rules 3.62 and 3.74(3). In addition, the Court summarized the following principles regarding amendments:

1. An amendment should be allowed no matter how careless or late, unless there is prejudice to the other side, and even that is no obstacle if it is repaired;

2. The threshold to allow amendments is very low except in cases of alleged fraud. Very significant evidence and the evidence of the intent to commit fraud is required; and

3. A modest degree of evidence justifies an amendment to Pleadings within the limitation period.

The Court held that there was no prejudice in this case as the existing Defendants and the proposed Defendants were closely related entities. Further, the existing Defendants were represented throughout the litigation by common counsel who also represented the proposed Defendants. There was a standstill agreement respecting limitation periods. The Court reviewed the amendments on a case-by-case basis, allowing some amendments and disallowing others.

The Plaintiff sought Security for Costs and Security for Judgment against the Defendants as a condition of their continued defence. Rule 4.22 of the Rules of Court allowed for Security for Costs as a discretionary Order. The Court granted Security for Costs against TC Canada for several reasons including:

1. TC Canada had ceased operations and had no assets in Alberta - the Plaintiff had no ability to enforce his existing Judgment, any future Judgment or any Order for Costs against TC Canada;

2. TC Canada's defence continued to be funded and the evidence did not show that an Order for Security would preclude it from continuing to defend the Action against it, or unduly prejudice its defence;

3. With regard to the merits of the claim, the Court noted that the Plaintiff had a final judgment against TC Canada and TC Canada had not posted Security as directed by the Alberta Court of Appeal; and

4. There was insufficient evidence to draw the conclusion that the Plaintiff was responsible for the closure of TC Canada.

The Court held that the unpaid final Judgment, the damages for wrongful dismissal and the Plaintiff's unpaid bonus were all strong claims. Taking into account all of the factors relevant to Rule 4.22, the Court held that Security for Costs against TC Canada was appropriate.

Although Security for Judgment was an extra-ordinary remedy to be granted only in exceptional cases, the Court held that those circumstances existed here because:

1. TC Canada enjoyed the benefit of revenue gathered by the Plaintiff, but chose not to pay the Plaintiff his bonus;

2. TC Canada did not honour the Judgment that it said it would;

3. TC Canada raised an unsubstantiated FERC investigation defence;

4. TC Canada had ceased its operations, thus making it difficult, if not impossible, for the Plaintiff to collect; and

5. TC Canada continued to be involved in the litigation and there was no evidence that it could not arrange to post security.

With regard to Security for Costs and Judgment against TC USA, the Court held that the corporation had no assets in

the jurisdiction against which the Plaintiff could enforce a Judgment. The Court also held that there was no basis to conclude that an Order for Security for Costs, or for Judgment, would prejudice its ability to continue its defence, or that it could not post security. However, on the evidence before the Court, the Court held that the claims against TC USA were not as strong as the claims against TC Canada.

Pursuant to Rule 4.11, the Court has discretion to enforce terms and conditions, and make any Order with respect to practice or procedures. The Court noted the following relevant circumstances:

1. The Plaintiff had not been paid the bonus the Court had determined he was entitled to;

2. TC USA, or at-least some of the Defendants under TC USA, decided to cease operations in Canada and remove its assets from Alberta;

3. TC USA controlled the flow of money in and out of TC Canada;

4. TC USA did not use any of its monies, including any profits earned, after terminating the Plaintiff to pay the Plaintiff his bonus;

5. TC USA had benefitted from the services of the Plaintiff for which he had not been paid; and

6. It would not be just and equitable, as a result of TC USA and TC Canada arranging its affairs, that the Plaintiff not be able to enforce Judgment in Alberta.

The Court held that exceptional circumstances existed that would make it just and equitable that both Security for Costs and Security for Judgment be posted by TC USA, despite the uncertainty respecting the merits of the Plaintiff's claim.

ATTILA DOGAN CONSTRUCTION AND INSTALLATION CO INC v AMEC AMERICAS LIMITED, 2014 ABCA 74 (CONRAD, BERGER and SLATTER JJA)
Rules 3.62 (Amending Pleading) and 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

The parties were equal participants in a joint venture agreement to design and build a magnesium oxide plant for Jordan Magnesia Company. The project did not proceed as planned and was subsequently terminated. The Appellant Plaintiff sued the Respondent Defendant. After a period of time and a lengthy legal history, the Appellants applied to amend their Statement of Claim and Defence to Counterclaim. First, the Appellant alleged that it entered into an agreement because of duress or undue influence. Second, it alleged that the Respondent was in breach of fiduciary duties by not disclosing a conflict of interest. The Case Management Judge dismissed the Application to amend the Plaintiff's pleadings.

The Plaintiff appealed the Order of the Case Management Judge to dismiss the Application. The Appellant argued that the Case Management Judge erred in setting too high an evidentiary standard for amending pleadings, misstated the law on duress and fiduciary duties, and failed to consider relevant evidence.

The Court of Appeal noted that the standard of review for a question of law was correctness and there had to be a palpable and overriding error for a reversal of the Case Management Judge's discretionary Decision. Decisions made by a Case Management Judge were discretionary and entitled to deference. They would only be overruled if they reflected an error of principle or were clearly unreasonable.

On the issue of amending pleadings, the Court noted that amending pleadings goes through three stages:

1. The Plaintiff is allowed to include any allegations that disclose a cause of action without having to produce any evidence in support of the pleading when an action is commenced;

2. An amendment can be made any number of times

without the consent or permission of the other parties, and without having to produce any evidence in support before the pleadings close (Rule 3.62(1)(a)); and

3. If any amendments are to be made after the pleadings close, they must be accompanied by either a Consent Order or the permission of the Court. Evidence in support of the allegation would be required (Rules 3.62(1)(c) and 3.65).

The Court of Appeal noted the importance of closing pleadings, as defined in Rule 3.67. The Court further noted that amendments could still be made. Although some evidence was required to amend after the close of pleadings, the evidentiary threshold was low. It was neither necessary for the amending party to show that the pleading could be proven at trial nor that it met the test for Summary Judgment.

In this case, the parties agreed that the Case Management Judge correctly set out the test for amending pleadings: no matter how careless or late the parties seeking the amendments are, amendments can be made subject to four exceptions:

(a) It would cause serious prejudice to the opposing party not compensable in costs;

(b) The amendment requested was hopeless;

(c) Unless permitted by statute, the amendment sought to add a new party or cause of action after the expiry of the limitation period; and

(d) There was an element of bad faith associated with the failure to plead the amendment in the first instance.

After stating the above, the Court analyzed the amendment for duress. The Appellants argued that the Case Management Judge engaged in a Summary Judgment analysis that set too high a standard for the amount of evidence required in support of the amendments. To determine the threshold necessary to justify an amendment, the Court held that a Judge was allowed some limited assessment of the evidence. This did not preclude weighing all of the tendered evidence by the Judge. In this case, the Court held that the allegation of duress, brought 13 years after the incident, could be taken into consideration to determine if an amendment was hopeless. On the issue of economic duress, the Court held that the Case Management Judge used the proper test and the Decision did not reflect a reviewable error. Overall, the Court held that the Appellant had not demonstrated any reviewable error with respect to the decision on the duress amendment.

The Appellant and the Respondent jointly hired counsel to settle their claim against Jordan Magnesia Company. The counsel hired had been previously retained by the Respondent, but acted jointly and for the benefit of both parties to settle the claim. The Court found no conflict of interest as a result of the Respondent's counsel being previously retained and did not allow the conflict of interest amendment. The Court noted that even if there was a conflict of interest, no damage resulted and as such there would be no remedy. If there was a breach that would entitle the Appellant to a remedy, the Court noted that any such conflict of interest would not relieve the Appellant of all of its responsibilities to contribute to the legitimately incurred litigation costs.

Overall, the Court held that the assessment of the evidence by the Case Management Judge, and his discretionary decision to refuse the amendments, were entitled to deference. There was no palpable and overriding error. There was also no unreasonable exercise of discretion or an extricable error of law. The Appeal was dismissed.

HOOPP REALTY INC v AG CLARK HOLDINGS LTD, 2014 ABCA 20 (PAPERNY, MARTIN JJA and BELZIL J (AD HOC)) Rule 3.68 (Court Actions to Deal with Significant Deficiencies)

The Appellant appealed a Chambers Decision striking out the Statement of Claim pursuant to Rule 3.68 of the Alberta Rules of Court, on the basis that it was plain and obvious that the claim could not succeed. The dispute

between the parties arose as a result of a design build agreement whereby the Respondent was obliged to build a warehouse for the Appellant. The warehouse was completed, but there were issues with dust from the floor that arose shortly after the completion of the project. The Appellant sued the Respondent in the Court of Queen's Bench for breach of agreement and negligence.

The Chambers Judge struck the Statement of Claim as it was plain and obvious that the Action would not succeed for two reasons. First, the agreement had a mandatory arbitration clause. Second, the limitation period for arbitrating the dispute had expired before any party had taken steps to commence an arbitration.

The Court of Appeal held that the Chambers Judge correctly interpreted and applied the decision in *Agrium Inc v Babcock & Wilcox Canada Ltd*, 2005 ABCA 82. The Court further held that parties who agree to mandatory arbitration as a remedy must arbitrate the dispute and cannot begin a civil suit. In the event that a party files a Statement of Claim within the limitation period for arbitration, and the arbitration has not commenced, the Court will strike the claim. The Court dismissed the Appeal.

MURPHY v CAHILL, 2014 ABQB 62 (VEIT J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 5.33 (Confidentiality and Use of Information), 5.41 (Medical Examinations), 5.42 (Options During Medical Examination) and 6.11 (Evidence at Application Hearings)

The Defendant, Cahill, was sued by his brother-in-law, Murphy, in Alberta and in Ireland. Immediately before the Trial in Ireland was due to commence, Cahill suffered a stroke. The Trial was adjourned, and Irish counsel for Murphy obtained an Order from the Irish Court to obtain additional evidence of Cahill's medical status, which was never received. Instead, a medical opinion letter was proffered by Cahill, and Murphy's counsel sought a medical report from another doctor. Murphy was allowed to enter all of these reports into evidence in the Irish Action, but Cahill requested that the Alberta Courts strike out Murphy's medical opinion because it disclosed Cahill's depression.

