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RULES

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Jensen Shawa Solomon Duguid Hawkes LLP

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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 have been circulated in paper format with the intention being to shift to electronic media for subsequent issues. This is the final 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 electronically, we ask that you visit www.jssbarristers.ca and subscribe to receive future issues of JSS BARRISTERS RULES online.

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

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

1.1	• KOERNER v CAPITAL HEALTH AUTHORITY, 2011 ABCA 289
1.2	• MOUME v LONDONDERRY SHOPPING CENTRE INC, 2011 ABQB 612
	• VINCENT v MODULINE INDUSTRIES (CANADA) LTD, 2011 ABQB 571
	• ALBERTA TREASURY BRANCHES v VALERIO, 2011 ABQB 580
	• EVANS v THE SPORTS CORPORATION, 2011 ABQB 616
	• IBM CANADA LIMITED v KOSSOVAN, 2011 ABQB 621
	• TORONTO DOMINION BANK v SAWCHUK, 2011 ABQB 757
	• ATTILA DOGAN CONSTRUCTION v AMEC AMERICAS LIMITED, 2011 ABQB 794
1.4	• ATTILA DOGAN CONSTRUCTION v AMEC AMERICAS LIMITED, 2011 ABQB 794
1.7	• VINCENT v MODULINE INDUSTRIES (CANADA) LTD, 2011 ABQB 571

2.11	• NAHIRNEY v OGILVIE & COMPANY, 2011 ABQB 586
2.13	• NAHIRNEY v OGILVIE & COMPANY, 2011 ABQB 586
2.14	• NAHIRNEY v OGILVIE & COMPANY, 2011 ABQB 586
2.22	• NAHIRNEY v OGILVIE & COMPANY, 2011 ABQB 586
2.23	• NAHIRNEY v OGILVIE & COMPANY, 2011 ABQB 586

3.15	• UNIVERSITY OF ALBERTA v ALBERTA (INFORMATION AND PRIVACY COMMISSIONER), 2011 ABQB 699
3.22	• UNIVERSITY OF ALBERTA v ALBERTA (INFORMATION AND PRIVACY COMMISSIONER), 2011 ABQB 699
3.26	• FOSTER v ROBB, 2011 ABQB 776
3.27	• FOSTER v ROBB, 2011 ABQB 776
3.28	• FOSTER v ROBB, 2011 ABQB 776
3.43	• HOWALTA ELECTRICAL SERVICES INC v CDI CAREER DEVELOPMENT INSTITUTES LTD, 2011 ABCA 234
3.44	• HOWALTA ELECTRICAL SERVICES INC v CDI CAREER DEVELOPMENT INSTITUTES LTD, 2011 ABCA 234

3.45	• HOWALTA ELECTRICAL SERVICES INC v CDI CAREER DEVELOPMENT INSTITUTES LTD, 2011 ABCA 234
3.66	• KENT v MARTIN, 2011 ABQB 675
3.68	• WONG v LEUNG, 2011 ABQB 687
	• KINDYLIDES v EDMONTON (CITY), 2011 ABQB 756
3.72	• MUNRO v MUNRO, 2011 ABCA 279
	• WONG v LEUNG, 2011 ABQB 722

4.1	• IBM CANADA LIMITED v KOSSOVAN, 2011 ABQB 621
4.2	• IBM CANADA LIMITED v KOSSOVAN, 2011 ABQB 621
4.14	• ATTILA DOGAN CONSTRUCTION v AMEC AMERICAS LIMITED, 2011 ABQB 794
4.16	• IBM CANADA LIMITED v KOSSOVAN, 2011 ABQB 621
4.24	• LDW v KDM, 2011 ABQB 800
4.29	• LDW v KDM, 2011 ABQB 800
	• CLANCY v GOUGH, 2011 ABQB 778
4.31	• VINCENT v MODULINE INDUSTRIES (CANADA) LTD, 2011 ABQB 571
	• UNIVERSITY OF ALBERTA v CHANG, 2011 ABQB 596
	• BRAR v PAWA, 2010 ABQB 779
4.33	• UNIVERSITY OF ALBERTA v CHANG, 2011 ABQB 596
	• BRAR v PAWA, 2010 ABQB 779
	• WONG v LEUNG, 2011 ABQB 722

5.1	• ARAAM INC v AMAN BUILDING CORPORATION, 2011 ABQB 631
5.2	• ARAAM INC v AMAN BUILDING CORPORATION, 2011 ABQB 631
5.6	• ATTILA DOGAN CONSTRUCTION v AMEC AMERICAS LIMITED, 2011 ABQB 794
5.8	• ATTILA DOGAN CONSTRUCTION v AMEC AMERICAS LIMITED, 2011 ABQB 794
5.17	• GOLDEN ESTATE v NEILSON, 2011 ABCA 338
5.25	• ARAAM INC v AMAN BUILDING CORPORATION, 2011 ABQB 631

6.14	• ROYAL BANK OF CANADA v SAMRA, 2011 ABQB 556
	• TURNER v DN DEVELOPMENTS LTD, 2011 ABQB 554
	• CANADA (NATIONAL REVENUE) v GLAZER, 2011 ABQB 559
	• ALBERTA TREASURY BRANCHES v VALERIO, 2011 ABQB 580
	• KYDD v ABOLARIN, 2011 ABQB 690

7.1	• MOUME v LONDONDERRY SHOPPING CENTRE INC, 2011 ABQB 612
	• PL v ALBERTA, 2011 ABQB 771
7.2	• PL v ALBERTA, 2011 ABQB 771
7.3	• CONDOMINIUM CORPORATION NO. 0425177 v JESSAMINE, 2011 ABQB 644
	• PETERS v WILSON ESTATE, 2011 ABQB 665
	• EXCELSIOR PROPERTIES LTD v COSENTINO DEVELOPMENTS INC, 2011 ABQB 666
	• WONG v LEUNG, 2011 ABQB 687
	• CHUNARA v JINA, 2011 ABQB 709
	• PL v ALBERTA, 2011 ABQB 771

7.5	• BONSMA v TESCO CORPORATION, 2011 ABQB 620
7.6	• BONSMA v TESCO CORPORATION, 2011 ABQB 620
7.8	• BONSMA v TESCO CORPORATION, 2011 ABQB 620
9.13	• PETERS v WILSON ESTATE, 2011 ABQB 689
9.14	• AGF TRUST COMPANY v MCLEOD, 2011 ABQB 711
9.15	• WESTGROVE PLUMBING & HEATING LTD v BAYVIEW CONSTRUCTORS INC, 2011 ABCA 298
	• TORONTO DOMINION BANK v HUNIK, 2011 ABQB 610
10.29	• KENT v KENT (ELLIS), 2011 ABQB 611
	• EVANS v THE SPORTS CORPORATION, 2011 ABQB 616
	• KENT v MARTIN, 2011 ABQB 675
	• LAMEMAN v ALBERTA, 2011 ABQB 724
	• LDW v KDM, 2011 ABQB 800
	• CLANCY v GOUGH, 2011 ABQB 778
10.30	• KENT v MARTIN, 2011 ABQB 675
10.31	• KENT v KENT (ELLIS), 2011 ABQB 611
	• KENT v MARTIN, 2011 ABQB 675
	• LAMEMAN v ALBERTA, 2011 ABQB 724
	• LDW v KDM, 2011 ABQB 800
	• CLANCY v GOUGH, 2011 ABQB 778
10.33	• KENT v KENT (ELLIS), 2011 ABQB 611
	• EVANS v THE SPORTS CORPORATION, 2011 ABQB 616
	• KENT v MARTIN, 2011 ABQB 675
	• FORSBERG v NAIDOO, 2011 ABQB 705
	• LAMEMAN v ALBERTA, 2011 ABQB 724
	• LDW v KDM, 2011 ABQB 800
	• CLANCY v GOUGH, 2011 ABQB 778
	• WISHEWAN v AMACK, 2011 ABCA 38
12.70	• UNRAU v FREAKE, 2011 ABQB 663
14.1	• WESTGROVE PLUMBING & HEATING LTD v BAYVIEW CONSTRUCTORS INC, 2011 ABCA 298
15.4	• VINCENT v MODULINE INDUSTRIES (CANADA) LTD, 2011 ABQB 571
	• UNIVERSITY OF ALBERTA v CHANG, 2011 ABQB 596
15.12	• WONG v LEUNG, 2011 ABQB 687
501	• WONG v GIANNACOPOULOS, 2011 ABCA 277
505	• WONG v GIANNACOPOULOS, 2011 ABCA 277

KOERNER v CAPITAL HEALTH AUTHORITY, 2011 ABCA 289 (SLATTER JA, BIELBY JA and VERVILLE J (AD HOC))
Rule 1.1 (What These Rules Do)

This Application concerned an Appeal of an Order which struck the Appellant's Statement of Claim as a consequence of her failure to comply with various Orders of the Case Management Judge. The Court ruled that, pursuant to Rule 1.1(2), the same rules apply to all litigants, even if self-represented. The obligation to comply with Court Orders is one that is imposed on all persons whether they are represented by counsel or not. The Court found that the Appellant did not merely fail to comply with an Order, she actively refused, believing the Order to be contrary to the Charter. The Court of Appeal upheld the Decision to strike the Statement of Claim.

