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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. This is the third issue of four planned printed 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. 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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LAMEMAN v ALBERTA, 2011 ABQB 396
Rules 1.2 (Purpose and Intention), 2.23 (Assistance Before the Court) and 6.3 (Applications Generally)

The Plaintiffs applied to allow foreign lawyers a right of audience to assist them in their case against the Defendants. The Plaintiffs claimed to be impecunious and unable to prosecute the case without substantial *pro bono* help, which was offered by the foreign lawyers. The Plaintiffs had counsel of record, but they requested that the foreign lawyers be permitted to, amongst other forms of assistance, question witnesses in the absence of counsel of record.

A preliminary issue in the Application was whether the Defendants, the Governments of Alberta and Canada, had standing to make submissions. It was the Applicants' position that: (1) the Intervenor, the Law Society of Alberta, ably represented the interests of the Defendants, (2) there was a massive asymmetry in resources favouring the Defendants, and (3) the Defendants' participation in the Application would only interfere with the Plaintiffs' right to choose their own counsel. Yamauchi J. rejected these arguments given that the Defendants were "parties" to the Proceeding and each would be a "person affected", pursuant to Rule 6.3(3). The Court determined that any Order made by the Court (relating to the main issue of the Application) would either impact the Defendants or the way in which the Defendants managed their cases. The Court also noted that excluding the Defendants could, contrary to Rule 1.2, result in further delay to an Action that had already faced significant delay.

With respect to the main issue, Yamauchi J. determined that, despite the apparent broadness of Rule 2.23(1), the Court had no discretion to permit assistance where the Court's ruling would contravene Section 106(1) of the *Legal Profession Act*, RSA 2000, c. L-8 (the *"LPA"*). The Court referred to *obiter dictum* in *Professional Sign Crafters (1988) Ltd v Wedekind*, [1994] 7 WWR 137, which

distinguished between a right of audience under "old" Rule 5.4 and the right to practice law under the then equivalent of Section 106(1) of the *LPA*. Yamauchi J. stated that there was no suggestion that the Court in that case intended its comments to extend so as to allow trained lawyers to circumvent the regime of self-regulation established by the Alberta Legislature, particularly where the party seeking this relief was already represented by counsel of record. In concluding that the Rules and the *LPA* prohibited the foreign lawyers from the expanded participation that they sought, Yamauchi J. noted that the Information Note to Rule 2.23 emphasizes that "assistance" must fall short of "acting as a barrister or solicitor". Yamauchi J. found no need to make a determination with respect to whether Rule 2.23 was limited to self-represented litigants, nor did His Lordship specifically determine the breadth of Rule 2.23. His Lordship did indicate that the foreign lawyers were not prohibited from providing support to counsel of record through research and drafting, provided that counsel assumed ultimate responsibility for the work product.

SEARS CANADA INC v C & S INTERIOR DESIGNS LTD, 2011 ABQB 471
Rules 1.2 (Purpose and Intention) and 3.68 (Deficiencies in Claims)

The Defendants applied to have the Action struck or stayed in light of the existence of an identical action in Ontario. In its Rule 3.68 analysis, the Court first determined, after its review of the caselaw, that parallel proceedings will not result in an automatic stay granted in this jurisdiction. Master Hanebury then applied a two-step test: first, whether the Alberta Court has jurisdiction *simpliciter*, and second, whether Alberta was the *forum conveniens*. The Court, referring to *Donaldson v Farrell*, 2011 ABQB 11, noted that Rule 3.68 is to be considered through the lens of Rule 1.2. In particular, Master Hanebury remarked that the Rule 1.2 factors of "timeliness" and "cost-effectiveness" should be considered when applying Rule 3.68. The Court concluded, given the specifics of the case and the circumstances surrounding it, which included an ongoing, interrelated class action involving the same Parties in Ontario, that it would be more beneficial if the Action proceeded in that jurisdiction. Under the circumstances, Master Hanebury ordered the Alberta Action to be stayed.

UNIVERSITY OF ALBERTA v ALBERTA (INFORMATION AND PRIVACY COMMISSIONER), 2011 ABQB 389
Rule 2.10 (Intervenor Status)

The Association of Academic Staff University of Alberta ("AASUA") applied for Intervenor status. The Application was not opposed. Lee J. noted that the Court has the discretion to grant or refuse such an Application. Lee J. reviewed the Rules and determined that there was nothing in the language of Rule 2.10 to suggest that the common law principles are not applicable. Lee J. reviewed the common law principles as set out by Wittmann C.J. in *R v Hirsekorn*, 2011 ABQB 156:

> 1. An intervention may be allowed where the proposed Intervenor is specially affected by the decision facing the Court or the proposed Intervenor has some special expertise or insight to bring to bear on the issues facing the Court *(Papaschase Indian Band v Canada (Attorney General)*, 2005 ABCA 320;
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> 2. An Intervenor in an appellate court must take the case as they find it and cannot, to the prejudice of the parties, argue new issues which require the introduction of fresh evidence *(Batchewana Indian Band v Canada (Minister of Indian and Northern Affairs)* (1996), 199 N.R. 1 (F.C.A.));
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> 3. Intervenor status may also be granted where the proposed Intervenor's interest in the proceedings may not be fully protected or argued by a party *(United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*), 2002 ABCA 243); and
>
> 4. The Court should take a two-step approach to determine an Intervenor application: first determine the subject matter of the proceeding, and second determine the proposed Intervenor's interest in the subject matter *(Papaschase)*.

