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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. 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.

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SWARTOUT v QUINNCORP HOLDINGS INC, 2012 ABQB 610 (MASTER MASON)
Rules 1.2 (Purpose and Intention of These Rules), 1.4 (Procedural Orders), 5.2 (When Something is Relevant and Material), 5.3 (Modification or Waiver of This Part), 5.25 (Appropriate Questions and Objections) and 5.33 (Confidentiality and Use of Information)

The Plaintiffs entered into a Joint Venture Agreement with one of the Defendants, 268981 Alberta Ltd., in 1998. 268981 Alberta Ltd. amalgamated with Quinncorp Holdings Inc. ("Quinncorp") in 2001. Under the Joint Venture Agreement, Quinncorp was to develop a neighbourhood in phases, using funds provided by a number of investors, including the Plaintiffs. After deducting Quinncorp's expenses and a management fee, net profits were to be distributed 70% to the investors and 30% to Quinncorp. The Plaintiffs commenced this Action in 2011, alleging that they had not received all of the net profits they were entitled to under the Joint Venture Agreement. The Plaintiffs sought the return of their initial contributions, payment of net profits owing under the Joint Venture Agreement, and an accounting of all revenues, expenses and profits. Quinncorp alleged that repayment of initial contributions was not due, that net profits had been properly distributed and that the Plaintiffs had been overpaid. Quinncorp further alleged that the Joint Venture Agreement did not require Quinncorp to report or account directly to the Plaintiffs.

Quinncorp presented two issues to the Court for advice and direction. The first issue related to Quinncorp's ability to defer production of source documents. During the Questioning of Quinncorp's corporate representative, some Undertakings were given which related to source documents underlying summary information that had been produced by Quinncorp. Quinncorp argued that it was not required to produce these source documents until entitlement to an accounting was established at Trial. Quinncorp further argued that production should be delayed because its accountant was preparing a report on the underlying revenues and expenses of the Joint Venture Agreement, and because it would be too difficult to produce the source documents. Quinncorp argued that the Plaintiffs were using disclosure Rules to obtain accounting relief that could only be granted after liability was established at Trial. Quinncorp argued that the general rule is that while that there must be full Discovery on all issues prior to Trial, if liability and remedies are easily severable, it is appropriate to defer Discovery on remedies until liability has been established.

Master Mason held that the records sought by the Plaintiffs were not solely relevant to the accounting. Rather, the records were also relevant to whether Quinncorp had paid the net profits under the Joint Venture Agreement. Quinncorp's calculation methodology was at the heart of the dispute, and as such, source documents showing costs and revenues were relevant, material and necessary to resolve the issue at Trial. Any documents that also related to other projects could be redacted and would be subject to an Undertaking pursuant to Rule 5.33.

Quinncorp further argued that the Plaintiffs' representative on the Joint Venture Agreement agreed that Quinncorp's accountant would review and substantiate the distribution of net profits. Quinncorp argued that this agreement bound the Plaintiffs and prevented them from seeking production of the source documents until the report was complete. Master Mason held that the Joint Venture Agreement did not constitute contracting out of the production requirements of the Rules of Court. Relevance and materiality govern the production of documents in litigation, not a paragraph in a Joint Venture Agreement.

Quinncorp further argued that, pursuant to Rules 1.2 and 1.4, the litigation would be more timely and cost effective if the Plaintiffs' production requests were held in abeyance pending the review by Quinncorp's accountant. Master Mason held that the Plaintiffs were entitled to access source documents for their own review, and that it would be inconsistent with Rules 1.2 and 1.4 to delay production of the documents.

Quinncorp also argued that, pursuant to Rule 5.25, it would be unduly onerous to respond to Undertakings relating to source documents. Further, the production requirements should be modified in relation to the source documents because, pursuant to Rule 5.3, the difficulty of

producing them would be disproportionate to their likely benefit. However, Master Mason held that a Party seeking to modify or limit another Party's rights under the Rules faces an onerous test. Alberta Courts have recognized that the process of responding to Undertakings requires time and money, and the Party giving the Undertaking will have to devote some resources to ensure that the Undertakings have been met. The fact that it will take time is not a sufficient excuse for not responding. The Costs of responding to Undertakings will be addressed in the normal course of the Action.