Madam Justice Veit considered whether Murphy could use the reports in the Alberta Action. First, Justice Veit noted that Rule 6.11(1)(f) may govern whether the Defendant's medical report is evidence. The Justice reviewed the history of the Rule, and considered the case law under former Rule 263 to help interpret Rule 6.11(1)(f) which, the Justice clarified, was intended to "allow applications to be heard on the basis of existing evidence only where such reliance does not create unfairness for the Parties" [emphasis in original]. Justice Veit concluded that, for the purposes of the Applications, it could be assumed that Rule 6.11(1)(f) referred to all evidence produced in any other Action, including the medical opinion submitted in the Irish Action.

Justice Veit also considered whether that evidence should be permitted in Alberta. Her Ladyship observed that Cahill had received notice of the intended use of the opinion, and had sufficient time to consider the implications of its use. Although Rule 6.11 did not identify the test for the Court to determine whether permission should be granted to adduce evidence from a different Action on an Application, Justice Veit summarized the relevant factors using prior case law.

Justice Veit concluded that Cahill's medical evidence was not compelled, and the use of the evidence did not breach the implied undertaking rule which was encompassed within Rule 5.33. Cahill used his health as an excuse for the adjournment of the Irish Trial, so he could not complain that his evidence had been compelled. Justice Veit also held that the context in which the medical opinion was obtained was sufficiently similar between the two Actions - Cahill had used his medical status in an attempt to avoid procedural obligations – so it was only fair and reasonable that all of the evidence which was available in the Irish Action should be made available to the Alberta Court. Her Ladyship also considered Cahill's argument that the use of the medical opinion should not be permitted because, in submitting to the assessment for the Irish Court, he was not allowed the protections available to an Alberta Defendant under Rule 5.42. Justice Veit opined that if the Irish Court issued the Order to receive the health evidence on its own motion, Rule 5.41 would not apply; but, if the Irish Order was obtained by Murphy because he was not satisfied with the medical information provided by Cahill,

Rule 5.41 was broad enough to cover the Order. Justice Veit concluded that, if the medical opinion had been dealt with in Alberta through the use of Rule 5.41, the Court would give permission to use the opinion, even though none of the options available under Rule 5.42 were made available to Cahill. Justice Veit also observed that the principles espoused in *The Ikarian Reefer*, [1993] 2 Lloyd's LR 68 (QBO) were no mystery to Alberta Courts and the principles were to be saluted: experts were not to engage as advocates, but they must be independent in the sense that they would give the same opinion if given instructions by the opposing party. Justice Veit concluded that the reference to *The Ikarian Reefer* decision did not taint the medical opinion proffered by Murphy. Justice Veit also held that Cahill's medical opinion letter would be subject to Rule 6.11(1)(f) because it was evidence produced in and for the proceedings. Her Ladyship concluded that it was clearly fair that Murphy's medical opinion be considered along with Cahill's materials. Justice Veit also held that Murphy's medical opinion should be admitted as evidence.

Justice Veit considered whether Cahill should be relieved of the obligation to present himself for Questioning on his Affidavit. Her Ladyship relied on Cahill's materials and held that they did not disclose any reason why he could not present himself for Questioning.

KNISS v STENBERG, 2014 ABCA 73 (CONRAD, BERGER and COSTIGAN JJA)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Appellant Appealed an Order striking his Application for Judicial Review and Statement of Claim alleging defamation.

The Appellant was employed under a collective agreement by the Respondent, Telus Corporation ("Telus"), and was a union member under the Telecommunications Workers Union ("Union"). When the Appellant was injured in an automobile accident, Telus made attempts to accommodate his injuries, including providing counselling. In one of the Appellant's counselling sessions, he made unspecified threats towards Telus personnel or property. The counselling employee communicated this threat to the Respondent, Martin Armour, who then communicated this to other Respondents including Ros Maddren, an occupational health adviser and Eric Stenberg, a corporate security investigator (collectively, the "Telus Employees"). Subsequently, Telus decided that the Appellant should undergo psychiatric assessment. The psychiatric assessment was arranged twice, the Appellant refused to attend either, and his employment was terminated.

On behalf of the Appellant, the Union filed an accommodation grievance and a termination grievance. The Arbitrator dismissed the termination grievance and retained jurisdiction over the accommodation grievance. The Arbitrator held that Telus had reasonable and probable grounds for requiring the Appellant to attend a psychiatric assessment and that Telus acted with credible information that there was a potential threat to the workplace. After receiving two legal opinions that there was no basis for Judicial Review of the Arbitrator's decision, the Union decided against applying for Judicial Review.

The Appellant filed a complaint with the Canada Industrial Relations Board ("CIRB"). He alleged that the Union breached its duty of fair representation on grounds that the Union had failed to represent him fairly at the hearing, refused to seek Judicial Review of the Arbitrator's decision, and failed to pursue the accommodation grievance. The CIRB dismissed the complaint and further held that once the termination grievance was dismissed, there was no labour relations purpose in pursuing the accommodation grievance. The Appellant applied unsuccessfully for reconsideration of the CIRB's decision.

The Appellant also filed complaints with the Office of the Privacy Commissioner of Canada and the Canadian Human Rights Commission. Both complaints were unsuccessful. The Appellant then filed an Application for Judicial Review of the Arbitrator's decision. Telus applied to strike the Judicial Review Application on the basis that the Appellant had no standing to seek Judicial Review. The Telus Employees applied to strike the Appellant's Statement of Claim stating that the dispute was solely within the jurisdiction of the Arbitrator.

In deciding whether the Appellant had standing to seek Judicial Review, the Master relied on the principle that once an employee was represented through a collective bargaining agreement, the appellant lost his right to self-representation unless he fell within certain exceptions. The Master held that there were no applicable exceptions and there was no evidence that the Union had been inadequate or unfair in its representation. The Master struck the Appellant's Judicial Review Application for lack of standing.

With respect to the striking of the Statement of Claim, the Master was satisfied that the Telus Employees' alleged defamatory comments concerned the Appellant's character and capacity as an employee. The Master struck the Claim against Stenberg and Armour on grounds that these comments were work related and in the exclusive jurisdiction of the Arbitrator. The Master struck part of Maddren's claim, but allowed the claim with respect to Maddren's communication with the Appellant's physician.

The Appellant Appealed the Master's Decision and produced fresh evidence. The Chambers Judge concluded that the Master properly struck the Appellant's Judicial Review Application. The Chambers Judge concluded that the Canada Labour Code (the "Code") applied and that the CIRB had exclusive jurisdiction to hear claims of inadequate representation. The Appellant had already asked the CIRB to make a decision on the inadequate representation issue and could now not make a claim on the same issue in Court. With respect to the portion that was not struck against Maddren, the Chambers Judge held that Maddren was acting in the course of her business in speaking with the physician. The Chambers Judge struck this portion of the claim holding that it was entirely within the jurisdiction of the Arbitrator.

The Appellant appealed the Order of the Chambers Judge on the following grounds:

1. With respect to striking of the Judicial Review Application against Telus:

    (a) The Chambers Judge erred in concluding that the CIRB had exclusive jurisdiction to adjudicate allegations of inadequate representation;

    (b) In the alternative, the CIRB did not exercise its jurisdiction and failed to conduct a detailed analysis of how the Union's counsel handled the grievances or evaluated the competence of the Union's counsel.

2. With respect to striking of the Claim against the Telus Employees, the Appellant stated that the Chambers Judge used the wrong test for an Application to Strike. Furthermore, the Appellant claimed that the communication between the Telus Employees and people outside of the Telus organization fell outside the ambit of the Arbitrator's decision and the Court retained jurisdiction.

The Court held that a decision to strike pleadings should be reviewed on a reasonableness standard, since it required an exercise of the Chambers Judge's discretion, absent an error of law. Extricable questions of law were reviewed on the correctness standard (*Eastaugh v Halat*, 2009 ABCA 122, at para 14).

With respect to the striking of the Judicial Review Application, the Court held that the Appellant was employed under a collective agreement between Telus and the Union and was subject to the provisions of the Code. The Code applied, the common law duty of fair representation was ousted and the Court had no jurisdiction over the allegations. The Appellant's argument that the Court had jurisdiction over inadequate representation allegations because the CIRB did not conduct a more thorough investigation was dismissed by the Court on grounds that it was an issue of correctness or adequacy and not an issue of jurisdiction. The Court held that Judicial Review of the Arbitrator's decision was not an available avenue for reviewing a decision the CIRB rendered in the exercise of its exclusive jurisdiction. Overall, the Court concluded that the Chambers Judge was correct to strike the Appellant's Judicial Review Application.

With respect to the striking of the Statement of Claim against the Telus Employees, the Appellant claimed that the Chambers Judge applied the wrong test. The Appellant relied on law that when a pleading disclosed no reasonable claim, no evidence can be submitted on the Application and the Court must assume that every fact pleaded is true (Rule 3.68(2)(b) and Rule 3.68(3)). The Court held that the Application was under Rule 3.68(2)(a). Specifically, the issue was with respect to whether the Court had jurisdiction or whether the jurisdiction lay solely with the Arbitrator. Thus, evidence could be admitted on the Application and the Court would not assume that every fact pleaded was true. The Court further held that the Statement of Claim could only be struck if it was plain and obvious that the Court had no jurisdiction and this could only be determined by the evidence and all the surrounding facts. The Court held that the Chambers Judge did not apply the incorrect test.

The Appellant argued that the comments made to Telus Employees were within the ambit of the Arbitrator, but comments made to non-employees were outside of the ambit. The Court stated that the issue could be resolved by considering the essential character of the dispute and the ambit of the collective agreement (*Weber v Ontario Hydro*, [1995] 2 SCR 929). The Court held that the essential character of this dispute arose either expressly or inferentially from the interpretation, application, administration or violation of the collective agreement. Thus, the Court held that the dispute was within the sole jurisdiction of the Arbitrator and dismissed the Appeal.