Lee J. granted Intervenor status to the AASUA on the basis that it brought a different perspective which may be of assistance to the Court.

MCAP SERVICE CORPORATION v CHIANG, 2011 ABQB 477
Rule 3.37 (Application for Judgment Against Defendant Noted in Default)

The Plaintiff sued the Defendants for the tort of waste. The Defendants were noted in Default. Shelley J. reviewed Rule 3.37, and determined that the Plaintiff had provided sufficient evidence as to the cost of the repairs to the property. On that basis Shelley J. granted Default Judgment in favour of the Plaintiff.

TLA FOOD SERVICES LTD v 1144707 ALBERTA LTD, 2011 ABQB 550
Rules 3.37 (Application for Judgment Against Defendant Noted in Default) and 3.38 (Judgment for Recovery of Property)

The Plaintiff relied on Rules 3.37 and 3.38 to bring an Application, without notice, for an Order for Judgment that would: (1) rectify a contract of purchase and sale, and (2) direct Land Titles to register a title in the name of the Plaintiff. The Defendant had been noted in default pursuant to Rule 3.36(1) for not responding to an Amended Statement of Claim.

The Court noted that neither Rule 3.38, nor its predecessor (Rule 149) under the "old" Rules, had been subject to judicial commentary or discussion. After setting out dictionary definitions of "recovery", Shelley J. found that "recovery of property" in Rule 3.38 references the restoration or regaining of property or title, as opposed to a general usage of "recovery" that would include, for instance, a Plaintiff in a lawsuit seeking "recovery" through damages of what that Plaintiff had lost. Under Rule 3.38, Her Ladyship determined that Default Judgment for the recovery of property should only be available when the property is easily ascertainable, without the need for a Court Application. An example provided by the Court was a foreclosure Action where the Plaintiff has a mortgage identifying its interest, or in a bailment Action where the Plaintiff has an agreement describing the personal property sued for.

Turning to Rule 3.37, the Court indicated that the Plaintiff's Amended Statement of Claim had sought three remedies: damages, rectification of a contract, and specific performance. Shelley J., in denying the Plaintiff's Application, referred to *Fenske v Schneider*, 2007 ABQB 164, for the proposition that notice must be given to a Defendant of the Plaintiff's choice of remedy so that the Defendant can advance a position in regards to the appropriate equitable remedy. An additional reason for denying the Rule 3.37 Application was that the facts deemed admitted by the Defendant in the Amended Statement of Claim (as a result of the Defendant having been noted in default) were not sufficient to permit the Court to make an Order of rectification.

GOSKA NOWAK PROFESSIONAL CORPORATION v ROBINSON, 2011 ABQB 385
Rule 3.66 (Amendment Costs)

This was an Appeal of a Master's Order permitting amendments to a Statement of Claim. The Master awarded Costs of the Amendment Application to the Parties who had been successful in their Application to amend their pleadings. McMahon J. reviewed Rule 3.66 and determined that the intention of the Rule is to encourage litigants to get their pleadings right the first time. As such, McMahon awarded Costs against the successful amending Party.

CHEVALIER v SUNSHINE VILLAGE CORPORATION, 2011 ABQB 544
Rules 3.68 (Deficiencies in Claims), 3.70 (Parties Joining to Bring Action) and 1.2 (Purpose and Intention)

The Defendants applied to strike the Plaintiffs' pleadings on the basis that they did not disclose a reasonable claim of inducing a breach of contract, pursuant to Rule 3.68(2)(b). *Citing Hunt v Carey Inc*, [1990] 2 SCR 959, Master Laycock noted that the test for an Application to strike pleadings is "whether it is plain and obvious that the claim cannot succeed". Master Laycock considered the

allegation contained in the Statement of Claim to determine whether the required elements were pleaded. Master Laycock determined that the deficiencies in the pleadings could result in the Action being dismissed as against certain Defendants. The Plaintiffs then asked for leave to amend the pleadings. Master Laycock further noted that, pursuant to Rule 1.2, it would have been more timely and cost effective for the Plaintiffs to file a Cross Application for leave to amend, but decided to grant the Plaintiffs an Adjournment to amend the pleadings. It was determined that any prejudice to the Defendant could be dealt with through a Costs Order.

The Defendants also applied to strike the Plaintiffs' Statement of Claim on the basis that it was frivolous, pursuant to Rule 3.68(2)(c). The Defendant filed no evidence - as a result the argument was the same as that considered pursuant to Rule 3.68(2)(b) and the Court determined that the remedy was the same.

The Defendants also argued that the Plaintiffs had joined four separate causes of Action into the proceeding which resulted in misjoinder, pursuant to Rule 3.70. The Defendants argued that each claim was unique and that the calculation of damages for each party would be different. As such, trying the claims separately would meet the goals of Rule 1.2(2)(b) and (c). Master Laycock determined that the claims would be a misjoinder, except for the common claim of inducing breach of contract which resulted in a common question of fact with the same legal issues. Given that the Plaintiffs had been granted an opportunity to amend their pleadings, the Court was unable to grant the misjoinder Application until after the pleadings were Amended.