The second issue before the Court related to whether the U.S. counsel and a staff member of one of the Plaintiffs was entitled to view a real time transcript at a future Questioning. At the Questioning of Quinncorp's corporate representative, real time reporting was used, which generated a live transcript. The transcript was streamed to a computer in an adjacent conference room, where it was observed by U.S. counsel and a staff member. Quinncorp argued that this violated the general rule that only the Parties and Counsel of record have the right to attend Questioning. The Plaintiffs argued that because the real time software does not permit communication or interaction between those in the Questioning room and those observing elsewhere, the presence of others in a separate room watching a live transcript is not tantamount to attendance at the Questioning. Any concerns identified with additional attendees at Questioning, such as disruption, distraction and delay, do not arise where attendees are passively observing the transcript.

Master Mason held that observers in the next room were not allowed to communicate or interact with those in the Questioning room. The transcript remained confidential and was not broadcast to the public at large, but only to individuals who would be provided with a copy of the transcript in any event. Indeed, passively observing a real time transcript is not substantially different from receiving a copy of an expedited transcript the following morning. Provided that the attendees do not interrupt, communicate with those in the Questioning room during the Questioning or cause delays in the proceeding, such observation does not amount to attendance at the Questioning.

JO v ALBERTA, 2012 ABQB 599 (GRAESSER J)
Rules 1.2 (Purpose and Intention of the Rules), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), and 13.6 (Pleadings: General Requirements)

J.O. brought an Action against the Crown for breach of fiduciary duty, amongst other allegations, which resulted in the serious injury of a child in foster care. J.O. applied for Orders declaring that she had amended the Statement of Claim pursuant to Rule 3.65. The Crown argued that J.O.'s amendments should not have been allowed as they were repetitive, superfluous, unnecessarily inflammatory, and conclusive rather than explanatory (the Amended Claim added words such as "maliciously" and "recklessly"). Interpreting Rule 1.2, Justice Graesser made the following comments with respect to Pleadings and litigation efficiency:

> This is not an exercise in creating a perfect pleading. It is intended to result in a pleading that is comprehensible and precise, identifies the real issues in dispute, pleads relevant facts without conclusions and speculation, pleads causes of action which are not hopeless, provides sufficient facts to enable the opposite parties to understand the case against them, and is not frivolous or vexatious, all the while being succinct and in accordance with Rules 13.1 to 13.12. It is not up to the Court to draft pleadings for the parties.

The Court voiced concerns regarding the Amended Statement of Claim. The Amended Claim was not concise and contained some evidence as opposed to facts. Nevertheless, the Court permitted the amendments, stating that the Claim was not so objectionable that the Court should strike otherwise relevant provisions. Justice Graesser noted that his failure to "cut deeper" into the wording of the Amended Statement of Claim should not be viewed as tacit acceptance that the Amended Statement of Claim satisfied Rule 13.6.

DEBONA v DEBONA, 2012 ABQB 720 (MILLER J)
Rules 1.2 (Purpose and Intention of These Rules), 4.13 (Appointment of Case Management Judge), 4.14 (Authority of Case Management Judge), 4.15 (Case Management Judge Presiding at Summary Trial and Trial), 4.16 (Dispute Resolution Processes), 4.17 (Purpose of Judicial Dispute Resolution), 4.18 (Judicial Dispute Resolution Process), 4.19 (Documents Resulting From Judicial Dispute Resolution), 4.20 (Confidentiality and Use of Information) and 4.21 (Involvement of Judge After Process Concludes)

The Applicant requested that the Case Management Judge be recused due to insight obtained by the Case Management Judge while conducting the Judicial Dispute Resolution. The Applicant submitted that this insight would lead to bias against the Applicant.

The Court held that in the area of Case Management "courts should not easily and quickly accede to requests for recusal". Additionally, the Court held that delay in family law cases involving children should be avoided if possible.