SOMJI v WILSON, 2014 ABCA 35 (CONRAD, BERGER and COSTIGAN JJA)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 9.16 (By Whom Applications are to be Decided)

In the Court of Queen's Bench, the self-represented Appellant, Mr. Somji, noted the Defendants in default and obtained Default Judgments from Justice Wilson. Counsel for the Defendants appeared before Wilson J. shortly thereafter, at which time the Default Judgments were set aside on the basis that the Defendants had not been served. The latter Application was made pursuant to Rules 9.15 and 9.16. The Appellant appealed and subsequently discontinued that Appeal.

On January 4, 2013, the Appellant brought an action against Wilson J. and counsel for the Defendants for their involvement in setting aside the Default Judgments. He alleged deceit on the part of counsel, and a lack of capacity on the part of Wilson J. The claim exceeded $1.5 million. Jones J. struck the Statement of Claim against the Respondents pursuant to Rule 3.68.

The Court of Appeal upheld this decision, stating that the complete answer to the allegations against Wilson J. was apparent on the face of Rules 9.15 and 9.16, since Rule 9.16 states that an Application to Set Aside must be decided by the same Judge or Master who heard the Order. Further, Wilson J. was entitled to immunity on the basis that he was acting in his judicial capacity.

With respect to the allegations against counsel for the Defendants, the Court of Appeal agreed with Jones J. that there were no breaches of duties and, accordingly, no cause of action could be brought in the circumstances.

HAMILTON v ALBERTA, 2014 ABCA 103 (FRASER, WATSON and MCDONALD JJA)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Appellant applied for a teaching position with Rockyview School Division No. 41. He was not hired for the position. The Appellant believed his qualifications were equal or superior to other applicants and that he was discriminated against on the basis of his age.

Between 1995 and 2011, the Appellant meandered his way through several legal proceedings. In 2012, the Appellant lodged another pair of proceedings, one being a Statement of Claim and the other being an Originating Notice against Her Majesty the Queen in right of Alberta. The Crown applied by Notice of Motion to have the proceedings struck and dismissed pursuant to Rule 3.68(2)(b), (c) and (d) of

the Rules of Court. Jones J. struck the pleadings in their entirety because they disclosed no reasonable claim, the claim was frivolous, irrelevant, and improper and, under the circumstances, constituted an abuse of process.

The Appellant appealed. The Court of Appeal held that there was no standard of review that worked in the Appellant's favour. There was no error of law in the reasoning of Jones J. on inextricable questions of law, no palpable and overriding error in his assessment of the facts, and no injustice in the procedural background. The Court also held that there was no unreasonableness in his exercise of discretion. In conclusion, the Court held that there were no reversible errors in the conclusions of Jones J. and that the new proceedings were plainly an abuse of process under Rule 3.68(2)(c) and (d).

CHALUPA ESTATE v CHALUPA, 2014 ABCA 104 (BERGER JA)
Rules 4.22 (Consideration for Security for Costs Order) and 505 (When Appeal Available)

The Applicant sought leave to Appeal an Order for Security for Costs made by a Queen's Bench Justice. The Applicant, Ms. Goch, resided in Poland, and was married to the deceased testator for approximately ten years, during which time they lived in Alberta.

With respect to the right to Appeal, the Court stated there was no question that leave was required to Appeal, pursuant to Rule 505(3) and (4). The Court found that the test for leave to Appeal "requires that the appeal raise an important question of law and have a reasonable chance of success".

The Court of Appeal reviewed the reasons given by the Chambers Judge for making the Security for Costs award, including:

1. Ms. Goch resided in Poland and there was no indication she had assets in Alberta;

2. Ms. Goch was impecunious but for the condominium she owned in Poland;

3. There was significant detail of the allegations of theft and fraud against Ms. Goch;

4. There was no evidence to suggest her ability to continue with the Action would be prejudiced by an award for security for costs; and

5. Delays in the action attributable to the Applicant were thwarting the orderly administration of the estate.

Berger J.A. stated that he had some concern about the Chambers Judge's finding in respect of item 4 above, given the inevitable prejudice to the Applicant to pursue her action as a result of her impecuniosity. Nonetheless, Berger J.A. noted that the Applicant's ability to pay the award of Security for Costs was but one factor, and was not dispositive.

In the result, the Court found that no error of law warranting Appellate intervention had been identified by the Applicant, and the Queen's Bench Justice had applied Rule 4.22 correctly. The Application for leave to Appeal was denied.

SHAW v SHAW, 2014 ABQB 165 (SCHUTZ J)
Rules 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle) and 10.33 (Court Considerations in Making Costs Award)

Ms. Shaw provided Mr. Shaw with a *Calderbank* Offer, one day before the commencement of Trial, on January 7, 2014. The Offer was not accepted by Mr. Shaw, and a Trial ensued. The global effect of the Judgment following Trial was more favourable to Ms. Shaw than the terms of her *Calderbank* Offer.

The Court cited *Adams v. Adams*, 2011 ABQB 812 for the proposition that Costs in an Action for Matrimonial Property Division or Support should not be treated any differently than Costs in other litigation. The Court noted that Ms. Shaw's *Calderbank* Offer did not meet the requirements of the Rules of Court under the Formal Offer Rule, Rule 4.24, because the Offer was not served 10 days or more before the start of Trial. Therefore, Rule 4.29, which mandates

the Double Costs consequences of a Formal Offer, did not apply. However, Schultz J. stated that the Alberta Court of Appeal has made it clear that even informal offers that arguably do not comply with the Rules can have an effect on Costs.

In the result, the Court concluded that Ms. Shaw was entitled to ordinary fees under Schedule C, Column 1, from the time she retained counsel in this Action until January 7, 2014; and 1.25 times regular Column 1 after the *Calderbank* Offer was made on January 7, 2014.

CABRERA v STEED, 2013 ABPC 361 (JUDGE HIGA)
Rules 4.31 (Application to Deal with Delay) and 4.33 (Dismissal for Long Delay)

The Defendant Applicants applied to Provincial Court seeking dismissal of a Civil Claim against them on the grounds that sufficient time had passed since the last step had occurred which advanced the Action. The Applicants submitted that there had been a long, inordinate and inexcusable delay by the Respondent. The Respondent commenced an Action on or about February 25, 2010, and the Applicants had filed Dispute Notes on June 18 and June 23, 2010 respectively. The Respondent e-mailed counsel for the Applicants on June 24, 2012 requesting that a Dispute Note be filed for the individual Defendant, Mr. Steed. Counsel for the Applicant replied the day afterwards and attached a copy of both previously filed Dispute Notes.

Judge Higa referred to and relied on Rules 4.31 and 4.33 of the *Rules of Court*. Judge Higa noted that nearly 4 years had passed from the issuance of the Civil Claim against the Applicants, and approximately 3 ? years had passed since the filing of the Applicants' Dispute Notes. The Respondent had taken no further steps to advance the Action, save the e-mail issued to demand that a Dispute Note be filed. Judge Higa held that simply requesting the filed Dispute Note was not sufficient to allow the Action to continue. Judge Higa dismissed the Respondent's Civil Claim pursuant to Rule 4.33.

Although Judge Higa did not find it necessary to apply Rule 4.31, he observed that Rule 4.31 allows a Court to dismiss a Claim when satisfied that a delay has resulted in significant prejudice to a party. Judge Higa opined that the prejudice to the Applicants would be significant and that the amount of time that had passed was clearly inordinate and inexcusable delay. Judge Higa held that the Applicants had satisfied the requirements showing significant prejudice caused by the Respondent's delay.

DOW CHEMICAL CANADA INC v NOVA CHEMICALS CORPORATION, 2014 ABQB 38 (WITTMAN CJ)
Rules 5.2 (When Something is Relevant and Material), 5.11 (Order for Record to be Produced) and 5.13 (Obtaining Records from Others)

Nova Chemicals Corporation ("Nova") brought an Application for an Order compelling Dow Chemical Canada Inc. and Dow Europe GmbH (collectively "Dow") to provide further and better answers to Undertakings and Interrogatories. The Action involved allegations that Nova had unlawfully taken product from a plant to which Dow and Nova were joint owners.

Nova sought information from Dow that was in the possession of the Dow parent company, The Dow Chemical Company ("TDCC"). Particularly, Nova sought information related to TDCC's US Gulf Coast facilities. The Court outlined that Nova was seeking documents from a non-party to the Action but failed to bring the necessary Application pursuant to Rule 5.13, which allows the Court to order a non-party to an Action to produce documents. The Court also held that Dow did not carry on business in the United States, had no way to transport its product to the United States and therefore, the documents were not relevant and material to the Action.

Nova also sought the production of a spreadsheet that Dow claimed privilege over. Dow produced the original version of the spreadsheet, but claimed privilege over subsequent versions that had been created for the dominant purpose of litigation. The Court noted that no guiding authority was located on the changing nature of electronic spreadsheets and the implications for a claim of litigation privilege. The Court held that subsequent versions of the spreadsheet,

although incorporating data from earlier iterations, were different documents and therefore privileged.

In addition, Nova sought answers to Interrogatories that required the compilation of information into charts. The Court held that it did not have the jurisdiction to order a party to make new documents, but only to produce what already existed. The Court dismissed Nova's Application in its entirety.

RBZ CAPITAL CORP v PETROL ALCHEMY, LLC, 2014 ABQB 102 (EIDSVIK J)
Rules 5.27 (Continuing Duty to Disclose), 6.11 (Evidence at Application Hearings) and 11.25 (Real and Substantial Connection)

The Applicants sought an Order dismissing the Action against them on the grounds that Alberta did not have jurisdiction over the dispute or, in the alternative, an Order staying the Action in favour of an Action in Colorado.