OLCHOWY v ING INSURANCE COMPANY OF CANADA, 2011 ABQB 463
Rules 3.68 (Deficiencies in Claims), 3.72 (Consolidation or Separation of Claims) and 7.1 (Applications to Resolve Particular Questions or Issues)

The Parties agreed that two related Actions should be consolidated pursuant to Rule 3.72 and to have some issues determined in advance of Trial pursuant to Rule 7.1. The issues to be determined in advance of the Trial related to the proper interpretation of two separate insurance contracts. The Defendant, ING Insurance Company of Canada, applied pursuant to Rule 3.68(4) to strike out sections of an Affidavit on the basis that it contained inadmissible parol evidence. Strekaf J. agreed that the information constituted "inadmissible extrinsic evidence" which was not relevant to the issues on the Application. While Rule 3.68(4) would permit this evidence to be struck out, Strekaf J. decided that it was sufficient to find that the evidence would be disregarded.

MARTIN v GENERAL TEAMSTERS, LOCAL UNION NO 362, 2011 ABQB 412
Rules 3.68 (Deficiencies in Claims) and 7.3 (Summary Judgment)

The Defendant applied to strike portions of the Statement of Claim, pursuant to Rule 3.68, and to dismiss the remaining parts of the Statement of Claim, pursuant to Rule 7.3.

The Court referred with approval to *Donaldson v Farrell*, 2011 ABQB 11, which confirmed that that the Rule 3.68 test for striking out pleadings is, as it was in "old" Rule 129, whether it is plain and obvious or beyond reasonable doubt that the claim cannot succeed.

As authority for Summary Judgment under Rule 7.3, Hall J. referred to *Tottrup v Clearwater (Municipal District No 99)*, 2006 ABCA 380. Summary Judgment will be granted if it is "plain and obvious", "clear", or "beyond real doubt" that the Plaintiff's Action should be dismissed. Hall J. noted that the facts alleged (supporting a duty at law) in the pleadings are critical, and must be examined to determine whether a Cause of Action exists.

KENT v MARTIN, 2011 ABQB 418
Rules 3.74 (Changes to Parties)

After receiving the Defendants' records production the Plaintiff was able to determine the identity of four of the John Does included in the Statement of Claim. The Plaintiff then brought an Application to amend the pleadings to add the Parties to the Action. The Court applied Rules

3.74(2) and 3.74(3) in determining whether or not to grant the Application. In doing so, the Court relied on the recent decisions in *Manson Insulation Products Ltd v Crossroads C&I Distributors*, 2011 ABQB 51 and *869120 Alberta Ltd v B&G Energy Ltd*, 2011 ABQB 209. The Court stated that in order to be satisfied that the Order should be made, the Court would want to see a link between the new Defendants and the facts and incidents originally alleged against the extant Defendants. Furthermore, the new Defendants should be added as soon as is reasonable in the circumstances, and there should be no prejudice that would result that could not be remedied by a costs award, an adjournment or the imposition of terms. The Court granted the Plaintiff's Application stating that the Plaintiff had provided at least "some evidence" to convince the Court to add the Parties, and that no prejudice had been claimed by the Defendants.

KENT v POSTMEDIA NETWORK INC, 2011 ABQB 479
Rule 3.74(Changes to Parties) and Rule 7.3 (Summary Judgment)

Pursuant to Rule 3.74(2)(b), the Defendants applied to remove one of the individual Defendants, Paul Godfrey, from the Action. In the alternative, the Defendants relied on Rule 7.3 for Summary Judgment to dismiss the claim against Godfrey.

The Court Dismissed the Defendants' Application in its entirety. In respect of the Application pursuant to Rule 3.74(2)(b), the Court noted that the Rule expressly requires that the Court must be "satisfied the order should be made". Tilleman J. held that this "means to me that justice requires that the application be granted." The test to be applied in an Application under Rule 3.74(2)(b) contains an "overarching concern about fairness".

With regard to Rule 7.3, the Court held that the evidence presented by the Defendants was insufficient as the Affidavit evidence presented did not positively swear to the facts that were required in order to illustrate that it was plain and obvious that the Plaintiff's allegations against Godfrey could not succeed.

WEINS v DEWALD, 2011 ABQB 400
Rules 4.4 (Standard Case Obligations), 4.31 (Application to Deal with Delay), 4.33 (Dismissal for Long Delay) and 15.4 (Dismissal for Long Delay)

The Plaintiffs applied for a Procedural Order to set timelines in the Action. The Defendant counter-applied for an Order striking the Action due to long delay, pursuant to Rules 4.31, 4.33, and 15.4. The last step that had materially advanced the Action was an April 26, 2006 Examination for Discovery. The Parties had agreed to adjourn the date for the present Application to a date in May 2011, which was outside 5 years from April 26, 2006, but it was agreed that such adjournment "would not be used to dismiss the Action pursuant to Rule 4.33..."

Master Laycock indicted that the prerequisites of Rule 4.33 [and, necessarily, Rule 15.4] had not been met because, had the Application been heard as originally scheduled (on April 21, 2011), the Court would have ordered a Rule 4.4(2) Procedural Order within the permissible time period, and such Order would have been a "thing" that materially advanced the Action. The Court rejected the Defendant's Rule 4.31 argument, suggesting that the Defendant had provided the Court with insufficient evidence to prove that the Defendant had suffered prejudice by delay in the Action. Master Laycock granted the Rule 4.4(2) Procedural Order, which required subsequent steps in the Action to be completed within a compressed timeline.

