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

Our website, www.jssbarristers.ca, now also features a Cumulative Summary of Court Decisions which consider the Alberta Rules of Court. The Cumulative Summary of the Rules is organized by the Rule considered, and includes an expanded summary of the Decisions including key quotations from the Decisions. It will be updated regularly to ensure that it provides an ongoing and current resource for those interested in the consideration of the Rules of Court on a cumulative basis.

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ROZAK (ESTATE), 2011 ABQB 239
Rules 1.1 to 1.10 (Foundational Rules)

The Defendant doctors appealed the Decision of a Master, who had dismissed their Application to compel the Plaintiff to answer certain Undertakings from the Cross-Examination on the Plaintiff's Affidavit. The Appeal involved the scope of Questioning on an Affidavit (under the old Rules). As part of his analysis, Graesser J. made a broad reference to the Foundational Rules of the new Rules, indicating that the scope of permissible Questioning on an Affidavit has not changed under the new Rules:

> Having regard to the foundational rules, I see no purpose or basis to change the scope of questioning on an affidavit in support of an application: questions relevant and material to the underlying application will be permitted and if refused, will be ordered to be answered...

COGENT GROUP INC v ENCANA LEASEHOLD LIMITED PARTNERSHIP, 2011 ABQB 335
Rules 1.2 (Purpose and Intention), 1.4 (Procedural Orders), 5.17 (People Who May Be Questioned), and 5.18 (Persons Providing Services to Corporations)

The Applicant sought an Order allowing it to Question an employee of a company related to the Defendant pursuant to Rule 5.18, which allows a person to be Questioned where that person has provided services for the Defendant and can provide the best evidence on the issue.

Both parties conceded that, although the individual sought to be Questioned had provided services to the Defendant corporation, those services were not related to the information which he possessed which was relevant to the Action. Nevertheless, counsel for the Applicant argued that Rule 5.18 applied so long as the individual provided services to the Defendant at some point and he could provide the best evidence on the issues in dispute.

In reaching its Decision the Court referred to former Rule 200 and the jurisprudence surrounding that Rule. Master Mason noted that Alberta case law in respect of Rule 200 permitted Questioning of an individual who did not meet the strict legal definitions of an "officer" or an "employee", so long as the individual had relevant and material evidence by virtue of the services he or she provided to the party. However, relevant jurisprudence also made it clear that non-party witnesses cannot be subject to Questioning simply because they "may have something to say".

The Court held that Rules 5.17 and 5.18 codify former Rule 200 and the relevant case law interpreting that Rule. The purpose of Rule 5.18, as identified by the Court, is to:

> ... allow questioning of persons akin to employees who have gained relevant and material knowledge as a result of providing services to a party corporation. The required connection is implicit in the rule and fundamental to the Alberta approach to questioning non-parties prior to trial.

In denying the Applicant's request, the Court found that it would be inconsistent with Rules 5.17 and 5.18 to "conclude that service providers who may have acquired relevant and material knowledge outside of the service

relationship, can be questioned prior to trial in the same fashion as an employee of a party". The Court added that it "is the provision of services in relation to the matters at issue in the action that transforms a mere witness into a service provider within the meaning of Rule 5.18".

The Court also denied the Applicant's request to obtain the same relief pursuant to Foundational Rules 1.2 and 1.4, holding that Rules 1.2 and 1.4 are "not intended to provide a platform to subvert other rules. Rather, they augment specific rules and allow the court to craft remedies appropriate to particular circumstances as needed".

HUNKA v DEGNER, 2011 ABQB 195
Rules 1.2(1), 1.2(2)(c), 1.2(2)(d) (Purpose and Intention), 5.1(1) (Disclosure of Information), 5.2(1) (When Something is Relevant and Material), 5.33(1) (Confidentiality and Use of Information) and 7.1(1) (Application to Resolve Particular Questions or Issues)

Two Applications were before the Court: one by the Defendants to sever the issue of share value from the remaining issues before the Court for the purposes of discovery, and another by the Plaintiffs for the production of certain documents.

In addressing whether the issue of share value should be severed, Gill J. reviewed the discretion provided to the Court by Rule 7.1(1), stating that the Court must be guided in exercising such discretion by the purpose and intention of the Rules as set out in Rule 1.2(1). As the issue of share value was found to be inextricably intertwined with other issues in the Action, Gill J. held that severing the issue would not be practical or useful and that, applying Rule 7.1(1), severance would not help to dispose of all or part of the Claims, substantially shorten the Trial or save expense. Gill J. further held that this conclusion was reinforced when the purpose and intention of the Rules, as set out in Rules 1.2(1), 1.2(2)(c) and 1.2(2)(d), was considered.

In addressing disclosure of documents, Gill J. indicated that the Plaintiff had requested disclosure of a number of financial records, which the Defendants objected to producing. Gill J. stated that the relevant Rules are Rules 5.1(1) and 5.2(1), and held that the principles outlined in *Mustard v Brache*, 2006 ABCA 265, in regard to old Rule 186.1, were still applicable, as was the approach outlined by the Court in *Weatherill (Estate of) v Weatherill*, 2003 ABQB 69. Gill J. held that the documents requested by the Plaintiffs appeared to be relevant and material and disclosure would be in accordance with the purposes outlined in Rule 5.1(1). With respect to the issue of confidentiality of the document production, Gill J. held that, taking into account the fact that a Consent Order was in place imposing the requirement of confidentiality, as well as the required confidentiality imposed by Rule 5.33(1), no further steps were required.