MOUME v LONDONDERRY SHOPPING CENTRE INC, 2011 ABQB 612 (MASTER SCHLOSSER)
Rules 1.2 (Purpose and Intention) and 7.1 (Application to Resolve Particular Questions or Issues)

The Plaintiff brought an Application for Summary Judgment and an Application that the Third Party insurer was obliged to defend the Defendant. The Defendant brought an Application for Summary Judgment as well as an Application under Rule 7.1 to have an issue brought before the Court to determine the existing insurance coverage. The Court dismissed the other Applications and held that it was appropriate to invoke Rule 7.1 and order a determination of a question or issue. The Court stated that a determination of a question or issue could dispose of the bulk of the issues in the lawsuit and as such it satisfied some of the goals set out in Rule 1.2.

VINCENT v MODULINE INDUSTRIES (CANADA) LTD, 2011 ABQB 571 (FOSTER J)
Rules 1.2 (Purpose and Intention), 1.7 (Interpretation), 4.31 (Application to Deal with Delay), and 15.4 (Dismissal for Long Delay: Bridging Provision)

The Defendant applied to have the Action dismissed on the grounds that more than five years had elapsed since the last thing was done that materially advanced the Action; or in the alternative, pursuant to Rule 4.31, there had been an inordinate, inexcusable delay by the Plaintiffs in pursuing the Action, resulting in significant prejudice to the Defendants.

In assessing whether Rule 15.4 applied to the circumstances before it, the Court noted the impact of Rules 1.7(1) and (3), which require that the meaning of the Rules should be "ascertained from the text, in light of the purpose and intention of these rules" and that reference can be made to the headings of the Rules in determining their purpose. Rule 1.2 also details the purpose and intention of the Rules.

The Court noted that the language in Rule 15.4 is mandatory and the Court "must dismiss" the Action if the time prescribed in Rule 15.4(1) has elapsed since the last thing that was done to significantly advance the Action and none of the exceptions in Rule 15.4(2) apply.

The Plaintiff argued that a Praecipe to Note In Default and a Consent Order setting the Noting in Default aside significantly advanced the Action for the purposes of Rule 15.4. The Court engaged in a thorough analysis as to whether those steps constitute things which significantly advanced the Action and relied on cases decided under former Rule 244.1 in determining whether to dismiss the Action.

The Court disagreed with the Plaintiff and held that, in the circumstances, neither the Noting in Default nor the subsequent Consent Order setting aside the Noting in Default significantly advanced the Action. Accordingly, the Court dismissed the Action against the Defendant.

ALBERTA TREASURY BRANCHES v VALERIO, 2011 ABQB 580 (ROSS J)
Rules 1.2 (Purpose and Intention of These Rules) and 6.14 (Appeal from Master's Judgment or Order)

This was an Application to set aside an award of solicitor-client costs. Ross J. found the Master's decision to award costs was reasonable, but that the amount of the costs awarded was unreasonable. In determining whether Her Ladyship could substitute her discretion for the Master's,

Ross J. stated that Appeals from a Master's decision are now on the record in Alberta, and a review of the experience of other jurisdictions was warranted to help determine the issue. Following her review, Ross J. held that it is appropriate for a superior court judge to substitute his/her discretion for that of a Master, if the findings of the Master are wrong in law or not supported by the evidence. Ross J. further held that, apart from precedent, it was appropriate under Rule 1.2(2) to substitute her discretion for the Master's, as it was more cost effective and timely than to send the parties back to Masters' Chambers for another hearing on the same issue.

IBM CANADA LIMITED v KOSSOVAN, 2011 ABQB 621 (MAHONEY J)
Rules 1.2 (Purpose and Intention), 4.1 (Responsibilities of Parties to Manage Litigation), 4.2 (What the Responsibilities Include) and 4.16 (Dispute Resolution Processes)

The Plaintiff sought an Order to have the mandatory Dispute Resolution Process waived pursuant to Rule 4.16(2). Pursuant to Rule 4.16, barring certain circumstances, parties must engage in a form of alternative Dispute Resolution prior to proceeding to Trial.

In this case, the Plaintiff argued that the Dispute Resolution requirement should be waived since the Plaintiff had a very strong case against the Defendants. The Plaintiff was confident it would obtain a Judgment granting full recovery following the Trial of the Action. Further, the Plaintiff advised that its corporate policy required that it could not accept anything less than full or near-full indemnity in fraud cases such as this one. The Plaintiff also argued that it was unlikely that the Defendants were in a financial position to agree to a settlement of a full or near-full indemnity resolution. The Plaintiff argued that there was "no realistic chance of the matter settling at JDR". Further, the Plaintiff submitted that proceeding to a JDR would be a waste of resources and time – both for the parties and for the Court. The Defendants argued that the matter was appropriate for a JDR and that the reasons provided by the Plaintiff in support of waiving the Dispute Resolution Process were insufficient.

The Court noted that Rule 4.16 is a new Rule and did not have a predecessor in the former Rules. Accordingly, there is no Alberta case law which is instructive. In determining whether to waive the mandatory alternative Dispute Resolution Process the Court considered Rule 4.16, Rule 1.2, and Rules 4.1 and 4.2 in respect of the Parties' responsibility to manage the litigation.

With regard to Rule 1.2, the Court noted that this foundational Rule "highlights the importance of identifying those issues in dispute and of effective communication between parties…". The Court added that the "rule stresses resolution of the claim in issue as early in the litigation process as possible and at the least expense". The Court held that the same principles apply to the mandatory alternative Dispute Resolution Process and that Rule 4.16 must be read in a manner which gives effect to the purpose statement contained in the Foundational Rule.

In addition to examining the new Rules, the Court looked at judicial consideration of similar Rules in other jurisdictions. In considering relevant and applicable jurisprudence, the Court noted that, before the new Rules of Court, the

> …traditional view was that although dispute resolution was a useful process, the court would not ordinarily order it over the objections of a party. The thinking was that a mandatory dispute resolution process is an oxymoron, because a party who believes that this it is a waste of time and money will not engage in good faith negotiations.

The Court added that such thinking is "not the new millennium view nor the view of the legislature when enacting the New Rules". Instead, the Court held that experience has shown that participation in alternative Dispute Resolution has resulted in many settlements that would otherwise not have occurred. Moreover, the alternative Dispute Resolution Process is valuable in identifying the real issues in dispute, reducing the costs of final resolution and, in some instances, improving the relationship between the Parties.

In its analysis, the Court also noted that, in addition to benefits, there are some disadvantages to mandatory Dispute Resolution, including expenditures of time, money and resources; nevertheless, absent the presence of compelling reasons "the court should not use its discretion to bypass the legislated objectives of the Rule". The Court then turned its attention to the specific instances where an exemption may be appropriate. The Court reviewed Rules 4.16(2) (a) – (e) and caselaw from other jurisdictions to examine situations where a waiver of the Dispute Resolution requirement is appropriate, noting that each case must be assessed on an individual basis and that the threshold for obtaining such exemptions is high.

Based on its interpretation of the Rules, its review of the purpose of the Rules, and its review of caselaw in other jurisdictions, the Court denied the Plaintiff's Application to waive the alternative Dispute Resolution requirement.