PEAVINE METIS SETTLEMENT v ALBERTA (ENERGY), 2011 ABQB 472
Rule 4.10 (Assistance by the Court)

This Application was for Intervenor status in a Judicial Review proceeding. Prior to the new Rules, the granting of Intervenor status was guided by common law principles, the relevance of which remains due to the considerable discretion provided by Rule 4.10. With reference to existing caselaw, Browne J. stated: that the granting of Intervenor status is discretionary, that it should be exercised sparingly, and that a Court should be cautious not to allow an Intervenor to expand a lawsuit, delay a proceeding, or prejudice a party. Her Ladyship also referred to decisions

espousing the proposition that intervention may be allowed where the proposed Intervenor is specially affected by the decision facing the Court. Because of the nature of this particular case, the Court referred to caselaw indicating that when there is a "constitutional dimension", a Court is generally more lenient in granting Intervenor status. Browne J. granted Intervenor status to the Applicant, subject to terms and conditions that limited participation which would have delayed or expanded the Judicial Review into a Trial.

XPRESS LUBE & CAR WASH LTD v GILL, 2011 ABQB 457
Rule 4.22 (Security for Costs)

The Defendants applied for Security for Costs against the Plaintiff corporation (which had assets in Alberta and carried on business there). The Court determined that different considerations apply to a Security for Costs Application when the Plaintiff is a corporation as opposed to an individual. In cases involving a corporate Plaintiff, the requirements of Rule 4.22 are less stringent than those of Section 254 of the Alberta *Business Corporations Act*, RSA 2000, c B-9, which envisions a situation where a corporation "will be" unable to pay costs. Rule 4.22, on the other hand, permits such an Order when it is "unlikely" that a Plaintiff can pay costs. Hall J. chose to apply Rule 4.22 because it was less onerous on the Applicant, and remarked that in considering such an Application, the Court should be mindful that a limited corporation can be a "one-way valve", against which there may be no recourse for a Defendant should a Costs award be made against a Plaintiff. The Court granted the Application. Hall J. was persuaded in the circumstances that it was not likely that the Plaintiff had sufficient exigible assets or the ability to pay a Costs Order against it.

AUTOWELD SYSTEMS LIMITED v CRC-EVANS PIPELINE INTERNATIONAL, INC, 2011 ABCA 243
Rule 4.22 (Security for Costs)

The Plaintiff applied for leave to appeal a Security for Costs Order made by the Case Management Judge. The corporate Plaintiff claimed that the Order unduly prejudiced its ability to prosecute the claim. In applying Rule 4.22, the Court stated that the Rule must be read in light of the legislated consideration in section 254 of the *Business Corporations Act*, RSA 2000, c. B-9.

DAGHER v THOMPSON, 2011 ABQB 499
Rules 4.22 (Security for Costs), 4.23 (Contents of Security for Costs Order), 6.14 (Appeal from Master), 9.6 (Effective Date of Judgment Order), 13.5 (Variation of Time Periods), 15.2 (Transitional Provisions) and 15.12 (New Test or Criteria)

This Application was an Appeal from a Master's Order requiring the Plaintiff to pay Security for Costs. Park J. determined that the Standard of Review was reasonableness and the Decision of the Master was only to be interfered with if a palpable and overriding error could be shown.

Park J. noted that the wording of Rule 4.22 is different than the old Rule 593 under which the Master proceeded. Rule 4.22 specifically sets out factors to be considered, including, the ability of the Respondent to pay the costs award and whether an Order for Security would unduly prejudice the Respondent's ability to continue the Action. In this instance, the Plaintiff failed to adduce sufficient evidence that the claim would be stifled if security was required. Park J. then considered that the portion of the Master's Order which dealt with disbursements and determined that the Costs attributable to the required experts was premature. Park J. therefore reduced the amount of security for disbursements.

There was an argument advanced by the Respondent that, pursuant to Rule 9.6(a), the Master's Order took effect when it was pronounced and that it was binding unless stayed or varied. As the Master's Order was neither stayed nor varied, the Action was therefore dismissed as a result of the Plaintiff's failure to post security in the time allowed. Park J. exercised his discretion, pursuant to Rules 13.5(2) and 13.5(3), to set aside the Master's Order in part and provided a new deadline for the Security to be posted.

TORONTO-DOMINION BANK v SUITEL CANADA EXECUTIVE SUITES, 2011 ABQB 519
Rules 4.22 (Security for Costs) and 4.23 (Varying Security for Costs)

The Plaintiff applied for Security for Costs against a Defendant individual. Yamauchi J. first determined that the wording of Rule 4.22, which speaks of "a party" rather than "a Plaintiff", showed the Legislature's intent to make some Defendants give security. Yamauchi J. also noted that the Plaintiff bore the onus of establishing its case under Rule 4.22. If the Plaintiff met that onus, the onus would shift to the Defendant, since the Defendant was the only person who knew whether there was any reason why the Court should not order him to post Security for Costs. Yamauchi J. then considered the relevant Rule 4.22 factors, which, in this case, included 'delay' under Rule 4.22(e). Before making a decision, Yamauchi J. noted that an Order for Security for Costs is not a final Order. Rule 4.23(4) permits the Court to increase or decrease the security required and to vary the nature of the security. In the circumstances, Yamauchi J. granted the Plaintiff's Application by permitting Certificates of *Lis Pendens* to be registered against Alberta properties in which the Defendant held an interest.

581257 ALBERTA LTD v AUJLA, 2011 ABQB 539
Rules 4.24 (Formal Offers to Settle), 4.28 (Confidentiality of Formal Offer to Settle), 4.29 (Costs Consequences of Formal Offer to Settle), 9.13 (Re-Opening Case), 10.33 (Court Considerations in Making Costs Award), 10.42 (Actions Within Provincial Court Jurisdiction), 15.1 (Definitions), 15.2 (Transitional Provisions) and 15.6 (Transitional Provisions)

The Application before the Court was a reconsideration of a Costs Award made after the Trial of the Action. The reconsideration included the Plaintiff's request for solicitor-client Costs and Costs consequences arising from the Parties' Notices to Admit Facts and a Formal Offer issued during the course of the litigation.