HENDERSON (ESTATE) v ARNETT, 2011 ABQB 198
Rules 1.2 (Purpose and Intention), 1.5 (Rule Contravention, Non-Compliance and Irregularities), 5.32 (When Information May Be Used), and 5.34 - 5.40 (Experts and Expert Reports)

The issue before the Court was whether it was improper for a Party to an Action to file an Expert's Report with the Court without first obtaining the consent of the opposing Party.

Binder J. held that Rule 1.2 sets out the purposes of the Rules of Court, including the need to "identify the real issues in dispute, facilitate the quickest means of resolving a claim at the least expense, encourage the Parties to resolve the claim themselves as early in the process as practicable, and oblige the Parties to communicate honestly, openly and in a timely way". One intention of the Foundational Rules is to encourage Parties "to refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules" and "to use publically funded court resources effectively."

Binder J. reviewed Rules 5.34 to 5.40, regarding the proper procedure for Experts' Reports, and noted that, although the Rules contemplate service of Experts' Reports as between the Parties, they do not address whether the Reports should be filed with the Court.

Applying the Foundational Rules, in conjunction with Rule 5.32, Binder J. determined that an Experts' Report

only becomes part of the Court record if both Parties consent to its addition or upon Court Order. In reaching this Decision, Binder J. held that the new Rules reflect a policy of efficiency and economy. Restricting filing to essentials promotes those goals. Unnecessary filing wastes Court resources in terms of clerks' time and storage space. Counsel should communicate honestly, openly and in a timely way amongst themselves. The Experts' reports should only become part of the Court record by consent or with the approval of Court.

CONDOMINIUM CORPORATION NO 0825873 v 1246153 ALBERTA LTD, 2011 ABQB 178
Rules 1.2 (Purpose and Intention) and 9.9 (Determining Damages)

After Reasons for Decision in a Summary Judgment Application were issued (2010 ABQB 718), the Defendant challenged the Master's jurisdiction to grant condominium fee arrears which had accrued since the issuance of the Statement of Claim.

Master Breitkreuz determined, based on the cases presented by counsel, that the Court had discretion to grant or refuse the Application. However, Master Breitkreuz went on to state that Rule 1.2, which provides that the purpose of the Rules is to provide a means by which claims can be fairly and justly resolved in or by a Court process in a timely and cost-effective way, and Rule 9.9, which provides that the Court must determine damages for a continuing claim to the time the Court makes its determination of the amount, favoured the Respondent. The Court was aware that a claim for condominium arrears was not a damages claim, but that it would be unreasonable to interpret Rule 9.9 as being restricted to a damages claim, as the quantification of a liquidated claim is almost always far simpler than a damages claim. In determining what constituted a continuing cause of action, Master Breitkreuz cited case law pre-dating the new Rules, including *Wild Rose School Division No. 66 v Bert Pratch Const. Co.*, 1998 ABQB 831. Master Breitkreuz distinguished *Wild Rose* on two grounds, one of which was the Master's speculation that counsel might not have referred the Court in that case to Rule 250, the predecessor of new Rule 9.9. In the end result, Master Breitkreuz dismissed the Application.

SUKHWANT SHERGILL v SKENE, 2011 ABQB 334
Rules 1.7(2) (Interpreting the Rules) and 4.36(2)(b) (Discontinuance of Claim)

At the scheduled Application in an Originating Notice Action, the Applicant sought to withdraw its Application. In response, the Respondent argued that the Court should dismiss the entire Action to prevent the Applicant from reviving the matter in the future. The Respondent submitted that Rule 4.36(2)(b), which refers to the "discontinuance" of an Action (but not to a "withdrawal" of an Originating Notice Application), should apply by analogy under Rule 1.7(2) to this particular instance. The Court agreed: the withdrawal in this matter was an analogous situation because the Application was on the verge of being heard when it was withdrawn by the Applicant.

Master Prowse then determined that the reason that a Court's permission is required for a Discontinuance under Rule 4.36(2)(b) is to prevent a Plaintiff, who has caused a Defendant to expend time and resources in defending an Action, from unilaterally Discontinuing an Action, which would leave a Plaintiff free (subject to limitations issues) to re-litigate the same issues at a time of his or her choosing in the future.

Because the Respondent in this case had expended much time and expense in preparing for the Application, and because the Applicant had unilaterally decided to withdraw its Application because of unfavourable evidence it had acquired since the Originating Notice Action had been filed, the Court allowed the Applicant to withdraw its Application but on the basis that it could not revive the Originating Application. The Applicant could bring proceedings against the Respondent in the future, but only on grounds not presently available to it.

ANANA v LAKELAND COLLEGE FACULTY ASSOCIATION, 2011 ABQB 313
Rules 3.15(2) (Originating Application for Judicial Review) and 13.5 (Variation of Time Periods)

One of the issues in this Decision concerned the 6-month limitation period to file and serve an Originating Notice for Judicial Review, as required by Rule 3.15(2). The Court reinforced the plain wording of Rule 3.15(2): the 6-month limitation period is inflexible and is not affected by Rule 13.5 (the Rule that allows for a variation of a time period). Macklin J. also noted that an Administrative Board's denial of an Applicant's request for an Appeal of an original Administrative Decision is itself considered a "decision or act" that is subject to Judicial Review and the corresponding 6-month limitation period.