TORONTO DOMINION BANK v SAWCHUK, 2011 ABQB 757 (MASTER SCHLOSSER)
Rules 1.2 (Purpose and Intention of These Rules), 5.13 (Obtaining Records From Others), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 9.33 (Sale to Plaintiff)

This case dealt with the question of whether or not it is "appropriate to order a first mortgagee to provide a mortgage payout statement - or at least the payout figure - to a foreclosing second mortgagee". The first mortgagee was reluctant to provide the information because of concerns that doing so may violate privacy legislation.

Master Schlosser noted that "Rule 9.33(2)(e) *requires* the court to consider (amongst other things) the amount owed for prior charges" and that the "Foundational Rules require facilitating the quickest means of resolving claims at the least expense".

Master Schlosser noted that in Alberta prior encumbrancers are not made parties to Foreclosure Actions and including prior encumbrancers simply to impose disclosure obligations on them would increase costs and decrease efficiency.

It was indicated that compelling records of a non-party in a lawsuit usually requires notice under Rule 5.13. In deciding that no notice was required, the Court took into consideration that the first mortgagee was not a "true outsider" to the proceedings, the first mortgagee had no objection to producing the records other than wanting the Court's protection with respect to privacy legislation and that all the usual requirements under new Rule 5.13 and old Rule 209 were satisfied.
It was decided that the required information was to be produced. In coming to this conclusion, the Court specifically considered Rule 6.4 (which allows for 'ex parte' applications if a Court decides no notice is necessary), Foundational Rules 1.2(2)(b) and (e) and that if the first Mortgagee takes issue with the Order it can return to Court under Rule 9.15 to challenge the result.

ATTILA DOGAN CONSTRUCTION v AMEC AMERICAS LIMITED, 2011 ABQB 794 (WITTMANN CJ)
Rules 1.2 (Purpose and Intention of These Rules), 1.4 (Procedural Orders), 4.14 (Authority of Case Management Judge), 5.6 (Form and Contents of Affidavit of Records) and 5.8 (Records for Which There is an Objection to Produce)

The Defendant, AMEC Americas Limited ("AMEC"), applied for direction and assistance in regards to approximately 25,000 records it claimed were privileged. As well, AMEC applied to require the Plaintiff, Attila Dogan Construction and Installation Co. Inc. ("AD") to pay for the translation of approximately 20,000 to 25,000 records produced by AD in the Turkish language. AD cross-applied for an Order compelling AMEC to provide a detailed description of the records over which AMEC claimed privilege, and further production of other records.

AD argued that Rule 5.8 sets out only the minimum requirements for listing privileged records, and that it would be inconsistent with the Foundational Rules to prohibit a more detailed description. AD argued further that Rules 1.4 and 4.14 allow the Court to fashion a method of detailing the alleged privileged documents that would allow the Parties to narrow which documents should be challenged. The Court disagreed and held that *Dorchak v Krupka* (1997), 196 AR 81 (ABCA) applies to the new Rules.

The Court held "[t]here is nothing in Rule 5.8 that would suggest that privileged documents should be identified in a manner that would allow the opposing party to assess the claim of privilege."

The Court held that it was reasonable for AMEC to translate the foreign language documents as AD had already deemed the documents to be relevant and material. Wittmann C.J. reasoned that as Calgary counsel for AD could not read in Turkish, counsel must have already translated the documents to be in compliance with Rule 5.6(1)(b). In furtherance of the purpose of Rule 1.2, AD could forward the translated records to AMEC.

The Court also ordered that a previous Security for Costs Order against AD would be increased to reflect the amount of AMEC's disbursement for potential translation of the documents. If AD forwarded the translated documents, and if no issues arose regarding the accuracy of the translation, then AD could avoid increased Security for Costs and there would be no duplication of translation efforts and costs.

NAHIRNEY v OGILVIE & COMPANY, 2011 ABQB 586 (LEE J)
Rules 2.11 (Litigation Representative Required), 2.13 (Automatic Litigation Representative), 2.14 (Self-Appointed Litigation Representative), 2.22 (Self-Represented Litigants) and 2.23 (Assistance Before the Court)

The Defendants Applied for an Order prohibiting the Plaintiff's father from representing her. The Plaintiff was not suffering from any incapacity and there was no evidence presented that she required a Litigation Representative due to lack of capacity. The Plaintiff's father put forward an Affidavit in support of his position that he be appointed the Plaintiff's Litigation Representative based on Rule 2.14, Rule 2.13 and by virtue of a Power of Attorney he had for his daughter.

Lee J. decided that self-represented litigants have an audience before the Court by virtue of Rule 2.22. The Plaintiff's father may provide assistance to the Plaintiff in the manner set out by Rule 2.23 but that does not permit him to represent his daughter in the proceedings. There was no basis for the Appointment of a Litigation Representative as the Plaintiff was not a minor and had no capacity issues.

UNIVERSITY OF ALBERTA v ALBERTA (INFORMATION AND PRIVACY COMMISSIONER), 2011 ABQB 699 (LEE J)
Rules 3.15 (Originating Application for Judicial Review) and 3.22 (Evidence on Judicial Review)

The Respondent sought to file an Affidavit with Exhibits containing additional new documents before for the Court, in the context of a Judicial Review. The Respondent relied on two Federal Court decisions decided under Rule 312 of the *Federal Court Rules* SOR/98-106. It was noted that the new Rules do not have a similar provision. The cases relied on by the Respondent were distinguished and Rule 3.22 was applied. Lee J. noted that "Alberta jurisprudence has clearly set out a more restrictive approach" than the Federal Court.

Lee J. referred to the general rule cited in para 40 of *Alberta Liquor Store Assn v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 *("Alberta Liquor Store Assn")*: judicial review is conducted based on the return filed by the tribunal. Both *Alberta Liquor Store Assn* and *Dodd v Alberta (Registrar of Motor Vehicle Services)*, 2010 ABQB 184, were identified as authorities that outline the limited exceptions to the general rule, where supplementary evidence may be allowed. The exceptions were: a) to show bias, or a reasonable apprehension of bias, if the facts in support of the allegation do not appear on the record; b) to demonstrate a breach of the rules of natural justice not apparent from the record; c) to address issues like standing; and d) where the tribunal makes no, or an inadequate, record of its proceedings, affidavits are permissible to show what evidence was actually placed before the tribunal.

FOSTER v ROBB, 2011 ABQB 776 (TILLEMAN J)
Rules 3.26 (Time for Service of Statement of Claim), 3.27 (Extension of Time for Service) and 3.28 (Effect of not Serving Statement of Claim in Time)

The Plaintiff filed his Statement of Claim in September 2009. Two of the Defendants were not served with the Statement of Claim and applied to dismiss the Claim against them. Tilleman J. held that "Rules 3.26-3.28 are

similar to old Rule 11 and impose a strict mandatory limit on service of a Statement of Claim". As none of the rare jurisprudential exceptions applied to the facts of this case, the Court held that the Statement of Claim was dead as against the two Defendants in question.

HOWALTA ELECTRICAL SERVICES INC v CDI CAREER DEVELOPMENT INSTITUTES LTD, 2011 ABCA 234 (O'FARRELL JA (IN DISSENT))
Rules 3.43 (How to Make Claim Against Co-Defendant), 3.44 (When Third Party Claim May be Filed) and 3.45 (Form of Third Party Claim)

This matter was between Defendants to a tort claim where the Plaintiff was the landlord's subrogated fire insurer. The Plaintiff discontinued the suit against the Appellant tenant, who was a tenant that had paid its share of fire insurance premiums; however, the Respondent had issued a Notice to Co-Defendants seeking contribution and indemnity from the Appellants. The Appellants brought a Motion to Summarily Dismiss the Notices to Co-Defendants, but the Chambers Judge dismissed the Application. This was an Appeal from the Decision of the Chambers Judge.

The Appellants argued that since the Plaintiff discontinued its claim against the Appellant tenant the Notices to Co-Defendants should be struck on the basis that the Appellants had no liability against the Plaintiff and could therefore not be liable for contribution to the Respondent. The majority of the Court allowed the Appeal "on authority which holds that when a defendant claims against a co-defendant that it is entitled to contribution or indemnity by reason of the *Tort-Feasors Act*, a precondition to recovery is that the co-defendant be liable to the plaintiff".