A preliminary issue arose as to whether Eidsvik J. ought to consider a late filed Affidavit by one of the Respondents. The Respondents argued that the evidence clarified earlier evidence given in the Affiant's Cross-Examination, and that they had a duty to clarify as soon as it was discovered that clarification was required.

The Applicants conceded that an Affiant has a duty to correct an answer that is misleading or incorrect and that the Court has the discretion to accept this evidence pursuant to Rules 5.27 and 6.11(1)(e). However, they argued that this new evidence did not correct anything, but simply supplemented missing information which should not be received. Eidsvik J. disagreed with the Applicants, stating that the evidence did help to clarify, and allowed the evidence.

With respect to whether Alberta had jurisdiction to hear the matter, the Respondents argued that there were four presumptive factors of real and substantial connection pursuant to Rule 11.25, those being:

1. A contract formed in Alberta;
2. An alleged Tort committed in Alberta;
3. That the law of Alberta applies to part of the dispute; and
4. A permanent injunction was being sought.

The Applicants argued that, although some presumptive factors might exist, they were weak or tenuous, and further, the parties agreed to Colorado in a jurisdiction clause in an earlier Letter of Intent. The Court dismissed this argument, stating that Alberta had jurisdiction over the dispute. The Court noted that the Supreme Court of Canada had set out the parameters for when a court in Canada should assume jurisdiction, and the Rules of Court (Rule 11.25 specifically) also set out the presumptive connective factors. The Supreme Court noted that any presumptive connecting factor will do, as long as the link is not weak or tenuous.

The Court then went on to discuss choice of forum. The Court stated that both Alberta and Colorado had jurisdiction to deal with the dispute. The Court noted that there were multiple daily direct flights between Alberta and Colorado, and that distance is much less of a factor than it would have been in times gone by. The Court examined all the factors which favoured one forum over the other, and *vice versa*. There were several factors in favour of each; however, for the most part both forums appeared to be of approximately equal convenience.

The Court cited *Dyck v Questrade, Inc*, 2012 ABCA 187 for the proposition that the Applicants had the burden of showing that another other forum is "clearly more appropriate".

Eidsvik J. found that the Applicants had not met this burden, and dismissed the Application, awarding costs to the Respondents.

SECURE ENERGY SERVICES INC v CCS CORPORATION, 2014 ABQB 107 (WITTMANN CJ)
Rules 5.29 (Acknowledgement of Corporate Witness's Evidence) and 5.33 (Confidentiality and Use of Information)

The Applicant, Secure Energy Services Inc. ("Secure"), applied pursuant to Rule 5.33 for leave to provide documents produced by the Respondent, CCS Corporation ("CCS"), to the Competition Bureau of Canada ("Competition Bureau").

The Court held that Rule 5.33 is a codification of the implied undertaking rule. The Court held that, although there was no direct evidence that the real reason Secure brought the Application was to apply pressure on CCS in furtherance of the Action, that is exactly the result that would occur if Secure could release the documents to the Competition Bureau. The Court noted that the reasons for this Judgment were public, and given the broad powers available to the Competition Bureau, there appeared to be nothing to prevent it from compelling the production of the records if it so wished.

The Application was dismissed.

GORDON v TAYLOR, 2014 ABQB 11 (ROSS J)
Rules 5.41 (Medical Examinations), 5.42 (Options During Medical Examination), 5.43 (Payment of Costs of Medical Examinations) and 5.44 (Conduct of Examination)

The Plaintiff was involved in four separate car accidents. The Defendants sought Certified Medical Examinations (CMEs) pursuant to the *Minor Injury Regulation*, Alta Reg 123/2004 (MIR). The Plaintiff and Defendants did not agree on a certified examiner, and the Superintendent of Insurance (Superintendent) appointed four separate physicians to conduct the CMEs.

The Plaintiff contacted each physician and requested that the examination be videotaped, and all of the physicians refused to do so. The Plaintiff refused to attend the CMEs unless they were videotaped.

The Defendants brought an Application to require the Plaintiff to attend the CMEs.

Rule 5.42 allows a party ordered to undertake a medical examination to elect to have it videotaped. The MIR does not contain this right. The Court concluded that the entitlement to videotaping under the Rules does not apply to CMEs under the MIR, and ordered the Superintendent to appoint a physician to conduct a CME in relation to all four Actions.

WINDSOR v CANADIAN RAILWAY LTD, 2014 ABCA 108 (PAPERNY, WATSON and SLATTER JJA)
Rules 6.11 (Evidence at Application Hearings) and 7.3 (Summary Judgment)

The Defendant Appellant operated a train repair facility within the Calgary city limits beginning in the early 1900's. A chemical solvent leaked from the facility into the groundwater which then migrated into the rest of the community and the Defendant Appellant undertook some remediation on the lands. The Plaintiff Respondents commenced an Action for a reduction in their property values and loss of rental income caused by the presence of the chemical in the community's groundwater. The Action was certified as a Class Proceeding, and the Defendant Appellant applied to summarily dismiss portions of the Claim. The Case Management Judge granted only a portion of the Summary Dismissal Application, declining to dismiss the strict liability claims and the nuisance claims by those class members who had received remediation measures. The Defendant Appellant appealed.

The Court of Appeal reviewed and summarized the test for Summary Judgment, noting that modern civil procedure recognises that a "full trial is not always the sensible and proportionate way to resolve disputes". The Court of Appeal, following the recent Supreme Court decision in *Hryniak v Mauldin*, 2014 SCC 7, confirmed that:

> The modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record.

The Court of Appeal explained that the principles related to resolving disputes without a trial in the Ontario Summary Judgment Rule considered in *Hryniak v Mauldin* were consistent with the principles set out in Rule 7.3. The Court of Appeal noted that, as in Ontario, Rule 6.11 allowed *viva voce* evidence in chambers Applications in exceptional circumstances. Rule 7.3 calls for a "holistic analysis" of the merits of the claim, and is not confined to the test for a genuine issue for Trial. The Court of Appeal indicated that the same principles relate to class proceedings. The Court also noted that the theory that disputes would eventually go to trial was a "myth" which should no longer govern civil procedure. The Court of Appeal allowed the Appeal in part. Applying the principles as set out in *Hryniak v Mauldin*, the Court determined that there was no triable issue with respect to the strict liability claims; those claims were summarily dismissed. The Court held further that the test for Summary Dismissal was not met with respect to the nuisance claim for the class members whose properties had received remediation; those claims were allowed to proceed to Trial.

PARAMOUNT MORTGAGE CORP v AVENUE AH CONSTRUCTION GP CORP, 2014 ABQB 84 (TOPOLNISKI J)
Rules 6.14 (Appeal From a Master's Judgment or Order) and 13.18 (Types of Affidavit)

This was an appeal of a Master's dismissal of Applications to discharge ten Caveats registered against titles for ten properties.

The Caveators/Respondents filed Caveats claiming an equitable interest in mortgages and related instruments which they alleged were funded with their own traceable money. The same interest was claimed in all of the Caveats and the same evidence and arguments were applied in all ten Applications.

Master Schulz concluded that the Caveators had established a *prima facie* case for their Caveats. Maser Schulz noted that their problem in gathering evidence to better support their position was due to the Defendants'/Appellants' undisputed refusal to disclose certain financial documents despite their obligation to do so.

On Appeal, the Appellants contended that the Master erred in finding that the Caveators had established a *prima facie* case. They argued that the Caveators' unfounded suspicions regarding funding of the impugned mortgages was insufficient, and that their inability to obtain better information did not negate the requirement to meet their onus.

Justice Topolniski first addressed the standard of review on an Appeal from a Master's Decision. Topolniski J. stated that Rule 6.14(3) governs Appeals from a Master's Decision. Topolniski J. noted that the applicable test is whether the Master was correct, and the Appeal of a Master's Decision continues under the new Rules as it had in the past – a *de novo* hearing.

In discussing the nature and quality of the evidence presented, the Court considered the Respondents' supporting Affidavit ("Butt's Affidavit"), which the Appellants claimed was inadmissible and deficient, and constituted nothing more than unfounded suspicions. Justice Topolniski discussed Rule 13.18 of the Rules of Court, stating:

> Rule 13.18(2) is akin to old Rule 305(3) which permitted hearsay evidence on "interlocutory motions" if it was accompanied by the source, and grounds for the belief were given. [...]
>
> Rule 13.18(3) is very different. It prohibits hearsay in affidavits in support of an application that disposes of a claim, but it imposes no such prohibition in respect of affidavits like Steven Butt's affidavit, filed in response to an application: *Murphy v. Cahill*, 2012 ABQB 793 at paras. 3, 25-26.

The Court stated that, in any event, the beliefs in Butt's Affidavit were founded on his own conclusions based on the Records he reviewed, the result of his registry searches, as well as some information provided by the Appellants. Topolniski J. stated that even if this were hearsay, it would be permissible under Rule 13.18(3), and that

Butt primarily drew inferences based on his study of the materials provided to him.

The Appellants pointed to the Questioning of Butt on his Affidavit to support their position that there was no basis for his beliefs. Essentially, they claimed that he was not qualified to opine about what he discerned from his reviews because he was not an accountant, nor had he seen the "whole picture".

The Court responded by stating that, although Butt was not an accountant, he had conducted a detailed review of what was made available, and the Appellants did not direct the Court to any evidence suggesting that the documentation he reviewed was inaccurate or otherwise unreliable. The Court also conceded that Butt had not seen the "whole picture", but stated that "[h]ad the Promoters and Mortgagees complied with their obligations under the Settlement, he might have had the complete picture, but the Promoters and Mortgagees have chosen not to do so". The Court also noted that Butt's beliefs were not proffered as bare assertions. His conclusions were supported by the documents and registry searches.

In the result the Court determined that Butt's Affidavit was admissible, and that the Caveators had established a *prima facie* case to support the Caveats. The Appeal was dismissed.