The first issue considered by the Court was whether the New Rules of Court or the former Rules governed the Application for reconsiderations of the Costs Award. The Court held that Rule 15.2 directs that the new Rules apply to every existing proceeding unless otherwise provided. Rule 15.1 defines existing proceeding as a "court proceeding commenced but not concluded under the *Former Rules*". The Court also stated that Rule 15.6 allows the Court to "suspend or modify operation of the *New Rules* if there is doubt about their application, or if their application would result in difficulty, injustice or impossibility". Applying the direction arising from Rules 15.1, 15.2 and 15.6, the Court held that the Applications before it were governed by the new Rules.

The Court also addressed whether the Action should be re-opened to reconsider the Costs Award. The Court held that Rule 9.13 permits the Court to vary a Judgment at any time before it is entered if there is a good reason to do so. In this case, the Court exercised its discretion pursuant to Rule 9.13 and allowed the case to be re-opened since the Formal Offer had not been disclosed prior to the issuance of the Court's Reasons for Decision in accordance with Rule 4.28.

Since the Court ruled that the case could be re-opened, it turned its mind to whether the Offer at issue was a Formal Offer under the former Rules or the new Rules. The Formal Offer had been advanced under the former Rules of Court. The requirements for a Formal Offer under the new Rules are significantly different from those which were contained in the former Rule 169. Topolniski J. applied Rule 15.6 and held that the facts of the case before the Court "exemplify the *raison d'être* for Rule 15.6", exercised "discretion to suspend the operation of Rule 4.24" and determined the validity and effect of the Formal Offer pursuant to Rules 169 and 174(1) of the former Rules.

The Court also considered which Column of Schedule C applied to the Costs Award granted by the Court. The Court noted that although Rule 10.42 was triggered because the Judgment awarded fell within the monetary jurisdiction of the Provincial Court, in this case, since the Action alleged conversion, the proceeding did not fall within the Provincial Court's jurisdiction and Rule 10.42 did not apply. The Court considered the factors set out in Rule 10.33 and awarded the Plaintiff Schedule C, Column 1 Taxable Costs.

MCNULTY v EDMONTON (CITY), 2011 ABQB 481
Rules 4.29 (Double Costs), 10.29(1) (General Rule for Payment of Litigation Costs), 10.31(1) (Court Ordered Costs Award) and 10.33(1) (Court Considerations in Making Costs Award)

This Application related to Costs payable when the Plaintiff succeeded against one of multiple Defendants. The first issue was whether the Plaintiff was entitled to Double Costs pursuant to Rule 4.29. The Plaintiff had issued a Formal Offer against all of the Defendants. At Trial, the Plaintiff was successful against only one of the Defendants, however the Judgment against that Defendant had exceeded the amount of the Formal Offer. The Defendant argued that the Formal Offer could not have been accepted by one of the Defendants alone.

Lee J. indicated that the intention of the Double Costs Rule is to reduce claims and increase the possibility of settlement. Lee J. decided that the Defendant who was found liable in this case had a legal obligation to indemnify the other Defendants pursuant to a contract. Since only one Defendant was financially at risk, and the Formal Offer was less than the amount awarded against that Defendant, it was required to pay Double Costs to the Plaintiff. It did not make a difference that the Offer was addressed to all of the Defendants.

The second issue was whether the successful Defendants were entitled to Costs from the Plaintiff or whether the unsuccessful Defendant was required to pay those Costs. Lee J. determined that the Plaintiff was responsible for the Costs of the successful Defendants for those days on which the successful Defendants testified in addition to all Pre-Trial matters calculated at 50% of the party and party amount.

RUBIN v GENDEMANN, 2011 ABQB 466
Rule 4.29 (Double Costs)

Moen J. provided her Reasons for Decision regarding a number of issues including the determination of Double Costs under Rule 4.29. The Plaintiff claimed that special circumstances existed because she was close to poverty and would have to start over if Double Costs were awarded. The Court stated that the Plaintiff had initiated the Action and maintained it to the bitter end despite multiple offers to settle by the Defendant. In determining whether or not Double Costs should be awarded, Moen J. interpreted Rule 4.29(4)(e) and held that there were no special circumstances that would prevent the Court from awarding Double Costs.

991656 ALBERTA LTD v ISFELD, 2011 ABQB 469
Rules 5.10 (Subsequent Disclosure of Records) and 5.30 (Undertakings)

The Defendant applied for an Order requiring the Plaintiffs to provide information and documents objected to during Questioning.

In reaching its Decision, the Court applied Rule 5.30 and the Decision in *Trimay Ware Plate Ltd v Way*, 2009 ABQB 47, wherein the Court, applying former Rule 200(1.2), held that a person being Examined "is required to answer only relevant and material questions". The Court found that the Decision in *Trimay Ware Plate Ltd v Way* emphasized the narrowing of the scope of oral Questioning as a result of the 1999 Rules of Court amendments.

In addition, the Court held that certain of the Undertakings objected to were properly refused as they fell under the category of Rule 5.10 which provides for a continuing obligation on Parties to produce relevant and material records, as Parties become aware of such documents, if they not already been produced during the course of the litigation.