O'Farrell J.A. concurred with the majority's Decision to allow the Appeal and Summarily Dismiss the Notice of contribution and indemnity issued by the Respondent against both Appellants. However, O'Farrell J.A. reached the same Decision for different reasons. O'Farrell J.A. stated that litigants should not be denied their day in Court because they have chosen the wrong pleading. O'Farrell J.A. went on to clarify that Rule 3.43(1) states that a Defendant who claims contribution or indemnity, or both against a Co-Defendant under the *Tort-Feasors Act* or the *Contributory Negligence Act* shall file and serve the required notice using Form 15, but need not file any pleading in respect of that claim unless the Court otherwise orders. Further, the Defendant's claim against a Co-Defendant must be determined at the Trial of the Plaintiff's claim against the Defendant unless otherwise ordered.

O'Farrell J.A. contrasted the Rules and Forms relating to a Notice to Co-Defendant with those providing for the filing and service of a Third Party Notice. A Third Party Notice enforces duties which Third Parties owe to Defendants, not Plaintiffs. O'Farrell J.A. stated that Rule 3.44 permits claims against a Third Party or Co-Defendant "who… is or might be liable to the party filing the third party claim for all or part of the claim against that party" on the basis of a related occurrence or transaction. O'Farrell J.A. went on to state that the Rules of Court constitute substantive law as well as procedural rules and questioned the applicability of authorities which narrowly construe the *Tort-Feasors Act* and what it permits by way of claims to contribution. Despite this difference of opinion from the majority of the Court, O'Farrell J.A. concurred with the majority because the Respondent stood no chance of a successful claim for contribution from the Appellants.

KENT v MARTIN, 2011 ABQB 675 (MILLER J)
Rules 3.66 (Costs), 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)

This Application dealt with determining the appropriate Costs award. The Plaintiff had been successful in an Application to amend its Statement of Claim as well as for relief from his obligation under the Implied Undertaking Rule.

Miller J. stated that Rule 3.66 deviates from the standard Rule that if you win an Application you are entitled to Costs and referred to *Koppe v Garneau Crafts Ltd*, 2005 ABQB 727 wherein the Court stated, with respect to the predecessor to Rule 3.66, that:

> Rule 141 does not say that the applicant must pay the costs of the fight over whether it has the right to amend, even if it wins that fight. That would be a most undesirable result, because it would mean that the respondents on motions like that could defend them with impunity, knowing that win or lose they would receive costs.

In this case, the amendment was opposed on the basis that the Implied Undertaking Rule applied and the Plaintiff was not able to use that information in these proceedings. Miller J. determined that Rule 3.66 applied to the amendment Application only and Rule 10.29 applied to the portion of the Application regarding the Implied Undertaking Rule. Miller J. stated that Rules 10.30, 10.31 and 10.33 are drafted in such a way as to provide a great deal of latitude to the Court. As such, Miller J. awarded Costs to the Plaintiff under the appropriate Schedule C Column for the Application for relief from the Implied Undertaking Rule. The amendment Application arose as a result of a surprise disclosure during Questioning. As such, the Plaintiff could have had no knowledge of this information prior to the Questioning. Miller J. awarded party-party costs to the Plaintiff for the amendment Application.

WONG v LEUNG, 2011 ABQB 687 (MASTER SMART)
Rules 3.68 (Deficiencies in Claims), 7.3 (Test for Summary Judgment) and 15.12 (Test under New Rules to Apply)

The Defendant applied to strike the Plaintiff's Statement of Claim on the grounds that it disclosed no reasonable claim and was frivolous, irrelevant, improper, or otherwise constituted an abuse of process. In the alternative, the Defendant sought Summary Judgment dismissing the Action.

The Court found that because the Application was made prior to the commencement of the new Rules, but was heard after November 1, 2010, the new Rules applied (pursuant to Rule 15.12). With regard to Rule 3.68, Master Smart referred to *Tottrup v Alberta (Minister of Environment)*, 2000 ABCA 121, as authority that: (1) the Court must assume that the allegations of fact made by the Plaintiff are true, at which point the Court then determines whether those facts disclose a cause of action, (2) the Plaintiff is entitled to a broad reading of the pleadings, and (3) if the alleged facts, examined in light of the existing law, do not disclose a cause of action, the claim should be struck. Master Smart also noted that pleading deficiencies will not necessarily result in an Action being struck, when, for example, flaws in a pleading are capable of amendment. The Court referred to Donaldson v Farrell, 2011 ABQB 11 for the proposition that a pleading that is frivolous is one that is indicative of bad faith or is hopeless factually.

Turning to Rule 7.3, Master Smart, citing *Manufacturers Life Insurance Co v Executive Centre at Manulife Place Inc*, 2011 ABQB 189 and *BA Capital Inc v Stream Oil & Gas Ltd*, 2011 ABQB 91, stated that the test for Summary Judgment is the same as it was under the "old" Rules. The Court granted Summary Judgement in addition to striking the Statement of Claim as being frivolous and not disclosing a reasonable cause of action.

KINDYLIDES v EDMONTON (CITY), 2011 ABQB 756 (MASTER SMART)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

One of the Defendants applied to have the Action struck as against all of the Defendants in the Action. The claim was for pain and suffering caused by physical and mental torture. In applying Rule 3.68(1), Master Smart stated that "I am to assume that the facts pled in the Statement of Claim are true". Further, Master Smart stated that the claim should not be struck simply because the liability to the Plaintiff would be novel or dubious. Instead, it should only be struck if it is plain and obvious that the claim discloses no cause of action. However, Master Smart also clarified that:

> ...[while] material facts must be taken as true, the court is not obliged to assume the correctness of patently ridiculous allegations, those based on wild speculation and assumptions or are "only language, not reality".

The Application was granted and the Action was dismissed as against all Defendants.

MUNRO v MUNRO, 2011 ABCA 279 (PAPERNY and BIELBY JJA, SLATTER JA IN DISSENT)
Rule 3.72 (Consolidation or Separation of Claims and Actions)

The Defendant Appealed a Decision dismissing his Application to consolidate two matters, an Action for breach of a matrimonial property agreement and an Application for retroactive child support.

The Appellant applied to have the two claims consolidated. The Court noted that an Order to consolidate is discretionary and the standard of review on Appeal is reasonableness. In determining whether to consolidate the Claims, the Court held that it must weigh several factors, including "the extent to which there are common claims and disputes, and the possibility that consolidation may save time and resources in pre-trial procedures and at trial. The court must also consider potential prejudice to the parties which may arise from consolidation…".

The Court, dismissing the Appeal, agreed with the Chambers Justice that although there was an overlap in the factual context, the benefit of consolidating the Actions was "diminished by the fundamental difference in the issues and outweighed by the prejudice".

WONG v LEUNG, 2011 ABQB 722 (MASTER SMART)
Rules 3.72 (Consolidation or Separation of Claims and Actions) and 4.33 (Dismissal for Long Delay)

The Defendant applied to dismiss the Plaintiff's Action for want of prosecution. The Plaintiff cross-applied for, amongst other things, consolidation of the Action with another Action that had been commenced in 2009.

Master Smart referred to *Munro v Munro*, 2011 ABCA 279 as authority that the Court must weigh several factors when considering consolidation under Rule 3.72. These factors include: the possibility of saving time, saving resources, and the potential prejudice to the parties. The Court rejected the Rule 3.72 request, noting that the two Actions had no common questions of law or fact, and they did not arise from the same transaction.

The Court then considered, under Rule 4.33, whether a "thing" had been done that significantly advanced the Action. Master Smart referred to *Hooda v HSBC Canadian Direct Insurance Incorporated*, 2011 ABQB 196 for the proposition that there is no material difference between "significantly" and "materially" ("materially" being the word used in the equivalent test under the old Rules). The Court, referring to cases decided prior to the new Rules, noted:

> (1) Rule 4.33 is written in absolute terms and is mandatory;
>
> (2) A procedural step that is required by the Rules will always be a "thing" that significantly advances the Action, regardless of whether it actually did so; however, the step must be completed, not just commenced;
>
> (3) A procedural step contemplated (but not required) by the Rules may also be enough, in and of itself, to materially advance an Action; nevertheless, to be a "thing" under Rule 4.33, the step must move a lawsuit closer to Trial in a meaningful way. Further, advancing the Action is not sufficient; the Action must be "significantly" advanced; and
>
> (4) An ordinary Appeal from a Queen's Bench Judgment/Decision is not a mandatory step; rather, it is the unsuccessful party's choice to Appeal a Decision.

The Defendant's Application was allowed, since there had been no "thing" done by the Plaintiff to significantly advance the Action in 5 years.