869120 ALBERTA LTD v B & G ENERGY LTD, 2011 ABQB 209
Rules 3.6 (Permission of Court for Amendment), 3.66 (Costs of Amendment) and 3.74 (Changes to Parties)

The Plaintiff applied to amend a Statement of Claim to allow new Parties to be added and for substantial amendments to the Statement of Claim.

Eidsvik J. addressed the Rules of Court dealing with amendments, including Rules 3.62 through to 3.76, holding that the most applicable Rules were 3.65, which gives the Court the right to permit an Applicant to amend a pleading, and 3.74, which applies when an Applicant seeks to add parties to an Action. Rule 3.74(2)(b) allows the Court to Order that a person be added if the Court is "satisfied that the order should be made". However, Rule 3.74(3) stipulates that "[t]he Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms".

Eidsvik J. held that former Rules 132 and 133, although somewhat differently worded, were similarly broad, and that Rule 3.74(3) basically codifies the "classic rule" that "an amendment should be allowed no matter how careless or late, unless there is prejudice , as outlined in *Balm v 3512061 Canada Ltd*, 2003 ABCA 98 and *Milfive Investments Ltd v Sefel*, 1998 ABCA 161. Citing additional case law arising from the former Rules relating to amendments, Eidsvik J. noted that other generally accepted criteria include that the amendment must raise a triable issue (must not be "hopeless"), and that there must be a "modest degree of evidence" if the amendment is beyond trivial or of a clarifying nature, unless the claim to be added is fraud, in which case a "stiffer test" is to be used. Finally, Eidsvik J. held that, if the Claim against a person to be added or the cause of action is outside the limitation period, then reference is to be made to s. 6 of the *Limitations Act*, RSA 2000, c L-12, to determine if it should be allowed.

Eidsvik J. allowed several of the requested amendments, and allowed the addition of some of the additional Parties. With respect to costs, Eidsvik J. held that, pursuant to Rule 3.66, the Party filing the pleading is subject to costs. Eidsvik J. noted that although the "result ha[d] been mixed" in the Application, the Plaintiff should bear the costs of the Application because the Application was unduly complicated by several revisions of the Claims and Affidavits being filed on the eve of the Applications.

PL v ALBERTA, 2011 ABQB 215
Rule 3.68(2) (Deficiencies in Claims)

The Defendant sought an Order for a Stay of the Action or an indefinite extension of the time in which to file a Statement of Defence on the basis that the allegations in the Statement of Claim duplicated and overlapped with two existing Class Action Proceedings. One of the Class Action Proceedings had been certified, while the other Class Action was pending Certification.

Graesser J. stated that the Court has the jurisdiction to extend the time limit for filing a Statement of Defence under the appropriate circumstances. Graesser J. referred to Rule 3.68(2) and determined that the applicable provisions were either that the Pleadings did not disclose a reasonable Claim, or that the Claim constituted an abuse of process. Graesser J. determined that the Defendant was not entitled to a stay as it had other methods to deal with these

concerns. The Defendant could have demanded Particulars, or applied to strike portions or the entire Statement of Claim, although neither of these types of Applications stay the obligation to file a Statement of Defence.

Graesser J. also considered the fact that the Defendant was resisting the second Class Proceedings Application, presumably on the basis that all such Claims should proceed on their own merits. As the Plaintiff was seeking to advance the Claim on its own merits, Graesser J. determined that there was no good reason to Stay the Action or provide an indefinite extension to the time for filing a Statement of Defence.

KENT v MARTIN, 2011 ABQB 298
Rule 3.74 (Changes to Parties)

The Plaintiff sought an Order to amend an existing Amended Statement of Claim, including the addition of a Defendant. The information which formed the basis for the Application and the Amendments was obtained through the pre-trial Discovery Process and was protected by the Implied Undertaking Rule.

Miller J. considered whether the Court's discretion under Rule 3.74 was sufficient to set aside the protection provided by the Implied Undertaking. Miller J. rejected the argument that information obtained at pre-trial Discovery cannot be used to amend a Pleading or add parties. In granting leave to amend the Pleadings, Miller J. decided that the information sought to be used involved the "same or similar parties" and the "same or similar issues" and there was no prejudice.

ATTILA DOGAN CONSTRUCTION v AMEC AMERICAS LIMITED, 2011 ABQB 175
Rule 4.22 (Security for Costs)

The Court approached an Application for Security for Costs in two steps. First, it undertook an evaluation of each of the Rule 4.22 factors. With specific reference to Paragraph 4.22(e) ("...any other matters the Court considers appropriate"), Wittmann C.J. considered case law surrounding the Counterclaim of the Defendant: specifically, how and in what situations the existence of a Counterclaim affects the outcome of a Security for Costs Application.

Second, the Court considered whether it was just and reasonable to grant the Application after it had taken all of the Rule 4.22 factors into account. The Security for Costs award was granted because, among other things, the Action involved a foreign Plaintiff that did not call evidence with respect to its ability to pay a potential costs award against it.