P BURNS RESOURCES LIMITED v LOCKE, STOCK & BARREL COMPANY LTD, 2014 ABCA 40 (CONRAD, BERGER and COSTIGAN JJA)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Plaintiff Respondent commenced an Action against the Defendant Appellant alleging termination of an oil and gas lease pursuant to a particular clause in the lease. The Plaintiff Respondent applied for, and was granted, Partial Summary Judgment by a Master and the Defendant Appellant appealed the Master's Decision to a Justice who upheld the Master's Decision. The Court of Appeal observed that the Defendant Appellant had filed further expert evidence for consideration on the *de novo* Appeal pursuant to Rule 6.14. The Defendant Appellant appealed to the Court of Appeal on the basis that the presiding Justice had erred in interpreting the terms of the lease and had failed to consider that there was a genuine issue for Trial. The Court of Appeal confirmed that the Decision to grant Summary Judgment was reviewable on a standard of reasonableness and the identification of the legal test for Summary Judgment was reviewed for correctness. The Appellate Court approved the test for Summary Judgment as set out by the Justice:

> An Application for Summary Judgment requires the applicant to prove that there are no genuine issues to be tried. Summary Judgment may only be granted on legal issues and where the facts are undisputed. [Citations omitted]

The Court of Appeal held that the Justice erred in seemingly discounting the expert's testimony entirely; the expert's evidence was relevant to the analysis of whether there was a genuine issue for Trial. The Court was satisfied that the Defendant Appellant had met its evidentiary burden of adducing sufficient evidence to defeat Summary Judgment. In the result, the Appeal was allowed and the partial Summary Judgment terminating the Defendant Appellant's lease was set aside.

SHREEM HOLDINGS INC v BARR PICARD, 2014 ABQB 112 (WAKELING J)
Rules 7.1 (Application to Resolve Particular Questions or Issues), 10.13 (Appointment for Review), 10.18 (Reference to Court), 10.20 (Enforcement of Review Officer's Decision), 10.26 (Appeal to Judge) and 10.27 (Decision of Judge)

Previously, the Appellant law firm, Barr Picard, brought an Application for an Order directing that a Review Officer's Decision regarding a fee dispute be entered as a Judgment. That Application was dismissed, as:

(a) The Certificate of Review did not certify the amount owed;

(b) The Certificate of Review did not identify Deepak Kumar as a client (and the Application sought

Judgment against Deepak Kumar); and,

(c) The unresolved issues in the Certificate of Judgment made it impossible to enforce.

The Court advised the parties that a further Application could be brought to determine if the Court had jurisdiction to order any other remedies, such as a Trial of an issue, which might accelerate the dispute resolution process.

The Appellant law firm brought a further Application to the Court requesting the Court to Order, pursuant to Rule 7.1, a Hearing to answer the following questions:

1. Was Barr Picard restricted to recover only the amount of its initial estimate of legal fees?

2. What parties were liable, if any, for the legal fees?

3. Were the Respondents obligated to pay interest as per the retainer agreement?

The Court held that a request filed for review of a law firm's accounts does not serve as a foundation for the second and third questions above. Additionally, the questions to be answered fall outside of the parameter of issues that would be reasonably contemplated by the request filed by the Respondent. The Court held that Rule 10.18 provides original jurisdiction to a Review Officer to make reference to a Court, and the Court does not have inherent jurisdiction as the Rules set out a comprehensive code dealing with the taxation of legal fees. Additionally, Rule 7.1 allows for an Order to answer a question at or before Trial, and Rule 10.13 does not involve a protocol to which a Trial is part, and thus Rule 7.1 is not applicable.

The Court held that the result did not produce any unfairness as a lawyer has a right to commence an Action against a client to seek payment of unpaid legal fees.

LOFTHAUG v CANADIAN IMMIGRATION SPECIALISTS LTD, 2014 ABQB 115 (LEE J)
Rules 7.1 (Applications to Resolve Particular Questions or Issues) and 7.3 (Summary Judgment)

The Plaintiff sought Summary Judgment for his Claim relating to unpaid commissions arising from a breach of a consulting agreement. In 2008, former Counsel for the Defendant prepared and filed a Consent Judgment which stated "the Plaintiffs' claim as to liability against all of the Defendants is established as it relates to all causes of action…". Thus, the Plaintiff in this Application sought Summary Judgment on the ground that the only real issue was the amount to be awarded. The Plaintiff sought Judgment for the sum of $1,239,000.00 based on the calculations prepared by his expert.

Lee J. stated that where there are genuine questions of fact and law relating to the assessment of damages, Summary Judgment is not available. He also noted that the test for Summary Judgment is whether there is a genuine issue for trial.

The Plaintiff argued that his Application complied with the purpose noted in Rule 7.1 of the Rules of Court, and that the Court was authorized to assess the Plaintiff's damages and render a Judgment. The Plaintiff further asserted that quantification of the commission claim was straight forward and simply required an assessment of the number of relevant clients multiplied by 50% of the fee charged. The Court disagreed with the Plaintiff, stating that while there were no issues regarding the expert's accounting and valuation expertise, his report was complex and was also subject to hundreds of pages of additional Questioning and Answers to Undertakings. Further, Lee J. noted that there were many Affidavits filed in this matter, and Questioning that occurred on those Affidavits appeared to be somewhat relevant to the issue of damages.

The Court stated that, despite the fact that liability was admitted, a party must adduce uncontroverted evidence to establish a claim for damages. Lee J. concluded that the factual matrix of the relationship between the parties was such that the question of damages could not be fairly and

properly determined without *viva voce* evidence and without findings of credibility.

In the result, Lee J. dismissed the Summary Judgment Application and ordered a Trial to determine damages.

CNH CAPITAL CANADA LTD v HIGHWAY EQUIPMENT SALES LTD, 2014 ABQB 6 (MASTER SMART)
Rule 7.3 (Summary Judgment)

The Plaintiff and Defendants by Counterclaim brought an Application for Summary Judgment of the Action and dismissal of the Counterclaim. The Plaintiff sought payment for equipment supplied to the Defendant, the amounts of which were undisputed. The Defendant disputed owing the amounts claimed because of alleged unsuitability of the equipment and counterclaimed for costs incurred for equipment repair which were not reimbursed by the Plaintiff.

The Plaintiff also sued the guarantor to the purchase and financing agreements for repayment of the debt. The guarantee was executed in Alberta but stated that it was to be governed by the laws of the State of Wisconsin, USA. No Guarantees Acknowledgment Act Certificate was completed or executed. The guarantor argued that Alberta law governed as no foreign law was pleaded or proven; therefore, because no Notarial Certificate was executed, the guarantee was unenforceable. The Plaintiff tendered evidence from a lawyer in Wisconsin who claimed that the State of Wisconsin does not require a signatory to a guarantee to sign before a Notary Public.

Master Smart held that there was insufficient evidence to determine the validity and amounts of the offsets claimed by the Defendant in its Statement of Defence and Counterclaim. For that reason, Master Smart gave judgment to the Plaintiff for the principal amount owing but ordered a stay of enforcement pending a determination of the validity and amount of the setoffs claimed. Because of the potential offsets, Master Smart denied the Application to summarily dismiss the Counterclaim.

With respect to the guarantee, numerous allegations of misrepresentation and collateral agreements were raised with respect to its enforceability. Without knowing how those issues might be dealt with under Wisconsin law, Summary Judgment was denied for the Claims against the guarantor.

LAIRD v SWORD ENERGY INC, 2014 ABQB 13 (MANDERSCHEID J)
Rule 7.3 (Summary Judgment)

The Applicant lessors sought Summary Judgment with respect to a petroleum and natural gas lease (the "Lease") entered into with the Respondents ("Sword"). The Applicants sought Summary Judgment on the basis that the facts were not in dispute, and Sword refused or failed to comply with its contractual obligation under the Lease to, within 30 days, remedy the breach alleged by the lessors, or commence the required proceedings for a judicial determination of whether the alleged acts or omissions constituted a breach.

The Applicants contended that the only real issue in this matter was the amount to be awarded as damages because the other issues could be decided on the basis of the record before the Court. Sword opposed the Application on the grounds that certain facts were in dispute, the interpretation of the Lease by the Applicants was incorrect, and these genuine, triable issues could only be determined by the Court after a weighing of the evidence at Trial.

After reviewing the evidence, the Court determined that the Applicant's reproductions of certain portions of the Lease were not accurate, and that Sword had adduced "some evidence" tending to establish a defence. The Court further pointed to several instances of legal issue intertwined with the facts which would require a Trial for determination. In the result, Manderscheid J. dismissed the Applicant's Summary Judgment Application.

PERREAL v KNIBB, 2014 ABQB 15 (ROOKE ACJ)
Rule 7.3 (Summary Judgment)

The Respondent, Perreal, was a passenger in a truck driven by the Applicant, Knibb. The truck was involved in a one-

vehicle collision that occurred near Winnipeg, Manitoba, and Perreal was allegedly injured. Over several months in 2012, Knibb and his lawyer received a number of documents from Perreal and an individual by the name of Mr. Dale Jacobi ("Jacobi") relating to the vehicle collision. These documents applied pseudo-legal strategies and concepts, which were addressed by Associate Chief Justice Rooke in *Meads v Meads*, 2012 ABQB 571. In this case, the documents included one labeled "Statement of Claim with Notice and Demand", sent by Perreal to Knibb, which gave Knibb 30 days to reject and disprove his alleged misconduct, or the document became a valid contract and true bill for the amount claimed. Rooke A.C.J. noted that such pseudo-legal strategies were "frivolous and vexatious litigation strategies that offer[ed] no beneficial effect". Further, Justice Rooke characterized the document as a foisted unilateral agreement and noted that a person has no obligation to respond to a Statement of Claim that is not filed in a Court.