LDW v KDM, 2011 ABQB 800 (JEFFREY J)
Rules 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Parties were involved in high conflict family litigation that spanned over six and a half years, culminating in a four week Trial. The Applicant, KDM, who was largely successful at Trial, sought Costs for, *inter alia*, a number of failed Judicial Dispute Resolutions, a Case Management intervention and Double Costs on the basis of a Pre-Trial Settlement Offer.

Jeffrey J. rejected KDM's claim for Costs for the failed Judicial Dispute Resolutions and Case Management intervention. Rule 10.31(2)(c) provides that unless a Party engages in serious misconduct in such a proceeding, no Costs shall be recovered. Jeffrey J. held that unreasonably declining to settle a matter during Settlement Conferences and Judicial Dispute Resolutions did not equate to serious misconduct under the Rules.

Jeffrey J. also rejected KDM's application for Double Costs, holding that the Pre-Trial Settlement Offer did not satisfy the requirements of Rule 4.24(2). The Settlement Offer was not in Form 22 and it did not state that it was to be treated as a "formal offer" proffered for the purposes of arguing for greater Costs after Trial. Moreover, the Settlement Offer did not notify LDW of the Costs consequences specified in Rule 4.29. Not only was such notice mandatory, it was crucial because LDW was representing herself and could not be expected to understand the significance of a Formal Settlement Offer prior to Trial for Costs purposes.

CLANCY v GOUGH, 2011 ABQB 778 (BENSLER J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

After Trial, Bensler J., declined to award Double Costs in relation to a Settlement Offer, declined to award second counsel fees and adjusted disbursements to accord with what was reasonable and proper in the circumstances.

Both Rule 4.29, and its substantive equivalent under the former Rules, Rule 174, contain strong language entitling a party who betters a Formal Offer at Trial to Double Costs. However, Bensler J. noted that "the operation of the rule on double costs is only triggered following a threshold inquiry where a Court determines the settlement offer was, in fact, genuine…". After reviewing relevant jurisprudence, Bensler J. found that the Defendants' Offer was not genuine as it lacked an element of compromise reflecting the relative strength of the Parties' positions at the time the offer was served. The terms of the Defendants' Offer failed to acknowledge the potentially meritorious Claim and triable issues raised by the Plaintiff. The Offer was at most a little over 1% of the Plaintiff's Claim. Bensler J. held that is was not 99% likely that the Defendants were bound to win at any point prior to Trial. The Defendants had also offered to forego their Counterclaim. However, the Counterclaim lacked substance. Accordingly, Bensler J. concluded that the Defendants' Settlement Offer did not contain a genuine element of compromise.

The Court also specifically declined to compare the value of the Settlement Offer to the final Judgment. Bensler J. found that the final Judgment at Trial in this case was an all or nothing proposition. Consequently, the Court held that a relative assessment in this regard would be inappropriate since "the judgment in an all or nothing trial is an erroneous standard from a comparative perspective". Bensler J. also found that, even if genuine, the Defendants' Offer could not reasonably be expected to induce settlement and allowing Double Costs in the circumstances would "aggravate the already formidable economic barriers that impede access to justice". Bensler J. held that the negative impact on access to justice qualified as a special circumstance favouring the exercise of the Court's discretion to order that the Double Costs rule not apply. Generally "courts should be reluctant to award costs for second counsel in the absence of an established need based on the complexity of the issues or law…". Relevant factors to be considered are:

(i) The general importance of the issue or issues to the parties or to others;

(ii) The value of the case;

(iii) The complexity and scope of the issues;

(iv) The size of the trial record;

(v) The manner in which opposing counsel conducts the case; and

(vi) Whether second counsel addressed the court.

Bensler J. held that the issues in this case were narrow, straightforward, and determined largely based on several key findings of fact. Second counsel fees were not warranted.

Although the Plaintiffs did not dispute the disbursements in the Bill of Costs, Bensler J. chose to exercise the Court's discretion to adjust certain disbursements to ensure a reasonable and proper Costs award. The Court disallowed disbursements for computer research, fax charges, laser printing, and photocopy charges. Bensler J. held that computer research and fax charges fall within the tariffs described in Schedule C as implied activities and necessary services. Her Ladyship held that a disbursement at 30 cents per page for laser printing and photocopying was excessive in light of the costs for such work at commercial printers, and that such disbursements should only apply to final documents. Bensler J. awarded a disbursement for laser printing and photocopying of final documents only, at 10 cents per page.

UNIVERSITY OF ALBERTA v CHANG, 2011 ABQB 595 and 2011 ABQB 596 (LEE J)
Rules 4.31 (Dismissal for Delay), 4.33 (Dismissal for Failure to Advance), and 15.4 (Bridging Provision: Dismissal for Failure to Advance)

Applications to dismiss two Actions for long delay resulted in a dismissal of both Actions pursuant to Rule 4.31.

The Court referred to *Brar v Pawa*, 2010 ABQB 779 as authority that the presumption of serious prejudice caused by inordinate and inexcusable delay is preserved under Rule 4.31 and that such prejudice is sufficient in and of itself to have the Action dismissed without evidence from the Respondent to rebut the presumption. Referring to *Kuziw v Kucheran Estate*, 2000 ABCA 226, the Court determined that "inordinate" is determined in light of all of the circumstances of a particular case, and that the burden to show such delay is on the Applicant. Once "inordinate" has been made out, the natural inference is that such delay is inexcusable, and a finding of inordinate delay shifts the onus to the Respondent to provide an excuse to rebut the presumption. Referring to *Ravvin Holdings Ltd v Ghitter*, 2008 ABCA 208, Lee J. asserted that if and when a presumption of serious prejudice has been rebutted, actual prejudice must be found, such prejudice needing to occur during the period of inordinate delay. Lee J. added that actual prejudice can take two forms: (1) prejudice that affects the ability of the Applicant to defend himself at Trial, such as lost witnesses, destroyed documents or faded memory, or (2) prejudice found collaterally in the difficulty a litigant has in conducting his affairs with an Action hanging over his head. The Respondents in this case failed put forward evidence to rebut the presumption of serious prejudice.

In analyzing Rules 4.33 and 15.4, Lee J. referred to *Hooda v HSBC Canadian Direct Insurance Incorporated*, 2011 ABQB 196 and *Bahcheli v Yorkton Securities Inc*, 2010 ABQB 824, as authority that the former "five-year drop-dead" rule remains applicable. The Court referred to *Morasch v Alberta*, 2000 ABCA 24 for the proposition that a functional approach should be taken to measure whether a "thing" during the relevant time period has genuinely furthered the litigation in a meaningful way. Lee J. noted that the mere setting of dates for Examinations for Discovery is not a "thing" that significantly advances an action. Lee J. determined that the Court must dismiss an action for long delay upon finding that five years has expired since the last "thing" done that significantly advanced an Action. Further, the question of prejudice to the party applying for such dismissal is irrelevant when there has been such a five-year delay.

BRAR v PAWA, 2010 ABQB 779 (MASTER HANEBURY)
Rules 4.31 (Dismissal for Delay) and 4.33 (Dismissal for Failure to Advance)

The Defendant by Counterclaim applied to strike the Counterclaim under the "drop dead rule".

With regard to Rule 4.33, the Court referred to *Morasch v Alberta*, 2000 ABCA 24 for the proposition that a "thing" is usually grounded in the Rules of Court, even if it is not an actual procedural step, and such a "thing" must "move the law suit closer to Trial in a meaningful way". After referring to case-law, Master Hanebury determined that a functional analysis must be undertaken of the facts in each case in which a party seeks to strike a claim under the "drop dead rule". Master Hanebury determined that, in this case, it would have been inequitable to look only at "things" done in relation to the Counterclaim: there had been responses to undertakings in the original Action within the relevant 5-year time-frame that had served to move the Action as a whole forward.

With regard to Rule 4.31, Master Hanebury determined that the test under the former Rules relating to the formation of a presumption of serious prejudice still applies. The Court stated the test as follows: a finding of inordinate, inexcusable delay raises a presumption of serious prejudice, which if rebutted means that all of the facts must be examined. Master Hanebury determined that there was sufficient evidence to displace the presumption in this case, given the extensive and detailed records kept by the Applicant. Master Hanebury then examined all the facts and concluded that the Applicant had not satisfied the Court that significant prejudice had arisen from the delay. The Court dismissed both the Rule 4.33 and 4.31 Applications.