Relying on the Decision in *Trimay Ware Plate Ltd v Way* and the Rules, the Court held that the information and records sought did not meet the "relevance and materiality" threshold.

1199918 ALBERTA LTD v TRL HOLDINGS INC, 2011 ABQB 506
Rules 5.33 (Confidentiality and Use of Information) and 13.18 (Affidavits)

The Plaintiffs sought leave to commence a Derivative Action. The Defendants opposed the Application and relied upon an Affidavit. The Plaintiffs sought to have certain portions of the Defendants' Affidavit struck pursuant to Rule 13.18(1), which requires that an Affidavit be sworn on personal knowledge or on information and belief disclosing the source of the information and if the Application may dispose of all or part of a claim, the Affidavit is to contain only personal knowledge of the Deponent.

Graesser J. determined that the Affidavit did not comply with Rule 13.18 as certain information presented in the Affidavit was based on information and belief and the Affiant had failed to indicate the source of that information. Graesser J. determined that the source of the information was determined when the Affiant was Questioned on the content of the Affidavit. Graesser J. decided not to strike the Affidavit, as requiring the Affiant to swear a replacement Affidavit correcting the irregularities would be overly academic and unnecessarily formalistic, which is contrary to the objectives of the Rules.

The Defendants objected to some of the information within the Plaintiffs' Affidavit on the basis that it had been produced in a separate Action and therefore breached the implied undertaking, which is codified by Rule 5.33, and therefore the Affiant was in contempt. Graesser J. determined that there may be theoretical non-compliance with the implied undertaking rule, but there was no prejudice to the Defendants and there was no contempt. The Plaintiffs could have amended the Originating Notice in the original Action, but instead filed a new Originating Notice. Had the new Originating Notice sought leave to use the information from the earlier Application in support of this new Application there would have been no issue about contempt. As such, to the extent that leave to use the information for the purposes of this new Application was necessary, Graesser J. granted such leave.

CAMPBELL v BEEKMAN, 2011 ABQB 437
Rules 5.34 and 5.35 (Expert's Report)

This matter involved an uncontested Application to "unfile" an Expert Report. Lee J. relied on Binder J.'s decision in *Henderson (Estate) v Arnett*, 2011 ABQB 198, wherein the Court stated that Rules 5.34 to 5.40 contemplate service of Experts' Reports, but are silent with regard to the filing of such reports. Binder J. stated that the new Rules reflect a policy of efficiency and economy, and that restricting filing to essentials promotes those goals. In relying on this decision, Lee J. held that the Court has the general discretion to "unfile", which it may exercise in appropriate circumstances, and granted the Application.

APEX SAFETY APPAREL INC v KEL-TEK SAFETY APPAREL, 2011 ABQB 406
Rule 5.4 (Appointment of Corporate Representative)

Tilleman J. delivered his Reasons for Judgment pursuant to a Case Management dispute where the Defendants argued that the Plaintiff's corporate representative should be declared as the Affiant for the Plaintiff's Affidavit of Records. The Plaintiff argued that an appropriate corporate representative had been selected. Tilleman J. stated that the Plaintiff had the right to appoint a representative pursuant to Rule 5.4 and relied on the case of *Damiani v Anderson*, [1977] AJ No 432. The Plaintiff's selection of a corporate representative was both reasonable and *bona fide* and achieved the goals of proceeding in a timely and cost effective manner.

NYSTROM v RANSON, 2011 ABQB 116
Rule 5.41 (Medical Examinations)

The Defendant sought to have the Plaintiff examined by two health care professionals pursuant to Rule 5.41. The Plaintiff agreed to the examinations, but sought to limit their length and scope. The Court had both the power and discretion to limit or restrict an examination of the Plaintiff based on existing cases. In this instance, the Court determined that the proposed tests were not overly intrusive or inappropriate and the examinations were allowed to proceed.

HOME TRUST v ROBINSON, 2011 ABQB 480
Rule 6.14 (Appeal from Master's Judgment or Order)

The Plaintiff Appealed from the Master's Decision to continue a property listing for additional days at a certain price in a residential foreclosure Action. During the Appeal, pursuant to Rule 6.14(3) and (7), Lee J. directed that a further Affidavit be submitted by the listing realtor to allow the Court to determine whether the alleged inaccuracies which the Plaintiff argued existed in the Defendant's evidence did in fact exist.

The Court held that the applicable test under the new Rules for an Appeal from a Master to a Justice was as set out in *Lee v Le Page*, 2010 ABQB 829. In applying the test set out in *Lee v Le Page*, and reviewing the additional Affidavit evidence admitted pursuant to Rule 6.14(3) and (7), the Court held that the Appeal should be granted and directed that the listing price be reduced as sought by the Plaintiff.

CANADA (NATIONAL REVENUE) v GLAZER, 2011 ABQB 559
Rule 6.14(Appeal from Master's Judgment or Order)

The Applicant Appealed a Decision of Master Wacowich dismissing a Motion to set aside the *ex-parte* registration of a British Columbia Supreme Court Judgment pursuant to the *Reciprocal Enforcement of Judgments Act* R.S.A. 2000, c. R-6. Manderscheid J. reviewed the cases which have interpreted Rule 6.14 and referred to *Janvier v. 834474* for its summary of the Standard of Review. Manderscheid J. determined that the record in its totality allowed for a meaningful review of the decision's correctness. Manderscheid J. determined that there was no reason to upset the Order of Master Wacowich as the conclusions reached were correct.