Regarding the Application for Summary Judgment, Justice Rooke heard from the Applicant and his counsel; however, neither the Respondent nor Jacobi was in attendance. Jacobi was known to the Court through his involvement with pseudo-legal strategies, his conviction in the United States for associated illegal activity, and information from Canadian authorities that considered Jacobi a threat. Based on this, Rooke A.C.J. noted that, had the Plaintiff and Mr. Jacobi attended, the status given to Mr. Jacobi by Perreal to act as his "full Power of Attorney" was irrelevant, and Mr. Jacobi was prohibited from representing Perreal by the *Legal Profession Act*. Additionally, because of Jacobi's involvement, Justice Rooke granted an ex parte Application that allowed Knibb's counsel to be identified by pseudonym and appear by telephone.

In this decision, the Court applied the well-established test for Summary Judgment, which required the Applicant to demonstrate that there was "no genuine issue of material fact requiring trial". Rooke A.C.J. held that the lawsuit was initiated after the relevant limitation period had expired and further accepted the Applicant's argument that the *Manitoba Public Insurance* Corporation *Act*, CCSM c P215 eliminated Perreal's right to sue and recover damages in tort for motor vehicle collisions in that jurisdiction. Rooke A.C.J. held that the Respondent's Action had no prospect for success and ordered Summary Judgment.

DINGWALL v DORNAN, 2014 ABCA 89 (BERGER, WATSON and ROWBOTHAM JJA)
Rules 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

The Plaintiff Respondents obtained judgment in Nevada against the Defendant Appellant and commenced proceedings to enforce the Judgment in Alberta. The Alberta Court granted the Plaintiff Respondents' Application for Summary Judgment on the basis that there was insufficient evidence to show that the Nevada Judgment was obtained wrongly, and therefore there was no genuine issue for Trial. The Defendant Appellant appealed.

The Court of Appeal noted that a foreign Judgment is evidence of a debt, and in order to be enforceable in Alberta the foreign Judgment must: have been issued by a Court of competent Jurisdiction; be final and conclusive; and be for a fixed sum. The Court stated that the test for Summary Judgment under Rule 7.3 was well articulated in prior case law: once the Applicant has shown that no genuine issue of fact requires a Trial, the onus shifts to the Respondent to show that the claim has a real chance of success and that there is an arguable defence to the claim. The Court further observed that Rule 7.3(1) enables a Party to apply for Summary Judgment on many different grounds, one of which is that there is no defence to a claim. In addition, Rule 7.3(2) provides that the Application must be supported by an Affidavit or by other evidence stating that the grounds for Summary Judgment have been met. The Court noted that one of the Plaintiff Respondents swore an Affidavit in support of the Summary Judgment Application which was supported by numerous exhibits detailing the trajectory of the Nevada Action. The Defendant Appellant claimed that, because the second Plaintiff Respondent did not file an Affidavit, the Application for Summary Judgment should have failed based on Rule 7.3(2) and 13.18(3).

The Court stated that Rule 13.18(3) allowed that an Affidavit was not strictly required in support of an

Application:

> …The plain reading of the rule does not mandate an affidavit based on personal knowledge. Rather, it says **if** an Affidavit is used, it must be on the basis of personal knowledge. Moreover, Rule 7.3(2) does not restrict the evidence on a summary judgment application to affidavit. It allows the application to be based upon "other evidence to the effect that the grounds have been met". …

The Court stated that given the Rule's ordinary meaning, there was no requirement for an Affidavit to be filed separately by the second Plaintiff Respondent. The Defendant Appellant argued further that there had been service irregularities in the Nevada Action which caused the Court to err in giving judgment in favour of the Plaintiff Respondents. The Alberta Court of Appeal confirmed that Rules 7.3(2) and 13.18(3) did not mandate an Affidavit of Service from the Plaintiff Respondents' counsel; all that was required was for Dingwall to depose that there was a Judgment which was final and conclusive, for a fixed sum and that he genuinely believed that there was no defence to the claim. It was not required that he swear to knowledge of every anticipated defence. In the result, the Court dismissed the Appeal, stating that the Chambers Justice had not erred. The Nevada Judgment was enforceable in Alberta.

ORR v FORT MCKAY FIRST NATION, 2014 ABQB 11 (BROWN J)
Rules 7.3 (Summary Judgment) and 7.5 (Application for Judgment by way of Summary Trial)

The Plaintiff appealed the Judgment of a Master dismissing his Application for partial Summary Judgment. The Plaintiff was a First Nations Councillor and had been suspended by the First Nations Band Council. That suspension was quashed by the Federal Court. However, he did not receive payment for the time that he was suspended. The Plaintiff sought Summary Judgment for the pay that he did not receive during his suspension.

The Court cited the test for Summary Judgment as "whether the evidence renders a claim or defence so compelling that the likelihood it will succeed is very high". The Court reviewed the Supreme Court of Canada case of *Hryniak v Mauldin*, 2014 SCC 7 ("*Hryniak*") and held that, without diminishing the weight of the guiding principles provided in *Hryniak, Hryniak* applies to Applications under Rule 7.5, and not Rule 7.3.

The Court held that there was inadequate evidence to establish that the First Nations Band was legally obligated to pay the Plaintiff any funds. The Court also held that the cause of action pleaded by the Plaintiff, breach of compensation for electoral office, is not currently recognized as a cause of action. The Application was dismissed.

ALLEN v RADEJ, 2014 ABQB 171 (SCHUTZ J)
Rule 7.3 (Summary Judgment)

The Plaintiff fell out of a tree. The Plaintiff was intoxicated and climbed the tree as part of a challenge that he had issued to another individual. The Defendants brought a Summary Judgment Application.

The Court analyzed three issues that the Plaintiff submitted were triable issues: (a) employer-employee relationships; (b) social host liability; and (c) occupier's liability. The Court held that the "Defendants have satisfied their legal burden of showing that there is no genuine issue of material fact requiring trial". The Court cited *Hryniak v Maudlin*, 2014 SCC 7, for the general proposition that Courts need to arrive at a fair and just adjudication of claims in a way that does not impose unnecessary expense upon the litigants. The Court held that there were no triable issues and the Application was dismissed.

SAMOILOVA v MAHNIC, 2014 ABCA 65 (O'BRIEN, MARTIN and O'FERRALL JJA)
Rule 9.13 (Re-opening Case)

At Trial, the Trial Judge gave Judgment for retroactive lump sum spousal support. Submissions were not made on, and the Trial Judge did not consider, the tax consequences of a lump sum spousal support payment. That is, if the

payments were made monthly instead of in a lump sum, the payments would be deductible for the payer and taxable upon the recipient. With a lump sum payment the payment is not deductible for the payer, and is not taxable income for the recipient.

Following the release of the Trial Judge's Reasons for Judgment, but prior to entry of the Order, the Respondent wrote a letter to the Trial Judge requesting that the Trial Judge consider the tax implications of the lump sum payment award and its effects on the parties. In a letter to the Trial Judge, counsel for the Appellant responded to the Respondent's letter submitting that it was inappropriate to make any changes to the Judgment, and a reduction in the lump sum spousal support would create hardship for her client.

In an oral Judgment, the Trial Judge varied the Judgment on the basis that the parties had agreed that the Spousal Support Advisory Guidelines ("Guidelines") should be followed, and the amounts in the Guidelines are based on the payer deducting those amounts and the recipient being taxed on those amounts.

The Appellant then Appealed to the Court of Appeal and argued that the Trial Judge varied the Judgment without hearing sufficient evidence, and the Trial Judge was required to give her notice of the Court's intention to vary the Judgment. Additionally, the Appellant sought to adduce fresh expert evidence.

The Court of Appeal held that the Appellant's submissions that she required notice that the Trial Judge may vary the Judgment were not sustainable, as she knew that the Judge would be hearing submissions on the issue and chose to not put forward further evidence at that time. The Court of Appeal denied the admission of fresh evidence, holding the evidence should have been put forward to the Trial Judge after it became clear that the tax consequences of the lump sum spousal support award were at issue. Further, the Court of Appeal held that to admit fresh evidence would be problematic as the purported expert had not been qualified as such, the Rules had not been complied with, there had been no cross-examination of the expert and the Court of Appeal was not given the benefit of the Trial Judge's assessment of the expert evidence. The Application was dismissed.

ALBERTA (CHILD, YOUTH & FAMILY ENHANCEMENT ACT, DIRECTOR) v AR, 2014 ABCA 38 (CÔTÉ JA)
Rules 9.2 (Preparation of Judgments and Orders) and 510 (Service)

The Director of Child Services had removed four children who had the same mother but two different fathers from their home; permanent guardianship was subsequently granted to the Director in four separate Orders. The parents were dissatisfied and each appealed in separate Actions to the Court of Queen's Bench. The mother won her Appeal, but the fathers' Appeals were dismissed.

The Director of Child Services appealed the mother's Action to the Court of Appeal and one of the fathers applied to be added as a party or to intervene. Justice Côté observed that the Application was a contradiction: in form it was an Application to add a person who was not a party to the Appeal as a Respondent, or alternatively for leave to intervene; but, in substance, it was a late Application to adjourn the Appeal. The Applicant father argued that he had a right to be added as a party to the Appeal, and his delay in making his Application was due to irregularities in the guardianship Order process. Justice Côté disabused the Applicant of this notion, stating that the Orders were properly signed under Rule 9.2(2)(c), and that the Applicant's Counsel did not reply or object to the draft Order in time.

Justice Côté also noted that Rule 510(1) provided that a Notice of Appeal to the Court of Appeal must be served on the parties affected. Justice Côté opined that, due to the circumstances, it was difficult to understand how the Applicant was or would be affected. Justice Côté explained that the substance of the Application was to adjourn the Appeal because Applicant's Counsel was not ready to argue the Appeal, a Factum had not been filed, and the Applicant's Counsel was scheduled to be away on the hearing date. Adding the Applicant as a party was therefore pointless or nearly pointless unless the Appeal was adjourned.

Justice Côté set out the test for adding a party on Appeal stating that the main criteria of protecting a legal interest had two possible sub-parts: whether it is just and convenient and necessity. Justice Côté concluded that the Applicant had not shown a right to be added as a party, and it would be harmful to the children as well as procedurally to add the Applicant at such a late stage. The Appellant's request to intervene in the Appeal was similarly denied.