ARAAM INC v AMAN BUILDING CORPORATION, 2011 ABQB 631 (VERVILLE J)
Rules 5.1 (Disclosure of Information), 5.2 (When Something is Relevant and Material) and 5.25 (Appropriate Questions and Objections)

The Plaintiff sought to compel Answers to Undertakings given by the Defendant during Questioning. Verville J. considered Rules 5.1(1), 5.2(1) and 5.25(1)(a), as well as the existing common law. Verville J. noted that in *Mahamed v Matthews*, 2011 ABQB 187, Veit J. reviewed Rule 5.2 and stated that the Rule is "much narrower than its predecessor". Verville J. reviewed each undertaking to determine whether it was relevant and material to the issues in dispute and considered whether the Undertaking could reasonably be expected to significantly help determine the answer to an issue in dispute.

GOLDEN ESTATE v NEILSON, 2011 ABCA 338 (MCFADYEN, BERGER, O'FERRALL JJA)
Rule 5.17 (People Who May be Questioned)

The Public Trustee of Alberta, as the Personal Representative of the estate of the deceased, brought a Claim against the Appellants pursuant to the *Fatal Accidents Act*. The Appellants appealed the dismissal of their Application to compel the mother and spouse of the deceased to attend for Questioning pursuant to Rule 5.17.

The Court held that the Chambers Judge properly concluded that the deceased's mother and spouse were Parties to the Action, despite the fact that they were not named in the style of cause. However, the Court further held that the Chambers Judge erred in determining that they were not "adverse in interest" to the Appellants because the mother and spouse of the deceased did not have a Cause of Action against the Appellants. The Court held that section 3(1) of the *Fatal Accidents Act* "expressly confers a cause of action on the spouse, parents and children of a deceased". The *Fatal Accidents Act* provides that a Claim must be brought by the Executor or Administrator of the estate, unless there is none or the Executor or Administrator has not brought a Claim within one year. In such circumstances, the Action may be brought by the parents, spouse, or child of the person whose death was allegedly caused by the wrongful or negligent act.

The Court held that "parties on whose behalf a claim is brought under the *Fatal Accidents Act*, or who claim relief directly under the *Fatal Accidents Act* are parties adverse in interest to the party or parties whose negligence or

wrongful acts are alleged to have caused the death… ". The Court held that this finding was based on a "true parties" approach to the assessment of Questioning under the new Rules. The mother and spouse of the deceased were true Parties whose evidence would enhance speed, economy, fairness and disclosure.

ROYAL BANK OF CANADA v SAMRA, 2011 ABQB 556 (BENSLER J)
Rule 6.14 (Appeal from a Master's Judgment or Order)

In this Appeal of a Master's decision, the Court referred with approval to *Janvier v 834474 Alberta Ltd*, 2010 ABQB 800 with regard to determining the appropriate standard of review. Bensler J. noted that, because an Appeal from a Master's Decision is no longer conducted as a hearing de novo, the Master's Decision is now accorded a greater degree of deference. Referring to *Janvier*, Her Ladyship noted the following: (1) Masters continue to be limited in their jurisdiction to determine questions of fact - such a finding made within a Master's jurisdiction is entitled to deference and is not to be interfered with unless there is "palpable or overriding error"; (2) a review of a Master's decision on a question of law is assessed on a standard of correctness; and (3) the standard of review for questions of mixed law and fact depends upon the characterization of the question and of the error: where the error arises in identifying the legal standard, the standard is correctness, but where the error arises in applying the correct legal standard to a given set of facts, the standard is reasonableness and the decision should not be interfered with unless there is a palpable and overriding error.

Two of the issues were questions of law and therefore assessed on the standard of correctness. The third issue involved mixed law and fact, and was not a situation in which the error, if any, was in identifying the correct legal test to be applied. The appropriate standard of review for that issue was reasonableness.

TURNER v DN DEVELOPMENTS LTD, 2011 ABQB 554 (BROWNE J)
Rules 6.14 (Appeal from Master's Judgment or Order), 15.1 (Definitions) and 15.12 (New Test or Criteria)

The Defendants Appealed the Decision of Master Wacowich discharging their caveat and certificate of *lis pendens* filed against property owned by the Plaintiffs.

In its analysis, the Court noted that an Appeal from a Master's Judgment or Order is now an Appeal on the record. Further, in accordance with Rule 15.1, the new Rules apply to an existing proceeding commenced, but not concluded, under the former Rules. If the new Rules "impose a new test, provide new criteria, or provide an additional ground for an application in an existing proceeding, the *New Rules* apply…".

Although the former Rules and the new Rules do not dictate the standard of review to be applied, the Court noted that cases decided under the former Rules held that the applicable standard of review was one of correctness. However, under the new Rules, since Appeals from a Master are no longer hearings *de novo*, but rather on the record, recent Decisions have concluded that this change results in an "appellate standard of review". Browne J. agreed that the appropriate standard of review is an appellate standard of review.

There was no dispute over the Master's finding of facts; instead the issue was in respect of the correct interpretation of an insurance contract, an issue of law. Therefore, the appropriate standard of review was correctness. On that basis, the Court granted the Defendants' Appeal.

CANADA (NATIONAL REVENUE) v GLAZER, 2011 ABQB 559 (MANDERSCHEID J)
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* RSA 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.

KYDD v ABOLARIN, 2011 ABQB 690 (MACKLIN J)
Rule 6.14 (Appeal From Master's Judgment or Order)

This was an Appeal from a Master's Decision to grant an Application by the Plaintiff to Amend the Statement of Claim. In determining the proper standard of review, Macklin J. stated that Rule 6.14 provides that an Appeal from a Master's decision is on the record. Macklin J. further stated that the standard for review of a question of law is correctness, whereas the standard for facts or factual inferences is reasonableness. In instances of a mixed question of fact and law where the principle of law can be extricated from the question, the standard of review on the principle of law is correctness. Macklin J. relied on the case of *Janvier v 834474 Alberta Ltd*, 2010 ABQB 800. The Appeal was dismissed.

PL v ALBERTA, 2011 ABQB 771 (GRAESSER J)
Rules 7.1 (Application to Resolve Particular Questions or Issues), 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

This case dealt with a preliminary Application to determine whether a Summary Judgment Application was a nullity because it was in essence a Severance Application, where leave was not sought or granted to sever the issues to be heard at the proposed Summary Judgment Application.

In allowing the Application to proceed, Graesser J. noted that certain wording in Rule 7.1(1)(a)(i) (having to do with severance) is substantially the same as in Rule 7.3(1) (having to do with Summary Judgment) and that these Rules are to be read together. Both Rules permit the Court to deal with the entirety of a claim or merely part of it, thus broadening the instances where severance is available (relative to the old Rules). Graesser J. conveyed that this is done to offer litigants the choice to use the appropriate Rule that will best promote the objectives of the Foundational Rules. Severance "hives off" an issue from the Action, but the determination of the issue is still subject to disclosure procedures and mandatory Alternate Dispute Resolution. Summary Judgment Applications do not require either the disclosure process or mandatory Alternate Dispute Resolution.

It was also argued that the Summary Judgment Application should not proceed because the Respondent had not amended its pleadings in accordance with established case law which addressed Striking portions of a Plaintiff's Statement of Claim. However, Graesser J. distinguished this case from *Elbow River Marketing v Canada Clean Fuels Inc*, 2011 ABCA 258 (*"Elbow"*) stating that Elbow was "not a determination that in no case can summary judgment proceed in the face of a motion to amend the pleadings, or if the pleadings are not settled." Rather, "[e]ach case should be dealt with on its merits."

The Court acknowledged that, unlike the old Rules, pursuant to Rule 7.2 a Summary Judgment Application can be brought any time after the Action is commenced, one does not have to wait until a Statement of Defence is filed. With respect to Rule 7.3(1)(c), Graesser J. indicated that it is contemplated that in some cases quantification of the claim will remain after liability is decided.

CONDOMINIUM CORPORATION NO. 0425177 v JESSAMINE, 2011 ABQB 644 (MASTER SMART)
Rule 7.3 (Summary Judgment)

The Plaintiff sought Summary Judgment for outstanding condominium fees, plus interest and Costs. Master Smart considered Rule 7.3 and accepted that the authorities adjudicated pursuant to old Rule 159 apply to Applications for Summary Judgment pursuant to the new Rules. Master Smart applied the two step procedure set out in *732311 Alberta Ltd v Paradise Bay Spa & Tub Warehouse Inc*, 2003 ABCA 362.