TS v STAZENSKI, 2011 ABQB 508
Rule 6.37 (Notice to Admit)

The Defendant sought an Order setting aside a Notice to Admit Facts filed by the Plaintiff. Burrows J. stated that the following should not be included in a Notice to Admit Facts:

- -Matters of opinion that it is not reasonable to expect a Defendant to admit;
- -Facts that would circumvent the Rules relating to expert evidence; and
- -Facts that relate to points that would not normally be the subject of evidence.

KWAN v SUPERFLY INC, 2011 ABQB 343
Rule 7.3 (Summary Judgment)

The Defendants applied for Summary Judgment. Marceau J. referred to *Manufacturers Life Insurance Company v Executive Centre at Manulife Place Inc*, 2011 ABQB 189, as authority that Rule 7.3 operates in the same manner and follows the same legal principles as its precursor, "old" Rule 159. The Court then noted that, in general, the test for Summary Dismissal is that it must be "plain and obvious that the action cannot succeed", the Action is "bound to fail" or the Action has "no prospect of success". His Lordship proceeded to identify the relevant principles, as approved by the Court of Appeal in *Murphy Oil Co v Predator Corp*, 2006 ABCA 69, relating to the burden of proof required in a Rule 7.3 Application:

1. A party bringing a Motion for Summary Judgment bears the legal onus of showing no genuine issue for Trial.

2. There is no onus on the responding party to prove a genuine issue for Trial.

3. If the Applicant for Summary Judgment discharges his/her onus on the material filed, a Respondent who does not resist the Application through admissible evidence risks Judgment against him/her. This is an evidentiary burden.

4. There is no obligation on the Respondent to file material. He/she can accept the risk described above. If the Applicant fails to discharge his/her legal onus, the Application will fail.

5. More commonly a Respondent will provide admissible evidence opposing the Motion. In that event, the Court will consider all of the evidence to determine whether the Applicant has shown that there is no genuine issue for Trial.

All but one of the issues in the Action against the Applicants were struck pursuant to Rule 7.3, on the basis of issue estoppel and for the absence of a factual foundation.

ENCANA CORPORATION v ARC RESOURCES LTD, 2011 ABQB 431
Rule 7.3 (Summary Judgment)

The Court referred to *Manufacturers Life Insurance Co v Executive Centre at Manulife Place Inc*, 2011 ABQB 189, in which it was determined that the test for Summary Judgment is the same as under the "old" Rules. Kent J. proceeded to draw from *Tottrup v Clearwater No 99 (Municipal District)*, 2006 ABCA 380, where an expression of the rule for Summary Judgment is given. Her Ladyship made reference to an Ontario Court of Appeal decision for the proposition that Summary Judgment is inappropriate to decide a significant question of law involving the definitive interpretation of a legislative provision. The Court further noted that Summary Judgment is denied where a determination of the issue requires a careful analysis of a complex legal test. Kent J. granted the Application, noting that: (1) no findings of fact were made so there could be no inconsistent factual findings, and (2) the interpretation of the legislative provision in question would be the same at Trial.

1238117 ALBERTA LTD v FARM AIR PROPERTIES INC, 2011 ABQB 527
Rule 7.3 (Summary Judgment)

The Defendant applied for Summary Dismissal of the Action on the basis that the Plaintiff's claim was meritless. Master Smart referred to *Kwan v Superfly Inc*, 2011 ABQB 343, for the proposition that Rule 7.3(1)(b) operates in the same manner and follows the same legal principles as Rule 159 of the "old" Rules. Master Smart then indicated that the test for Summary Judgment may be expressed as "an action is bound to fail" or that the Action has "no prospect for success". The Master determined that the Applicant satisfied its onus to show that there was no merit to the claim, and that the materials filed and the argument made by the Respondent failed to adequately refute the Applicant's evidence. Master Smart, in granting the Application, remarked that speculation and supposition from the Respondent as to what might be proved in the future were not sufficient to resist the Application.

TU v ZISCHE, 2011 ABQB 443
Rules 8.4 (Scheduling of Trial Dates by the Court Clerk) and 8.5 (Scheduling of Trial Dates by the Court)

The Defendants applied to set a Trial date, notwithstanding that the Parties had not complied with the Rules of Court Pre-Trial requirements. In order to secure a Trial date, the Defendants sought an Order from the Court setting down various deadlines in respect of Experts' Reports and also sought an Order waiving the requirement for the Plaintiff to file an Affidavit of Records.

The Court noted that the new Rules of Court do not allow for a Conditional Certificate of Readiness; however, Rule 8.5(1)(c)(iii) provides the Court with discretion to set a Trial date or direct the Court Clerk to set a Trial date, if the Court is "satisfied that a trial date should be set".

The Court exercised its discretion pursuant to Rule 8.5 to make a procedural Order and to allow for the Action to be set down for Trial, despite the Parties' inability to certify that no further Pre-Trial steps were required.

PROPHET RIVER FIRST NATION v RATH & COMPANY, 2011 ABQB 408
Rules 10.7 (Contingency Fee Agreement Requirements), 13.5 (Variation of Time Periods), 15.2 (Transitional Provisions) and 15.6 (Transitional Provisions)

The Applicant sought an Order permitting the Taxation of the Bill of Costs issued by the Respondent. Pursuant to former Rule 647, the Taxation was out of time, unless the Court directed that it proceed. Although neither party

argued that the matter should be heard under the new Rules of Court, Macleod J. found that, pursuant to Rule 15.2, the new Rules should apply to existing proceedings.