AUTOWELD SYSTEMS LIMITED v CRC-EVANS PIPELINE INTERNATIONAL, INC, 2011 ABQB 265
Rule 4.22 (Security for Costs)

The Defendant applied for Security for Costs against a foreign corporation with no assets or business operations in Alberta. The Court's discussion of Rule 4.22 began by referring to comments from *Ritter v Hoag* (2003), 25 Alta LR (4th) 267 (QB), regarding what constituted "just and reasonable" under the old Rules for Security for Costs.

McMahon J. addressed Rule 4.22(b) and noted that the Court need not determine that the Plaintiff would be unable to pay the Security in order to grant such an Application; rather, the Court's mandate, when determining what is just and reasonable, is merely to consider the ability of the Plaintiff to pay. Under Rule 4.22(c), McMahon J. determined that a balanced consideration of the merits of the entire Action is required, rather than a focus merely on the merits of the defence as under the old Rules. Under Rule 4.22(d), McMahon J. referred to case law that makes a distinction between an impecunious individual Plaintiff, who may be shut out of the Court process with the granting of an Order for Security for Costs, versus a limited liability corporation as Plaintiff - an impecunious company with a cause of action which is a one-way valve, in which money can flow from the company to its shareholders but not in the opposite direction. Security for Costs is more likely to be granted in the latter situation.

McMahon J. granted an Order for Security for Costs because of the unchallenged description of the Plaintiff's net asset position and the absence of evidence from the Plaintiff that it could not raise significant Security.

SPECTRUM CENTRE FOR PHYSICAL THERAPY AND ATHLETIC REHABILITATION LTD v FILIPENKO, 2011 ABQB 340
Rules 4.22 (Security for Costs) and 4.23 (Contents of Security for Costs Order)

The Defendant sought an Order for Security for Costs pursuant to Rules 4.22 and 4.23. In granting the Application, Master Laycock considered the decision of Wittmann C.J. in *Attila Dogan Construction v AMEC Americas Ltd*, [2011] AJ No 308, 2011 ABQB 175, which, at paras. 24 and 25, sets out a two-step test for Security for Costs Applications pursuant to Rule 4.22.

The first step is to review the five factors set out in Rule 4.22 (a-e), being the likelihood of enforcing an Order or Judgment against assets in Alberta, the ability to pay costs, the merits of the Action, undue prejudice, and any other matters the Court considers appropriate. If, based on these factors the Court is in favour of granting the Application, then the Court must consider the second step of the test. The second step is to ask whether it is just and reasonable to grant the Order for Security having taken into account the factors in Rule 4.22.

HOODA v HSBC CANADIAN DIRECT INSURANCE, 2011 ABQB 196
Rule 4.33(1) (Dismissal for Long Delay)

This was an Application to dismiss an Action based on an alleged failure to do a thing that materially advanced the Action within a period of time. Although the 5-year drop-dead period under Rule 244.1 of the old Rules applied to this Application, reference was made to the new Rules. Master Breitkreuz stated that the only difference [apart from the time periods involved] between old Rule 244.1 and new Rule 4.33(1) is the difference between the wording: "materially advanced the action" and "significantly advanced the action". In Master Breitkreuz's view, this change in wording is "a difference without a difference".

GOSHULAK v NGUYEN, 2011 ABQB 346
Rules 4.33 (Dismissal for Long Delay) and 15.4 (Dismissal for Long Delay: Bridging Provision)

The Defendants applied to have the Action dismissed on the basis of long delay, pursuant to Rules 4.33 and 15.4. The Statement of Claim was filed and served on the Defendants on March 17, 2005. The Plaintiffs claimed that the Action had been significantly advanced between March 17, 2005 and March 17, 2010 by the gathering of medical records and preparation of damage assessments. The Court relied on the reasoning in *Top Grade Solutions Inc v Flying Pizza 73 Inc*, 2009 ABQB 492, and held that the gathering of medical records and preparation of damage assessments had not significantly advanced the Action because the Defendants were unaware that these steps were being taken. Further, Master Mason held that Rule 4.33 did not apply because the Application was governed by the transitional provisions of Rule 15.4.

MAHAMAD v MATTHEWS, 2011 ABQB 187
Rule 5.2(1) (When Something is Relevant and Material)

One of the Defendants applied for disclosure of the contents of a Settlement Agreement made between the Plaintiff and another Defendant. In determining whether or not the Settlement Agreement was relevant and material the Court applied Rule 5.2(1). Veit J. stated that the Rule was much narrower than its predecessor and that it excluded tertiary evidence. Further, the Court stated that the materiality or weight of evidence must be addressed with a view to determining whether the record will significantly help to determine one of the issues raised in the Pleadings. The Court held that the existence of a Settlement Agreement was relevant and material, but that the content of the Agreement was not material.

CHEVALIER v SUNSHINE VILLAGE CORPORATION, 2011 ABQB 295
Rules 5.12 (When Affidavit of Records Must Be Served) and 5.5 (Penalty for Not Serving Affidavit of Records)

The Defendants applied for an Order extending the deadline to file the Defendants' Affidavits of Records. The

Defendants were an individual and a corporate Defendant. The individual Defendant had also made an Application for an Order that the Action against him be struck. The Court recognized that the purpose of Part 5 of the Rules is to, amongst other things, encourage early disclosure. Rules 5.5(1) and (3) achieve this by fixing the time in which the Defendants must file their Affidavits.