The Defendant relied on defects in the Plaintiff's Affidavit. Master Smart agreed that the Plaintiff's Affidavit

was defective and without more would not satisfy the fundamental evidentiary requirements under Rule 7.3. Master Smart decided that the defects were not determinative, and the fact that the Defendant chose to Question the Plaintiff's officer under Oath cured the defect as the "oath extends to the documentary undertakings delivered … the "true" nature of the documents provided is implicit".

PETERS v WILSON ESTATE, 2011 ABQB 665 (HALL J)
Rule 7.3 (Summary Judgment)

The Defendant sought Summary Dismissal of the Plaintiff's Action and Summary Judgment on its Counterclaim.

In its assessment the Court noted that, in the context of an Application for Summary Dismissal, the Court "must accept as true, the facts averred by the party opposing the application, unless those facts have been disturbed in cross examination of the witnesses giving evidence on behalf of the respondent". The Court held that where the evidence in the Applicant's Affidavits contradicted the evidence advanced by the Respondent in its Affidavits, the evidence of the Applicant must be disregarded, as conflicts in evidence can only be resolved at Trial. However, the Court went on to hold that where the evidence adduced, whether it is through Affidavits, Cross Examination on Affidavits or in Questioning in the overall Action, is of assistance to the Respondent, the Court may consider it in determining the Application. Stated another way, the Court assumes that the facts deposed to or elicited by the Respondents are true, and then determines whether, on that assumption, a Summary Dismissal of the Claim and/or Summary Judgment on the Counterclaim should be granted. The only exception to that general rule is where "the Applicant has cross examined the Respondent and has obtained an admission contrary to the facts alleged by the Respondent in opposing the Application".

Based on the evidence advanced, both on behalf of the Applicant and the Respondent, the Court granted the Applications, dismissing the Plaintiff's Claim and granting Summary Judgment on the Defendant's Counterclaim.

EXCELSIOR PROPERTIES LTD v COSENTINO DEVELOPMENTS INC, 2011 ABQB 666 (ROSS J)
Rule 7.3 (Summary Judgment)

A group of Defendants sought Summary Judgment dismissing the Plaintiff's Claim and a Third Party Claim of another Defendant. Ross J. reviewed the test for Summary Judgment set out in Rule 7.3 as well as the analysis provided by Kent J. in *Encana Corp v ARC Resources Ltd*, 2011 ABQB 431. Ross J. noted that "despite the new Rules' focus on avoiding costly litigation, the test for summary judgment remains the same and continues to carry a 'stringent and high threshold' for the moving party". Ross J. decided that Summary Judgment would not be appropriate based on the existing record and that the positions of the Respondents were arguable.

CHUNARA v JINA, 2011 ABQB 709 (LEE J)
Rule 7.3 (Summary Judgment)

The Plaintiff applied for Summary Judgment. Lee J. stated that when applying for Summary Judgment as a Plaintiff, the Plaintiff bears the ultimate onus of meeting the requirements of Rule 7.3. The Court determined that the Plaintiff bears the evidentiary burden of proving its Cause of Action on a balance of probabilities such that every fact necessary to support the claim must be proven. His Lordship then determined that the Defendant can avoid Summary Judgment in favour of the Plaintiff by proving that there is a genuine issue for trial. The Court noted that it must be beyond doubt that no genuine issue for trial exists. Lee J. granted the Application: the Plaintiff had established his Cause of Action, and the Respondent had failed to prove that there was any genuine issue for trial.

BONSMA v TESCO CORPORATION, 2011 ABQB 620 (GRAESSER J)
Rules 7.5 (Application for Judgment by way of Summary Trial), 7.6 (Response to Application) and 7.8 (Objection to Application for Judgment by way of Summary Trial)

The Defendant applied for an Order directing that the matter be heard by way of a Summary Trial pursuant to Rule 7.5.

The Court noted that after a party brings a Motion to have a matter heard by way of Summary Trial, the responding party can either agree with the process and file the appropriate materials pursuant to Rule 7.6, or, if the party disagrees, it can object pursuant to Rule 7.8. In this case, the Plaintiff objected to the Application.

Pursuant to Rule 7.8, an objection to a Summary Trial must be dismissed if the Court is of the opinion that the matter "is suitable for summary trial" and "the summary trial will facilitate resolution of the claim or a part of it". The Court held that the new Rules have not changed the test to determine whether a Summary Trial is appropriate. However, as noted by the Court, the Foundational Rules, which emphasize "proportionality, efficiency, economy and expedience", encourage processes such as Summary Trials.

In reaching its decision, the Court reviewed relevant cases decided under the former Rules, including *Duff v Oshust*, (2005), 381 AR 386. In that case, the Court held that factors to be considered on an Application for a Summary Trial included: the monetary amount in dispute; the complexity of the matter; its urgency; any prejudice likely to arise by reason of delay; the cost of taking the case forward to a conventional Trial in relation to the amount involved; the course of proceedings; whether all of the witness or only some were or will be cross-examined in Court; where there is a real possibility that the Defence can bolster its evidence by Discovery of the Plaintiff's documents and witnesses; and whether the resolution will depend on findings of credibility.

The Court held that the case before it did not have the "factual matrix within which a judge can prefer one set of facts over the other and come to factual findings", and as a result denied the Defendant's Application and directed that the matter proceed to Trial.

PETERS v WILSON ESTATE, 2011 ABQB 689 (HALL J)
Rule 9.13 (Re-opening Case)

The Defendant previously applied for Summary Dismissal of the Plaintiff's claim and also for Summary Judgment of the Defendant's Counterclaim. Hall J. granted both Applications in the Defendant's favour and the Plaintiff subsequently applied to re-open the case before the Order was entered, and to change or modify the Order in favour of the Plaintiff. In deciding the Application, Hall J. stated that Rule 9.13(a) gives the Court discretion to vary a Judgment or Order, but that the circumstances contemplated by the Rule are those where the Judge, on his or her own, has rethought the matter or wishes to clarify it. Rule 9.13(b) on the other hand contemplates an Application being made by a party to the proceeding to change or modify the Judgment or Order or Reasons for it.

With regard to Rule 9.13(b), Hall J. agreed with the decision in *Evans v Sport Corp.*, [2011] AJ No 687 (Grasser J.), and stated that the Rule can be applied without the allowance or introduction of new evidence. The Plaintiff in this instance did not provide any new evidence. Hall J. noted that there was no good reason to modify or change the Decision, and that there was nothing new that was misunderstood by him or not brought to his attention. The Application was denied, however, Hall J. varied the original Order in regard to the time the Plaintiff had to vacate the premises as well as the Costs between Parties, because his original Order was made without hearing from counsel on those two issues.

AGF TRUST COMPANY v MCLEOD, 2011 ABQB 711 (MASTER HANEBURY)
Rule 9.14 (Further Order after Judgement or Order Entered)

The Applicant, a second mortgagee, sought to vary an Order Nisi/Order for Sale in a Foreclosure proceeding with respect to the amount of mortgage indebtedness owed to the Respondent, the first mortgagee. The Respondent argued, amongst other things, that Rule 9.14 was inapplicable, and that the Order was a Judgment and the Court could not entertain a motion to adjust the amount outstanding. In considering Rule 9.14, Master Hanebury noted a narrow exception, that further directions are allowed by a Court, provided they do not vary the Judgment, but merely supplement it, or work it out, or allow the Court to clarify the effect of its earlier Judgment. Master Hanebury determined that Rule 9.14 supports the Court's ability to determine the amount required to pay out the first mortgage

pursuant to the Order. The reason for this is that the Court would not be varying its Judgment, but would merely be deciding its effect.

WESTGROVE PLUMBING & HEATING LTD v BAYVIEW CONSTRUCTORS INC, 2011 ABCA 298 (O'BRIEN JA)
Rules 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 14.1 (Appeals)

The Applicants sought an Order extending the time to file a Notice of Appeal from an Order for Summary Judgment. O'Brien J. A. held that the applicable test for an enlargement of time remains the test set out in *Cairns v Cairns*, [1931] 4 DLR 819 at 826-827, [1931] 3 WWR 335. An applicant must show:

> (a) that there was a bona fide intention to appeal before time expired and that some special circumstance would excuse or justify the failure to appeal;
>
> (b) an explanation for the delay and an absence of prejudice to the other side, such that it would not be unjust to disturb the judgment;
>
> (c) that the appellant has not taken the benefits of the judgment from which the appeal is sought; and
>
> (d) that the appeal would have a reasonable chance of success if allowed to proceed.