The Court held that the Applicant willingly entered into the JDR process knowing who the Justice was, and allowing the Application would derail the litigation. The Application was dismissed.

ELEMEN v CARBONEL, 2012 ABQB 674 (VEIT J)
Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities) and 11.25 (Real and Substantial Connection)

Elemem sought to have Carbonel's Statement of Defence struck as it contained untrue statements. Previously, Elemen had served a Statement of Claim for divorce and corollary relief upon Carbonel who resided in the Philippines. However, Elemen had not applied to the Court for leave to serve the Statement of Claim outside of Canada.

The Court held that as both Parties were unrepresented and there was no irreparable harm to either Party, Rule 1.5 could be applied to correct the deficient service. The Court also applied Rule 1.5 to strike the portions of the Pleadings that dealt with corollary relief as the Philippines was the *forum conveniens*.

The Application to strike the Statement of Defence was not granted, as the appropriate process when the Pleadings conflict is to proceed to Trial, not to strike the Pleadings. The Court granted the divorce as there was no dispute regarding the facts that gave rise to the granting of a divorce.

BOWMAN v RADFORD ESTATE, 2012 ABQB 722 (MASTER SCHLOSSER)
Rules 2.1 (Actions by or Against Personal Representatives and Trustees), 3.62 (Amending Pleading), 3.68 (Court Options to Deal with Significant Deficiencies), 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

The dispute between the Parties in this case arose in connection with the distribution of a quarter section of land. The Executor originally sold the quarter section to the Plaintiff, but title was never transferred. Subsequently, when one of the beneficiaries, Ms. Brooks, became Trustee, she sold the same quarter section to another party, who transferred title into their name. The Application was made to have portions of the Pleadings struck or amended, and also to have the Claim summarily dismissed.

In order for the Applicant's Summary Dismissal Application to succeed, Master Schlosser stated that it must be "plain and obvious" or "beyond doubt" that there was no merit to the Plaintiff's Claim. The Applicant Defendant would have to show both that the sale of the property was made solely for the purpose of distribution, and that the beneficiaries were opposed to it. The Applicant did not file an Affidavit and Master Schlosser held that it was clear on the evidence that the Estate was not fully administered. Master Schlosser further noted that it could not be said that it was plain and obvious or beyond doubt that the sale of the second quarter was for distribution to the beneficiaries only and that their lack of concurrence barred the sale of the land to the Plaintiff. Based on this, there appeared to be a triable issue.

A portion of this Application was to strike parts of the Statement of Claim for serious defects. The Defendant argued that a paragraph of the Claim should be struck because it referred to the "Defendant Estate and Brooks and Graunke, either *individually* or as a group" (emphasis

added), which was taken by Master Schlosser to mean that the Plaintiff was seeking to make the beneficiaries personally liable. It was noted that there was nothing in the evidence or the allegations that would attract personal liability to the beneficiary. Her only involvement was in a representative capacity as Trustee of the Estate. Based on this, Master Schlosser held that this part of the Application was justified.

The Style of Cause named "[The] Estate of Julianita Radford, Susan Brooks and Remedios Graunke". Master Schlosser noted that an "Estate" is not a legal entity and a deceased person was also not a legal entity. Naming only the Estate would have been fatal, but in this case it was held to be a curable irregularity. The allegations against Ms. Brooks personally were struck and the Style of Cause was to be corrected to show Ms. Brooks in her representative capacity as Trustee of the Estate. Master Schlosser ordered the Statement of Claim to be amended, filed and served within thirty days of the date of the Order. In the end, the Applicant succeeded in having portions of the Pleadings struck or amended, but the Summary Dismissal Application was dismissed.