MACPHERSON LESLIE & TYERMAN LLP v MOLL, 2014 ABCA 45 (CÔTÉ, CONRAD and COSTIGAN JJA)
Rules 10.18 (Reference to Court), 10.19 (Review Officer's Decision), 10.20 (Enforcement of Review Officer's Decision) and 10.26 (Appeal to Judge)

The Respondent, MacPherson Leslie & Tyerman LLP ("MLT"), previously provided legal services to the Appellant, Marianne Moll ("Moll"), and subsequently had the legal invoices reviewed by a Review Officer (the "Review"). The Review Officer issued a Certificate of Review and no Appeal was launched therefrom.

MLT then applied to a Master to allow for enforcement of the Certificate of Review. That Application was granted, and Moll then appealed it to a Queen's Bench Justice. That Appeal was dismissed, and then Moll appealed to the Court of Appeal.

Moll argued that her insurer, not herself personally, was liable for the legal invoices issued by MLT. The Court noted that a Review Officer must refer questions arising from the terms of a Retainer Agreement to the Court, but held that this argument had not been raised at the Review, and the time for Appeal of the Review had expired. The Application was dismissed.

ALBERTA TREASURY BRANCH v 14010507 ALBERTA LTD, 2013 ABQB 748 (WAKELING J)
Rules 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.9 (Reasonableness of Retainer Agreements and Charges Subject to Review), 10.26(1) and (2) (Appeal to Judge), 10.27 (Decision of Judge) and 10.31(1) (Court-Ordered Costs Award)

The Applicant Appealed a Decision of the Review Officer, pursuant to Rule 10.26 (1) of the Rules of Court. The Applicant alleged that the Review Officer wrongly failed to enforce a Court Order requiring the Defendant, who borrowed money from the Applicant, to indemnify them for fees the Applicant paid its legal counsel to enforce its rights under the loan agreement. The Applicant loaned the Respondent $100,000.00 under a personal line of credit in 2006 and made three additional loans to a numbered company and the Respondent in 2008. Security for these loans consisted of a General Security Agreement between the Applicant and the Respondent and a mortgage by the Respondent in favour of the Applicant. The Respondent agreed to indemnify the Applicant for legal fees the Applicant incurred to collect outstanding amounts for the loan instruments. The Review Officer heard the parties and reduced the Applicant's legal fees by fifty percent.

Wakeling J. stated that, pursuant to Rule 10.27, if the Decision of the Review Officer reflected an error of principle or if the award was inordinately high or low, the Review Officer's Decision could be varied or revoked. The Court also held that a factual determination that was clearly wrong may also justify intervention.

The Court outlined the following general principles governing Court-Ordered Costs payable by one litigant to another:

1. The Court of Queen's Bench of Alberta is responsible for settling, if asked to do so, the amount a lawyer is entitled to for the performance of legal services for a client or the amount one litigant must pay another litigant as a result of a Costs Order.

2. The Court has discretion to issue a Costs Order.

3. The Court, in exercising its discretion, must act in a principled manner. Rule 10.2(1) of the Rules of Court assists in determining what remuneration is reasonable.

4. Absent exceptional circumstances, the unsuccessful party pays the successful party a sum intended to indemnify the successful party for all or a portion of its legal fees.

5. In most cases, the successful party will only receive partial indemnity.

6. In the absence of a contractual term committing one party to pay the other's costs on a full-indemnity basis, costs are awarded to a successful party on a full-indemnity basis only in exceptional cases.

7. Contracts may contemplate the existence of litigation between the parties and allocate the burdens associated with it, including provisions obligating the payment of legal costs at stipulated levels under specified circumstances. The Court may choose to hold a party to its promise.

8. Legal service performed by a lawyer which increases the likelihood the purpose stipulated under the specified conditions will be achieved is a legal service specified in a fee indemnification agreement for which Respondent must indemnify the Applicant.

9. A Party who is ordered to indemnify another party for its legal fees is not responsible for costs associated with unnecessary steps. A corollary to this principle is that a client who instructs a lawyer to take steps which would not normally be undertaken is responsible for the costs associated with the extraordinary measures.

10. The Court has an overriding obligation to ensure that those who are obliged to pay for legal services are treated reasonably, taking into account all the circumstances.

The Court held that the Review Officer breached several of the general principles governing Costs. First, the Review Officer did not comply with the first principle. The Review Officer failed to recognize or give effect to the Court of Queen's Bench's Order stating that the Applicant is entitled to its costs on a Solicitor and Client basis.

Second, the Review Officer did not comply with the third principle in that he did not make his assessment in a principled manner. The Review Officer specifically failed to assess the matter before him on the merits and this omission constituted a legal error.

Third, the Court held that the Review Officer did not follow the seventh principle. The Respondent had agreed to indemnify the Applicant for the legal services the Applicant had incurred to protect its interest. The Review Officer failed to study the loan documents to determine the legal services which were indemnified.

The Court held that the Review Officer did not ask whether the Applicant sought indemnification for any costs associated with any unusual or unnecessary expense or for any step undertaken by its counsel which did not increase the likelihood the lender's security interest would be protected. The Court held that if the Review Officer had asked the above questions, he would have found it necessary to review the tenth principle, to ensure that those who are obligated to pay for legal services are treated reasonably.

Pursuant to Rule 10.27(1)(c), the Court revoked all parts of the Decision of the Review Officer and directed another Review Officer to hear the case on its merits. The Court held that the Review Officer must make an individual assessment in accordance with the principles set out in this Decision. The Court allowed the Appeal by the Applicant.

THORESON v ALBERTA (INFRASTRUCTURE), 2014 ABCA 31 (BERGER, COSTIGAN and McDONALD JJA)
Rule 10.2 (Payment for Lawyer's Services and Contents of Lawyer's Account)

The Appellants appealed a Trial Judge's award of Costs

under s. 39(1) of the Expropriation Act. The Court of Appeal briefly discussed whether the reasonableness standard from former Rule 613 applied to an award of costs under the *Expropriation Act*. The Court concluded that it did.

STEINKE v HAJDUK GIBBS LLP, 2014 ABQB 34 (WAKELING J)
Rules 10.2(1) (Payment for Lawyer's Services and Contents of Lawyer's Account), 10.26 (Appeal to Judge) and 10.27 (Decision of Judge)

The Appellant law firm appealed the Decision of the Review Officer to reduce the law firm's fees by approximately 19%. The Respondent clients cross-appealed, stating that the Review Officer should have made a larger reduction.

With respect to the standard of review, the Court held that it may only review or revoke the Review Officer's Decision if it reflected an error of principle or if the award was inordinately high or low. The Court also held that a factual determination that was clearly wrong may also warrant intervention.

The Court reviewed the general principles governing the review of an account submitted by a lawyer to a client as set out in *Alberta Treasury Branch v 1401057 Alberta Ltd*, 2013 ABQB 748. The Court held that the Review Officer failed to take into account the general principles governing costs and committed errors of law for the following reasons:

1. The Review Officer's Decision failed to honour the terms of the retainer agreement and without a compelling reason, relieved the clients of their obligation to pay their lawyer.

2. There was no indication that the law firm failed to pass the costs principle that, unless there was a contrary provision in the retainer agreement, a client must pay for legal services which increases the likelihood of the purpose of the retainer agreement being achieved.

3. The Review Officer did not assert that any reduction ordered was attributable to the principle that ensured that those who are obliged to pay for legal services are treated reasonably, taking into account all circumstances. The Review Officer appeared not to have discussed whether the law firm's charges were exorbitant or if the law firm took advantage of its clients.

4. The Review Officer did not discuss the client's direction to the law firm to "fight".

The Court held that generally, after concluding that the Review Officer had committed errors in law, the Court would direct the matter back to the Review Officer to adjudicate the amounts needed to be paid in accordance with the correct legal principles. In this case, the Court held that another review by a Review Officer was not required for the following reasons:

1. The Court was completely satisfied that the principles governing the review of the Appellant's account could dictate only one result: the clients must pay the entire amount.

2. The record before the Review Officer was complete and there was no need to conduct another hearing to perfect the record.

3. The decision would save the clients and the law firm significant costs associated with an additional appearance before the Review Officer.

The Court went on to explain why the clients would have to pay the Appellants their account in its entirety:

1. The Respondent had made a promise to the Appellant to pay for all legal services which increased the likelihood of its success. It also expressly promised to pay for all time spent on the file.

2. The Respondent pressed the Appellant to fight its case and leave no stone unturned and now should not be in a position to complain about the work

performed by their lawyers.

3. The Court considered whether the law firm's charges were exorbitant, such that it can be said that the law firm took advantage of its clients. The Court held that this was not the case for two reasons. First, the law firm informed the clients of their billing procedures in the retainer agreement. Second, the Court held on review of the file that the clients were fortunate to recover the amounts and this was largely attributable to the good work of its lawyers.

The Court dismissed the Cross-Appeal by the Respondents as it was without merit. The Appellant was entitled to Costs in accordance with Schedule "C" of the Rules of Court.

HAMILL v KUDRYK, 2014 ABCA 82 (BIELBY JA)
Rules 10.41 (Assessment Officer's Decision) and 538 (Filing)

The self-represented Applicant applied for an Order "staying" or holding "null and void" the assessment of Costs made against him on appeal; he sought, in effect, to appeal a Decision of an Assessment Officer taxing those Costs in the amount of $6,700.40.

Bielby J.A. declined to stay or hold the Costs assessment null and void, stating "I have no jurisdiction to set aside the costs awarded to Ms. Kudryk by this Court upon its dismissal of Mr. Hamill's appeal".

However, Bielby J.A. was willing to take a more generous interpretation of the Application, and treat it not as an Application to overturn an entitlement to Costs, but rather as an Application to reduce the $6,700.40 awarded by the Assessment Officer. Bielby J.A. noted that, collaterally and preliminarily, the issue arose as to whether and how an award of Costs by an Assessment Officer could be challenged.