Master Laycock held that there was sufficient cause for the individual Defendant to extend the time to file his Affidavit under Rule 5.12. The Court found that the individual Defendant's upcoming Application to have the Action struck did not appear to be frivolous and in order to satisfy the efficiencies of time and expense the time for filing the individual Defendant's Affidavit of Records should be extended to 30 days after the hearing of his Application to strike the Action against him. The Court did not award an extension to the corporate Defendant because the corporate Defendant had not brought an Application to have the Action against it struck. The Court found that the corporate Defendant had not demonstrated sufficient cause to extend the time for filing its Affidavit of Records under Rule 5.12.

HUNKA v WAIWARD STEEL FABRICATORS LTD, 2011 ABCA 142
Rule 5.18 (Persons Providing Services to Corporations)

The Appellants Appealed an Order of Gill J. dismissing their Application to interview some of the professional advisors of the Respondent, including its auditor and insurance broker. In dismissing the Application, Gill J. had suggested that the Appellant was at liberty to bring an Application pursuant to Rule 5.18.

One of the grounds for Appeal was whether the Chambers Judge erred by determining that Rule 5.18 applied to this scenario. The Court of Appeal was reluctant to determine the applicability of Rule 5.18 as the Appellant had not proceeded pursuant to Rule 5.18. However, the Court of Appeal did provide some helpful commentary on Rule 5.18:

> ...the Rules do not provide for questioning of persons who are merely witnesses. While Rule 5.18 has arguably somewhat expanded or, at least, codified the case law interpreting the prior Rule, it is relevant that the originators of the new Rule did not intend the rule to be used to discover mere witnesses: see the Alberta Law Reform Institute's Consultation Memorandum No. 12.2 entitled *Document Discovery and Examination for Discovery*, which states at para 144: "... the person being examined must have some sort of connection with the corporate party akin to that of an employee or officer and have first hand knowledge of events giving rise to issues in the action".

NOVOTNY v LEPAN, 2011 ABQB 205
Rules 5.33 (Confidentiality and Use of Information) and 12.9 (Starting Combined Proceeding, Family Rules)

This matter dealt with a matrimonial property Action and a divorce Action combined together under one proceeding. The Plaintiff in this matter applied for an Order preventing Counsel, representing all three Defendants, from continuing to act for all three Defendants on the basis that Counsel would be forced to breach either the confidentiality undertaking, outlined in Rule 5.33, or the professional obligation to disclose information received for one client to all other clients, outlined in the Law Society of Alberta's *Code of Professional Conduct*.

The Court stated that the obligation in Rule 5.33 is triggered when information for the purpose of carrying on an Action is received. In determining the scope of Rule 5.33, the Court interpreted Rule 12.9 in order to decide whether or not a combined proceeding was considered to be one Action or multiple Actions. Jeffrey J. relied on the heading immediately before Rule 12.9 and the decision in *Lord v Bell-Lord*, 2007 ABQB 274, to find that Rule 12.9 was similar to its predecessor, old Rule 563, in that it is a procedural rule which permits two Actions to be commenced together, but this does not result in those two Actions becoming one. Therefore, in applying Rule 5.33, the Court held that a combined proceeding was considered to be two separate Actions.

MEEHAN v HOLT, 2011 ABQB 110
Rules 5.40(3) (Expert's Attendance at Trial), 8.15(5) (Notice of Persons Not Intended to be Called as Witnesses), 8.16(1) (Number of Experts), 10.33(1) (Court Considerations in Costs Awards) and 15.2(1) (New Rules Apply to Existing Proceedings)

Following Trial, the Plaintiff sought costs, disbursements and pre-judgment interest from the Defendants. The Plaintiff and Defendants were unable to agree on costs and therefore re-attended before Sullivan J. for direction.

Sullivan J. held that, in accordance with Rule 15.2(1), unless an enactment or other Rule provides otherwise, the new Rules apply to every existing proceeding. Further, where the Rules impose a new test, provide new criteria or an additional ground, the Rules apply in respect of Applications not heard prior to the coming into force of the Rules. Sullivan J. held that, if there was a difference between the old Rules and the new Rules, Rule 15.6 allowed the Court to substitute the old Rules for the new Rules, particularly where it would be in the interests of fairness, timeliness and cost effectiveness to decide under the old Rules. In the circumstances before the Court, no difficulty or injustice arose as between the old Rules and the new Rules, and the Court considered the matter under both sets of Rules. This approach differed from the approach in *Broers v Real Estate Council of Alberta*, 2010 ABQB 774, where only the old Rules were considered.

Sullivan J. found that both the old and new Rules use the wording "reasonable and proper" to define a costs award. With respect to disbursements, Sullivan J. held that both the old and new Rules give the Court discretion to include in "costs" the charges of experts who testify at a Trial, as well as those who assist counsel in preparation. Sullivan J. noted that new Rule 8.16(1) provides that "[u]nless the Court otherwise permits, no more than one expert is permitted to give opinion evidence on any one subject on behalf of a party". However, Sullivan J. did not impose this test on the parties as the matter was argued at Trial under the old Rules. Taking into consideration both the new Rules and the old Rules, Sullivan J. disallowed some of the disbursements claimed by the Plaintiff for Experts' Reports.