The Applicant did not meet this test and the Application was dismissed.

TORONTO DOMINION BANK v HUNIK, 2011 ABQB 610 (MASTER PROWSE)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

This was an Application to set aside a Default Judgment. Master Prowse stated that the Court's authority to set aside, vary or discharge a Judgment in Default of Defence under Rule 9.15(3) applies only to Judgments granted by the clerk on praecipe, and not to Judgments granted by a Master or Judge. Since this Judgment was granted by a Master, section 9.15(3) did not apply. Additionally, the Court held that section 9.15(1) did not apply as the Applicant had received notice of the Hearing and never intended to appear.

KENT v KENT (ELLIS), 2011 ABQB 611 (ERB J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

In this Decision the issue before the Court was which party was entitled to Costs arising from the Action. The Plaintiff argued that he was entitled to Costs as a result of delays that the Defendant caused. Conversely, the Defendant argued that she was entitled to Costs because she was substantially the successful party.

With regard to the Defendant's argument, the Court considered Rule 10.29(1), which provides that the successful party is entitled to Costs from the unsuccessful party. The Court noted that it is not necessary that the successful party succeed on every point, but that there must be "substantial success" which is assessed on a "balanced assessment of the outcome and the nature of the final judgment".

The Court disagreed with the Defendant's assessment that she was substantially the successful party and instead found that the Plaintiff was substantially successful on all major aspects of the Action.

The Defendant also sought increased compensation as a result of the Plaintiff's conduct at Trial. The Court held that Rule 10.31(2)(c) provides that "reasonable and proper costs do not include costs related to dispute resolution or judicial dispute resolution processes unless a party engages in serious misconduct in the course of the resolution process". The Court found that the Plaintiff did not engage in serious misconduct and accordingly the Defendant was not entitled to Costs on that basis.

The Court then considered the Plaintiff's argument that he was entitled to Costs in addition to party-party Costs

as a result of delays caused by the Defendant. The Court applied Rule 10.33(2)(a), which provides that in making a Costs Award the Court can consider whether the conduct of a party "unnecessarily lengthened or delayed the action or any stage or step of the action". The Court agreed with the Plaintiff that the Defendant's conduct resulted in a delay and that the Plaintiff was entitled to reasonable compensation for such a delay.

In assessing the quantum of Costs, the Court noted that Rule 10.31(1)(b) allows the Court to Award Costs in any amount that it considers appropriate in the circumstances. The Court also found that although the former Rules of Court designated Column 1 as the default column for divorce and corollary relief matters, the new Rules of Court do not provide that same limitation. However, some courts have continued to apply the procedure used under the former Rules of Court and limit Costs to Column 1. The Court in this case held that, given the circumstances, it was appropriate to assess Costs under Column 4.

EVANS v THE SPORTS CORPORATION, 2011 ABQB 616 (GRAESSER J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.33 (Court Considerations in Making Costs Award) and 1.2 (Purpose and Intention)

This Application dealt with an Award of Costs following Trial. Graesser J. stated that "Costs are governed generally by Rule 10.29 and in more detail by R. 10.33". The Court determined that there are no significant differences between the old Rules and the new Rules in relation to Costs. The Court's powers and the parties' entitlement to Costs have not changed as a result of the new Rules. Graesser J. awarded Costs to the successful Defendant/ Plaintiff by Counterclaim, but refused to award an increase to the tariff amounts. Graesser J. added that Solicitor and Client Costs are routinely sought after Trial, often without any proper basis or foundation. This could result in a Trial after the Trial consisting of a review of every step in the Action looking for misconduct. This potential outcome is contrary to Rule 1.2 relating to proportionality, economy and efficiency.

LAMEMAN v ALBERTA, 2011 ABQB 724 (YAMAUCHI J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Plaintiffs sought leave to Appeal an Order of Costs made in relation to an adjournment Application, as required under the old Rule 505(3) which states:

> No … order made … as to costs only shall be subject to any appeal, except by leave of the court … making the order.

While the Plaintiffs were successful in their adjournment Application, the Court stated that it was troubled by the approach the Plaintiffs and their legal counsel had taken with respect to the litigation, and invited the Parties to address the issue of Costs. The Court reviewed the Parties' filed submissions on Costs and ruled that the Plaintiffs, despite being successful in the Application, were to immediately pay to the Respondents the Costs of the adjournment Application on the basis of Schedule C, Column 3.

In determining whether or not to grant the Plaintiffs leave to Appeal the Costs Decision, the Court found that the standard of review that the Alberta Court of Appeal would apply when considering an Appeal from a Costs Decision was a clear, palpable and overriding error. Yamauchi J. went on to state that the Applicants failed to demonstrate that the Court made a clear, palpable and overriding error as Rules 10.31 and 10.33 give the "Court the ability to depart from the general rule that a successful party to an application will be awarded costs". Further, "an applicant for an adjournment may be required to pay the costs of an application, even if successful, if the adjournment results from some fault of the applicant". The Court found that the Applicants did not meet the timelines imposed by the Court and as a result the Respondents incurred significant costs. Therefore, the Court's Decision to award Costs against the successful Applicant was not in error and the Application for leave to Appeal was denied.

FORSBERG v NAIDOO, 2011 ABQB 705 (THOMAS J)
Rule 10.33 (Court Considerations in Making Costs Award)

The Parties were unable to agree on Costs following Trial. Thomas J. referred to Rule 10.33 which identifies a range of considerations that are relevant when considering the applicable Costs. The Plaintiffs initially named several other Defendants, however, the Claims against all but two of the Defendants were removed from the Action prior to Trial. The Plaintiffs then Discontinued the Action against one of the two remaining Defendants with consent. Following Trial, the remaining Defendant argued that he should not be responsible for those costs flowing from Questioning the other Defendants, court reporter fees related to the other Defendants, costs to review the other Defendants' documents and the disbursements related to service on the other Defendants.

Thomas J. determined that the Plaintiff acted reasonably and was justified in including the other Defendants in the Action. As such, the costs associated with Questioning the other Defendants were reasonable and necessary under the circumstances. Thomas J. did reduce the Cost associated with reviewing the other Defendants' documents as the evidence was that the remaining Defendant did not produce much documentation.

WISHEWAN v AMACK, 2011 ABCA 386 (SLATTER JA)
Rule 10.33 (Court Considerations in Making Costs Award)

The Applicant applied for Leave to Appeal an Interlocutory Order. Leave was not necessary for an Appeal. Slatter J.A. held that "things done out of excessive caution" fall under Rule 10.33(2)(d) and are not appropriate for Costs awards.

UNRAU v FREAKE, 2011 ABQB 663 (ROSS J)
Rule 12.70 (Power of Court on Family Law Act Appeals)

This Appeal related to a decision of the Provincial Court on a parenting-time claim. The grounds of the Appeal related to errors of law, reviewable on a standard of correctness. Ross J. allowed the Appeal and determined that, pursuant to Rule 12.70, the appropriate remedy was not to return the matter to Provincial Court for a new hearing (pursuant to Rule 12.70(d)) since such remedy could involve a significant delay. The Court instead exercised its jurisdiction under Rule 12.70(c), which permits the Court to make an Order that the Provincial Court could have made. Ross J. indicated that the decision to invoke Rule 12.70(c) would be in the best interests of the child and it would allow the allocation of parenting time accordingly.

WONG v GIANNACOPOULOS, 2011 ABCA 277 (SLATTER JA)
Rules 501 (Definitions) and 505 (When Appeal Available)

The Applicant applied for Leave to Appeal an Order of the Court of Appeal declaring her to be a vexatious Litigant. Slatter J. A. stated that Appeal rights are entirely statutory, and the only right to Appeal an Order of a single Judge of the Court of Appeal is pursuant to Rule 505(6). This Rule requires Leave to Appeal the Order. In determining if it is appropriate to grant Leave to Appeal, the question is whether the proposed Appeal raises a serious issue of general importance with a reasonable chance of success. The test was not satisfied in this instance.