However, despite Rule 15.2, the Court held that Rule 15.6 affords the Court discretion to apply the old Rules to a matter which should otherwise proceed under the new Rules. In reaching this Decision, the Court noted that the history of this matter proceeded under the old Rules and that the application of former Rule 647 and the combination of new Rules 10.7 and 13.5 results in the same test to be applied with respect to the issue of Taxation. In light of these factors, the Court proceeded to apply the former Rules to the Application.

LAMEMAN v ALBERTA, 2001 ABQB 532
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.30 (When Costs Award May Be Made), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Defendants sought Costs arising from the Adjournment of Applications brought by the Defendants to Strike the Plaintiff's Statement of Claim. Specifically, the Defendants argued that they were entitled to "thrown-away" Costs for preparing and filing written briefs in respect of the Applications to Strike and Costs in respect of the Plaintiff's Adjournment Application.

The Court held that Rules 10.29, 10.30, 10.30 and 10.33 provide the Court with discretion when deciding to award Costs in favour of a party. However, the Court's discretion is not absolute and the Court "must exercise its discretion judicially and in accordance with established principles".

Based on the principles arising from prior decisions in cases such as *Freyberg v Fletcher Challenge Oil and Gas Inc*, 2006 ABCA 260 and *D'Amico v Weimkin*, 2008 ABQB 129, the Court held that the Defendants were entitled to Costs on an enhanced scale of Schedule C in respect of the Costs incurred in preparing for the Application to Strike and the Adjournment Application, payable immediately.

AYLES v ARSENAULT, 2011 ABQB 493
Rules 11.25 (Real and Substantial Connection) and 11.31 (Setting Aside Service)

The Defendant sought an Order staying or dismissing the Action on the basis that there was no real and substantial connection between the Action and Alberta and, in the alternative, that Alberta is *forum non conveniens* and that Newfoundland was the appropriate forum.

Rule 11.25 provides for the Service *Ex Juris* procedure. Conversely, Rule 11.31 allows an out-of-province Defendant to bring an Application to set aside service.

Rule 11.25(3) enumerates a number of situations in which a real and substantial connection to Alberta is presumed to exist. However, the Court noted that regardless of whether one of the circumstances provided in Rule 11.25(3) exists, the Court cannot take jurisdiction over an out-of-province Defendant unless the test for real and substantial connection is met in accordance with the two-stage test that was set out by the Court in *Royal & Sun Alliance Insurance Co of Canada v Wainoco Oil & Gas Co*, 2004 ABQB 643. The onus of proving a real and substantial connection rests with the Plaintiff.

After considering the principles set out in *Royal & Sun Alliance Insurance Co of Canada v Wainoco Oil & Gas Co*, and other leading decisions including *Muscutt v Courcelles* (2002), 60 OR (3d) 20 and *Van Breda v Village Resorts Ltd*, 2010 ONCA 84, the Court held that there was no real and substantial connection between the Action and Alberta, and accordingly the Alberta Courts lacked jurisdiction over the matter.

KOCH v WARKENTIN, 2010 ABQB 505
Rule 15.4 (Dismissal for Long Delay)

The Defendants sought an Order dismissing the Action as 5 years had elapsed since the last thing was done to significantly advance the Action. The last thing done in respect of the Action was the filing of one of the Defendant's Affidavit of Records on October 7, 2005. Between the filing of the Affidavit of Records on October

7, 2005 and the filing of the Defendants' Application on October 22, 2010, there had been no communication between the Plaintiff or anyone acting on his behalf and any of the Defendants or their counsel.

The Defendants argued that Rule 15.4(1)(b) applied, which provides that the Court must dismiss an Action if 5 years have elapsed since the last thing done to significantly advance the Action, unless Rule 15.4(2) applies.

The Plaintiff argued that counsel for the Plaintiff misplaced the file and no steps were taken as a result of counsel's failure to advance the Action. The Plaintiff also argued that Rule 15.4(2)(c) applied, which states that the Court must not dismiss the Action if "an application has been filed or proceedings have been taken since the delay and the applicant has participated in them for a purpose and to an extent that, in the opinion of the Court, warrants the action continuing". Specifically, the Plaintiff argued that Questioning in respect of one of the Defendants in a second Action, similar to the proceeding before the Court, constituted a step in this Action for the purposes of Rule 15.4(2)(c).

The Court referred to the decision in *155569 Canada Limited v Clarkson Gordon*, 2004 ABQB 17, which held that a step in another Action, where the two Actions are inextricably linked, may constitute a thing which material advances the other Action. However, in the case at bar, the Court held that although the two Actions involved the same Defendants and claims of the same nature, "the result in one would not dictate the result in the other".

Further, the Court held that the Defendant's participation in Questioning in the second Action was not for the purpose of advancing the Plaintiff's claim in this Action and, given the privilege which attaches to Questioning in an Action, the evidence obtained in the second Action could not be used in this Action.

The Court, in granting the Defendants' Application, held that none of the exceptions in Rule 15.4(2) applied and that no other exceptions could be considered by the Court. Moreover, the Court noted that, outside of the exceptions enumerated at Rule 15.4(2), the Court has "no discretion when an application is made under Rule 15.4(1)", and "[i]t must dismiss the action".

PRACTICE AREAS

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Insurance and Coverage Disputes
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Municipal and Local Government Litigation
Pension and Trust Litigation
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Professional Negligence Claims
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Wills and Estates Litigation
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