Sullivan J. also addressed the issue of "Notices to Admit and Not to Call", finding that both the old and the new Rules give the Court discretion to penalize Parties who refused to admit facts or objected to a Notice Not to Call an Expert. The new Rules on this issue are Rules 10.33(2), 5.40(3) and 8.15(5). The Expert's Report in question included evidence that was contrary to other evidence and it was reasonable for the Defendants to refuse to admit the report. Under the circumstances, Sullivan J. refused to penalize the Defendants for not admitting the report.

FORTH v MATHER, 2011 ABQB 303
Rules 5.41 - 5.44 (Medical Examinations by Health Care Professionals)

One of the issues before the Court was whether obtaining a Medical Examination ("ME") by a Health Care Professional of the Defendant's choice ("Defendant's Medical Examination") pursuant to the Rules of Court precluded the Defendant from obtaining a Certified Examiner's Medical Opinion ("CEMO") in accordance with the *Minor Injury Regulation*, Alta. Reg. 123/2004.

The Court held that a Defendant's Medical Examination and CEMO's are not mutually exclusive and the Defendant had recourse to both during the course of the litigation. In particular, Germain J. noted that there are no provisions in the Rules of Court or the *Insurance Act*, RSA 2000, c I-3, the governing statute for the *Minor Injury Regulation*, that place "any type of an elective burden on litigants to use one process or the other".

Moreover, the Court held that there are important distinctions between Defendant's Medical Examinations and CEMO's. For example, pursuant to the Rules of Court, only Defendants may request a Defendant's Medical Examination, while either party to the litigation can request a CEMO. In addition, a CEMO is admissible in Court as *prima facie* evidence, whereas a Defendant's Medical Examination is not admissible unless the parties agree or the procedure set out in the Rules of Court is followed.

ELBOW RIVER MARKETING LIMITED PARTNERSHIP v CANADA CLEAN FUELS INC, 2011 ABQB 321
Rule 6.14 (Appeal from Master)

The Applicant appealed the Master's Decision granting Summary Judgment. Pursuant to Rule 6.14, an Appeal from a Master's Decision is on the record and the standard of review is "overriding and palpable error" in respect of factual determinations, and "correctness" in regard to questions of law.

During the course of the Appeal, the Applicant sought to introduce new evidence in accordance with Rule 6.14(3). In reaching its Decision to allow the Appeal, the Court did not consider the new evidence, holding that new evidence which a party purports to advance on Appeal must be "new and significant". Further, Tilleman J. found that in order for new evidence to be significant "it would have to be prominent and noteworthy enough that it would have influenced or affected the Master's decision".

GUDZINSKI ESTATE v ALLIANZ GLOBAL RISKS US INSURANCE COMPANY, 2011 ABQB 283
Rules 6.14(3) (Appeal from Master), 15.1 and 15.12 (New Rules Apply to Existing Proceedings)

This was an Appeal from a Decision of Master Smart regarding the interpretation of an insurance policy covering an airplane. Browne J. confirmed that an Appeal from a Master's decision has "changed from being a hearing *de novo* under the Former Rules to a hearing 'on the record of proceedings before the Master' under the New Rules". Pursuant to the transitional provisions, including Rule 15.1 and following, the Rules apply to an existing proceeding commenced but not concluded under the former Rules, if the new Rules impose a new test, new criteria, or additional ground for an Application. Browne J. noted that both the former Rules and new Rules are silent as to the standard of review applicable to Masters' Decisions. However, the existing common law has established that the applicable standard of review is correctness.

Rule 6.14(3) allows for the admissibility of new evidence if it is "significant enough that it could have affected the Master's decision". Browne J. adopted the reasoning of Wilson J. in *Heritage Station Inc v Professional Stucco Inc*, 2011 ABQB 18, that Rule 6.14 incorporates the test for new evidence set out by the Supreme Court in *R v Palmer*, (1979) 50 CCC (2d) 193 (SCC), at p. 205:

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

Browne J. reiterated the importance that the evidence be new, in keeping with the language of the new Rules and the Decision in *Heritage Station*.

LABOUCAN v RED ROAD HEALING SOCIETY, 2011 ABQB 377
Rules 6.37(6) (Notice to Admit) and 15.4(1)(b) (Dismissal for Long Delay: Bridging Provision)

This was an Application to strike an Action for long delay, which required the Court to consider the circumstances surrounding a Notice to Admit being a "thing" that may have "significantly advanced" the Action.

Although Rule 15.4(1)(b) - the transitional provision between old Rule 244.1 and new Rule 4.33(1) - was not specifically mentioned, its presence as the bridging provision that currently governs the dismissal of actions for delay is worthy of note. Master Schlosser indicated that the test relating to Rule 244.1 from *Trout Lake Store Inc v Canadian Imperial Bank of Commerce*, 2003 ABCA 259, which summarized in what situations a Rule 244.1 Application to dismiss an Action may or may not have been successful, applied to this Decision. In other words, the Court appeared to tie the test that applied under the old Rule 244.1 (which used the words "materially advance") to Rule 15.4(1)(b) (which uses the wording "significantly advance").