Bielby J.A. noted that no procedure for appealing an assessment of Court of Appeal Costs is set out in the Rules of Court or the Practice Directions, but no argument was made that such an appeal is not possible. The Court stated that Rule 10.41(1) establishes the duties of an Assessment Officer in relation to a review of a Costs award made by a Justice of the Court of Queen's Bench, and, by analogy, to this Application. It provides that "...an assessment officer may, with respect to an assessment of costs payable,determine whether the costs that a party incurred ... are reasonable and proper costs".
The specific complaint by Mr. Hamill was that the sum of $4,000.00 awarded against him for the preparation of a Factum was not reasonable and proper, since the factum in question had not been filed and served in the time frame set out in Rule 538. After reviewing Mr. Hamill's evidence, Bielby J.A. determined that Mr. Hamill had not established that the Factum was not filed in time. The Court further noted that the remainder of Mr. Hamill's arguments went to the merits of the underlying Judgment, and not to this Application on Costs. Bielby J.A. dismissed the Application, with Costs.

GENGE v CENTRON RESIDENTIAL CORPORATION, 2014 ABQB 50 (PENTELECHUK J)
Rule 10.42 (Actions Within Provincial Court Jurisdiction)

The Plaintiff appealed a Judgment from the Provincial Court of Alberta. The Plaintiff had paid the Respondent Defendant $10,000.00 as a deposit for performance of services. The Respondent Defendant returned $1,972.09, deducting amounts for pooled damages and damages to or near the lot in question. The Plaintiff objected to the reduction and sued for its return. The Trial Judge dismissed the Action with Costs.

The Court held that standard of review on questions of law was correctness and that it would not interfere unless the Judge had made a palpable and overriding error.

The Court noted that the Applicant Plaintiff was self-represented and the Trial Judge had a special duty to provide assistance (*R v Phillips*, 2003 ABCA 4). After reviewing the Trial transcripts, the Court held that the Trial Judge had provided the required limited assistance to the Plaintiff and exercised proper judicial discretion. Second, the Court held that the contract, specifically, the performance deposit scheme, was legally enforceable. Finally, the Court held that there was no palpable and

overriding error demonstrated by the Trial Judge with respect to the assessment of damages. The fact that the Trial Judge accepted the evidence of the Respondent Defendant was sufficient evidence to support the deductions.

The Court dismissed the Appeal and awarded costs on Schedule "C". The Court applied Rule 10.42 to reduce the amount claimed to 75%. The Court also held that the Respondent Defendant would have Costs of the Appeal in the amount of $1,500.00 plus taxable disbursements.

OLSON v OLSON, 2014 ABCA 15 (PAPERNY, SLATTER JJA and BELZIL J (AD HOC))
Rules 12.44 (Application Within Course of Proceeding) and 12.51 (Appearance Before the Court)

A Justice in Chambers made a final Order respecting the parenting and support of the parties' child based on conflicting Affidavits without the Appellant being present. Both parties had anticipated an interim Order. However, the Justice was disinclined to make any Order on an interim basis because of the acrimony between the parties.

The Appellant, dissatisfied with the Order, appealed to the Court of Appeal. Slatter J.A. observed that, while Rule 12.51 was broadly worded to ensure that the Court had wide jurisdiction in family matters, it appeared in a Division under the Family Rules headed "Trial". Further, Rule 12.44 confirmed that the ordinary Rules on Interlocutory Applications applied to interim family Applications. Justice Slatter noted that final Orders were rarely made in Chambers based on conflicting Affidavits, and were ordinarily made after Trial or settlement of the dispute.

Justice Slatter, for the Court, held that in the circumstances there was no reason why an interim Order should not have been granted, and that it was open to either party to obtain a different permanent Order through the Trial process if they so wished. Justice Slatter opined that an interim Order in a family matter could be varied by the Court if there was a change in circumstances, and after Trial it was open to the Trial Judge to make a different Order and vary the interim terms from the previous Order. The Appeal was allowed in part and the Decision of the Chambers Justice was confirmed as an interim Order only.

CALVER v CALVER, 2014 ABCA 63 (CÔTÉ, HUNT and SLATTER JJA)
Rule 12.53 (Form of Orders)

In a family law Action, the parties obtained an interim Consent Order granting the Respondent mother residential custody of the children, and $500.00 per week in child support, inclusive of section 7 expenses. The Consent Order directed the father to provide a Notice of Assessment annually, and a subsequent divorce Judgment made the disclosure obligation mutual between the parties. Neither party disclosed their finances to one another until the father sought disclosure in 2012. In 2013, the father's Application to vary the interim Consent Order was heard in Justice Chambers. The oldest child, who was no longer a child of the marriage as defined by the *Divorce Act*, RSC 1985, c 3 (2nd Supp), and one of the two younger children, was living with the father by that time. The mother cross-applied for increased child support and section 7 expenses because of the father's increased income; the Chambers Justice granted retroactive child support for the older child and the father appealed.

The Court of Appeal considered whether the Chambers Justice erred in law when expenses for the older child were ordered retroactively, even though the child was no longer a child of the marriage. The Court of Appeal observed that a Court's jurisdiction to make a retroactive support Order is possible if the child is a child of the marriage when an Application is made for retroactive support or for income disclosure. The Court also commented, in response to arguments made by the Respondent mother, that disclosure obligations in support Orders are now the norm and are mandated by the *Rules of Court*, (e.g. Rule 12.53 and Family Law Forms FL-26 and FL-27). The Court allowed the Appeal and held that the father's income should be calculated without correcting for the additional funds received as an allowance for costs relating to his work in Northern Alberta. Support and expenses were not payable for the oldest child, who had ceased to be a child of the marriage by the time of the Application.

ZAITER v ALATRACHE, 2014 ABCA 72 (COTE, WATSON and VELDHUIS JJA)
Rule 12.54 (Certificate of Divorce)

The Respondent husband applied to dismiss an Appeal from a divorce decree brought by the Appellant wife. The Appellant frankly admitted to the Court of Appeal that she wanted finalization of the divorce delayed in order to force the Respondent to come to better terms with respect to financial issues. The Court of Appeal noted that the Appellant had not filed a Factum before the time limits within the Rules even though she had been reminded twice by the Case Management Officer. The Court stated that an Appellant who benefits from a stay of execution pending Appeal is under a duty to prosecute that Appeal promptly. The Court stated that Rule 12.54 forbade a Certificate of Divorce permitting re-marriage unless there is a Certificate of No Pending Appeal. The Court observed that this was an automatic stay of execution created by filing the Appeal which could not be lifted by any Court. The stay was therefore very serious. The Court was clear and firm that the Rules of Court and Court Orders applied to self-represented litigants and not just to parties with counsel. The Appeal was dismissed for want of prosecution.

JAMES v NORTHERN LAKES COLLEGE, 2014 ABCA 48 (VELDHUIS JA)
Rule 505 (When Appeal Available)

The Applicant sought Leave to Appeal a Decision denying him Leave to Restore an Appeal. Veldhuis J.A. held that the Application required her to exercise her discretion in a judicial manner in accordance with the principles of fundamental justice, and Leave to Appeal the decision of a single Judge pursuant to Rule 505 would be granted if the Applicant could establish that here was a serious question of general importance. Absent a question of general importance, the test for Leave to Appeal under Rule 505 is whether there was a possible error of law, discretion had been unreasonably exercised or the initial decision was based on a misapprehension of important facts.

Veldhuis J.A. held that the aforementioned tests were not met and the Applicant was simply re-arguing what he had argued before. The Application was dismissed.

MORBANK FINANCIAL INC v Field, 2014 ABCA 3 (WATSON JA)
Rule 515.1 (General Appeals List)

The Applicant sought to restore an Appeal to the General Appeals List under Rules 515.1(9.1) and 515.1(10) of the Alberta Rules of Court. The previous Application was struck due to non-compliance with the Rules. The Appeal was from an Order by Burrows J. in the Court of Queen's Bench declaring the Applicant bankrupt.

The Applicant disputed the validity and the amount of the debts claimed by the Respondent. The Applicant had relevant lawsuits to deal with these disputes, but argued that Burrows J., when granting the Order for bankruptcy, effectively granted Summary Judgment against his other claims. Watson J.A. stated that the existence of such Actions did not bar or oust the proceedings before the lower Court.

With respect to debts owing, the Applicant alleged that Burrows J. ought not to have used certain evidence against him. The Court found that there was nothing in the reasons to suggest that Burrows J. had misused the evidence or that it had been improper for him to consider it.

The Applicant also claimed unfair treatment by Burrows J., referring specifically to the fact that the Respondent was permitted to file voluminous material on short notice, whereas the Applicant was not allowed to file his own evidentiary response. The evidence the Applicant alleged had been denied by Burrows J. was unclear to Watson J.A. From the evidence, it appeared that Burrows J. had reviewed the Applicant's documents and considered the information prior to making his Decision.

In determining whether to restore the Appeal, the Court considered the following: the reason why the Appeal was struck; the length of the delay in bringing the Application to restore; the overall conduct of the litigation; the prejudice to the Respondent; and the merits of the Appeal.

With regard to why the Application was struck, the Applicant's position was that he made a simple miscalculation of timelines. Watson J.A found no evidence to support this assertion and rejected this claim.

The Applicant further claimed that, during the hearing before Burrows J., the Applicant made strategic or other mistakes that rendered the hearing so unfair that he should be given a second chance. Watson J.A. stated that this would be inconsistent with the policy behind the Rules of Court; specifically, that the competence of a party to a civil proceeding should not be the problem of the Court or the other party: *Kedmi v Korem*, 2012 NSCA 124 at para 8.

Overall, the Court found that there was no merit to the Appeal. The Applicant did not identify any reversible errors made by Burrows J. within any applicable standards of review. Finally, the Court did not consider assertions from the Applicant and another party that bankruptcy would affect his status as an architect. The Court decided that it must follow the procedures for bankruptcy to balance the interests of creditors and of insolvent debtors, and to allow such debtors to be successfully re-integrated into the commercial mainstream. The Court dismissed the Application to restore the Appeal.