With respect to Rule 6.37(6), the Court permitted a withdrawal of a deemed admission relating to a Notice to Admit (such deemed admission resulting from the Defendant's decision not to respond to the Plaintiff's Notice to Admit). The Notice to Admit had sought admissions of fact that were refuted in the Statement of Defence and specifically denied in Examinations for Discovery. Master Schlosser noted that withdrawal of the deemed admissions would not result in any prejudice that was not compensable in costs. The Master referred to authorities under the old Rules relating to such withdrawals and concluded that he had difficulty imagining that the test for withdrawal as found in those authorities would not be satisfied in this case.

Master Schlosser allowed the Application, deciding that it would be inappropriate to justify allowing the Action to continue on the basis of deemed admissions that would surely be withdrawn.

GERRY'S WELL SERVICES v FOUR WINDS ENERGY SERVICES LTD, 2011 ABQB 380
Rule 6.8 (Questioning Witness Before Hearing)

The Plaintiff sought Summary Judgment with respect to a debt owed for a construction project. The Defendant disputed the authority of the President of the company at the time, Mr. Roy, to enter into the arrangement with the Plaintiff, and commenced third party proceedings against Mr. Roy.

The Plaintiff relied on former Rule 266 (now Rule 6.8) to examine Mr. Roy. There was a dispute as to the nature of the Examination evidence. Rule 6.8 states that the transcript of the Examination must be filed. Master Smart determined that the Examination transcript is evidence for the purposes of a Summary Judgment Application and "it matters not whose evidence it is, if the transcripts establish a conflict in the evidence then the Summary Judgment must be dismissed".

MANUFACTURERS LIFE INSURANCE COMPANY v EXECUTIVE CENTRE AT MANULIFE PLACE INC, 2011 ABQB 189
Rule 7.3 (Summary Judgment)

Manufacturers Life Insurance Company sought Summary Judgment against Executive Centre on the basis of a default on a lease agreement for non-payment of rent. The parties agreed, and Veit J. accepted, that Rule 7.3 has not amended the test developed in Alberta jurisprudence with regard to Summary Judgment. Where there is no factual dispute, the onus is on the Respondent to establish that it has some arguable defence to the claim. Further, where there is no factual dispute, the rights of the parties can be fairly determined without a Trial during a Special Chambers Hearing.

SHAVER v CO-OPERATORS GENERAL INSURANCE COMPANY, 2011 ABQB 188
Rule 7.3 (Summary Judgment)

The Applicant sought Summary Judgment pursuant to Rule 7.3, dismissing the Action on the basis that it was commenced beyond the 10 year "ultimate" limitation period set out in s.3(1)(b) of the *Limitations Act*. The Applicant was injured in a motor vehicle accident in 2000 and issued a claim in 2002, suing the Administrator of the Motor Vehicle Accident Claims Act, among other parties. Eventually, the Motor Vehicle Accident Claims Fund consented to partial judgment in the Applicant's favour, which was entered in January 2010. The Claim against the Respondent was issued in July 2010, and was based on the SEF 44 endorsement found in the Respondent's policy. In seeking Summary Judgment, the Applicant cited case law which referenced former Rule 159, however, Veit J. offered no comment with respect to its applicability to the matter before the Court. Veit J. denied the Application for Summary Judgment, stating that, given the ambiguity of the SEF 44 clause, the interpretation most favourable to the Applicant was applicable.

MELANSON v ALBERTA (APPEALS COMMISSION FOR ALBERTA WORKERS' COMPENSATION), 2011 ABQB 367
Rules 10.29 (General Rule for Payment of Litigation Costs) and 10.31 (Court Ordered Costs Award)

After dismissal of Melanson's Application for Judicial Appeal, the Respondent, Workers' Compensation Board ("WCB") sought Costs for the Application pursuant to Rules 10.29 and 10.31. The Applicant argued that the Respondents, the Appeals Commission and the WCB were effectively self-represented, so were not entitled to Costs pursuant to Rule 10.31(5). Lee J. reviewed Rule 10.31(5), and disagreed with the Applicant's position. Rule 10.31(5) contemplates individual persons who are parties to an Action and representing themselves without the services of legal counsel. Both the WCB and the Appeals Commission are creatures of statute, and were represented by legal counsel. Lee J. could find no justification to deny the WCB costs as a result of the fact that it was represented by a salaried lawyer that works with the WCB.

KENT v MARTIN, 2011 ABQB 163
Rules 10.30 (When Costs Award May Be Made), 10.31 (Court Ordered Costs Award) and 10.33 (Court Considerations in Naming Costs Award)

The issue before the Court was the appropriate costs award in light of a breach of the Implied Undertaking. Belzil J. held that Rules 10.30, 10.31 and 10.33 "are broadly drafted to provide for ample latitude in awarding costs". The Court relied on prior decisions which interpreted the old Rules, including the Court's decision in *LSI Logic Corp of Canada Inc v Logani*, 2001 ABQB 968, which provided that "Schedule C costs are not to be applied mechanically in every case." The Court also cited *Jackson v Trimac Industries Ltd*, [1993] AJ No 218, which held "an award of solicitor client costs requires rare and exceptional circumstances". Belzil J. held that the costs to be awarded must be influenced by the breach of the Implied Undertaking, while at the same time recognizing that the situation did not warrant solicitor client costs as there was no "egregious, ongoing conduct by a litigant".

KOERNER v CAPITAL HEALTH AUTHORITY, 2011 ABQB 191
Rules 10.52 (Civil Contempt Declaration) and 10.53 (Punishment for Civil Contempt of Court)

The Defendants applied for a Declaration that the Plaintiff was in contempt of Court and an Order dismissing her Action. The basis of the Defendants' Application for civil contempt was that the Plaintiff failed to complete Questioning by the deadline set by the Court and extended by consent of the parties. Further, it was alleged that the Plaintiff failed to comply with a Court Order directing her to produce copies of various medical records.

Shelley J. noted that Rule 10.52 provides the Court with the authority to declare a person in civil contempt of Court and that there is no "appreciable difference between the new and old Rules dealing with civil contempt, at least as it relates to the failure to obey a Court Order." The Court also held that the purpose of civil contempt remains the same, namely "to achieve compliance with court orders and to uphold the court's authority".

Shelley J. stated that the requirements for a finding of civil contempt remain the same under the new and old Rules. There must be:

1. An existing requirement of the Court;
2. Notice of the requirement to the person alleged to be in contempt; and
3. An intentional act (or failure to act), without adequate excuse, that constitutes a breach of the requirement.

The Court must be satisfied beyond a reasonable doubt that each of these elements has been met. Moreover, the exercise of this power remains within the Court's discretion. Rule 10.53 sets out the penalties available if a person is found in civil contempt of Court. The penalties under Rule 10.53 are "essentially the same penalties set out in Rule 704 of the old Rules". Shelley J. applied Rules 10.52, 10.53 and the common law in relation to former Rules 703 and 704 and held that, based on the facts before the Court, it was appropriate for the Court to exercise its power to strike the Plaintiff's Action as against all of the Defendants.

ABOUT JSS BARRISTERS

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

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

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

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

We invite and welcome client referrals for litigation services, including conflict and distinct practice area referrals.

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JSS Barristers has acted, and continues to act, as counsel in some of the largest and most complex corporate and commercial litigation matters argued in Alberta. Our commercial litigation team includes a number of very experienced counsel, and we are particularly well placed to take on multi-party and document intensive cases.

Our approach is practical with emphasis on cost effective services. Where mediation and other alternative dispute resolution techniques are appropriate, we will engage those processes in order to achieve the best possible result for our clients. In other cases, resolution through Trial will provide the client with the best outcome, and we will not hesitate to proceed in that way.

We also have a great deal of experience in seeking and opposing various urgent and extraordinary remedies, such as injunctions, in various commercial contexts.
Modern commercial litigation is often highly data intensive. We have developed a sophisticated capacity to deal with document and data intensive cases through document scanning, imaging and indexing, and our litigators are well trained and comfortable in dealing with electronic Discovery and Trial. We are at the forefront in integrating advanced technologies into our practices.

In our corporate litigation practice, we have significant experience in handling shareholder disputes, oppression claims, stock option issues, and dissenting shareholder remedies.

Our corporate and commercial litigation team is highly motivated and results oriented, and we are focussed on finding solutions that maximize value for our clients.

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JSS Barristers has extensive experience in litigating tort claims. JSS Barristers' practice, among other things, encompasses claims arising from:

- Medical malpractice
- Motor vehicle accidents
- Slip and Fall
- Occupiers' Liability (Unsafe Premises)
- Product Liability
- Defamation
- Assault and Battery
- Breach of Fiduciary Duty
- Conspiracy
- Conversion

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JSS Barristers has extensive experience in litigation relating to disputes involving real property and real estate transactions. JSS Barristers' practice extends from residential disputes to complex commercial construction litigation. JSS Barristers acts for both Plaintiffs and Defendants in advancing and defending claims in relation to:

- Commercial Landlord and Tenant Litigation
- Condominium Litigation
- Construction and Engineering Disputes
- Development Appeals
- Easements and Restrictive Covenants
- Enforcement of Security
- Environmental Litigation
- Joint Ventures
- Land Acquisitions and Dispositions
- Lease Renewal Arbitrations
- Occupiers' Liability
- Partnerships
- Real Estate Purchase and Sale Litigation
- Restrictive Covenants
- Slander of Title

Employment Law

JSS Barristers has a team of experienced employment law advocates to assist our clients with their employment related legal issues. We represent employers and employees in all areas of employment law including wrongful dismissal, constructive dismissal, executive employment agreements, non-competition and non-solicit agreements, disability claims, human rights, privacy, drug and alcohol testing and worker and workplace accommodation. In addition to dispute resolution and advocacy services, we can also assist by providing advice on employment contracts and workforce management to help our clients avoid disputes and save money.

Our employment lawyers have appeared at all levels of Courts in Alberta including administrative tribunals such as the Employment Standards Board and the Human Rights Commission. We also have extensive experience in alternative forms of dispute resolution in the employment context, including mediation, arbitration and judicial dispute resolution.

Whether we are acting for a large corporation or an individual employee, we take pride in the high level of service we provide. Our goal is to ensure that we provide every client with timely, cost-effective and practical solutions to all employment related issues.

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