COLD LAKE FIRST NATION v ALBERTA (TOURISM, PARKS AND RECREATION), 2012 ABQB 579 (BROWNE J)
Rule 3.22 (Evidence on Judicial Review)

Cold Lake First Nation brought an Application for Judicial Review of a November 2010 decision of the North-East Regional Director of Parks, Government of Alberta. The Judicial Review required the Court to address two issues, including the admission of new evidence pursuant to Rule 3.22(d). In determining whether or not new evidence should be admitted, the Court relied on *Alberta Liquor Store Assn v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904. Browne J. stated that:

> Judicial review is the review of a decision, not a hearing or decision de novo. When reviewing the reasonableness or the correctness of a decision, the reviewing court must undertake that review based on the information available to the original decision maker…

Browne J. concluded that the admission of new evidence would turn the Judicial Review into a hearing *de novo*, and would not assist the Court in determining the central issue under Judicial Review. The Application to admit the new evidence was dismissed.

SANDERSON ESTATE v POTTER, 2012 ABQB 593 (READ J)
Rules 3.26 (Time for Service of Statement of Claim), 3.27 (Extension of Time for Service), 15.1 (Definitions) and 15.2 (New Rules Apply to Existing Proceedings)

The Defendant was involved in a motor vehicle accident in 2004 which resulted in the death of Sanderson, whose Estate commenced two separate Actions. The Statements of Claim in the two Actions were issued in May of 2006. The Defendant was Noted in Default on the basis of an erroneous Affidavit of a process server who swore that he had served the Defendant with both Statements of Claim. After the Statements of Claim expired, it was determined that someone else had actually been served, not the Defendant. The Defendant brought an Application to set aside the Noting in Default and strike the Statements of Claim against him, or alternatively, to grant him leave and extend time to permit him to file Statements of Defence.

Justice Read considered the following Rule-related issues:

(a) Which Rules of Court applied, those in effect when the Defendant was Noted in Default, or those in effect at the time of the Application?
(b) Should the Noting of Default be set aside?
(c) If yes, did the Court have discretion to renew the Statements of Claim? If so, should the Court exercise its discretion in this case?

Justice Read referred to Rule 15.2(1), which directs that unless an enactment or another Rule provides otherwise, the Rules apply to every existing proceeding. Rule 15.1(a) defines an "existing proceeding" as "a Court proceeding commenced but not concluded under the former Rules". The Court confirmed that an expired Statement of Claim does not become a nullity; it is simply not in force: *Shah v Christiansen* (1992), 5 Alta LR (3d) 174 (CA). An expired

Statement of Claim is "renewable", but this must be done through an Application: *Nixon v Timms*, 2012 ABQB 315.

Where there is a flaw in the procedure leading up to a Default Judgment, a Defendant, proceeding promptly, is entitled to open up the Default Judgment as of right: *Anstar Enterprises Ltd v Transamerica Life Canada*, 2009 ABCA 196. In the circumstances of this case, Justice Read set aside the Noting in Default because the Rules were not strictly complied with in serving the Defendant with the Statements of Claim.

In determining whether the Court had the discretion to renew the Statement of Claim, Rules 3.26 and 3.27 were examined. Rule 3.26(1) provides that a Statement of Claim must be served on the Defendant within one year after the date the Claim is filed. Rule 3.27(1)(c) states that the Court may grant an extension of time for service of a Statement of Claim if a special or extraordinary circumstance exists resulting solely from the conduct of a person who is not a party to the Action.

The Court concluded that the process server was not a party to the Action. The remaining question to be determined was whether the Defendant's situation constituted a "special or extraordinary circumstance". The Court referred to the facts of *Nixon* where a process server lied in his Affidavit that service of a Statement of Claim had been effected. The Court in *Nixon* considered the fraudulent Affidavit to be an "extraordinary circumstance". Justice Read distinguished *Nixon*, on the basis that the process server in this case swore a mistaken or false Affidavit, not a fraudulent one. Nevertheless, Justice Read found that the mistaken Affidavit sworn by the process server constituted a "special" circumstance contemplated by Rule 3.27(1)(c).

The Court exercised its discretion to permit an extension of time for service of the Statement of Claim for a period of 30 days, and the Defendant was given a further 30 days to file a Statement of Defence.

FRANSSEN v THULE TOWING SYSTEMS LLC, 2012 ABQB 657 (MASTER LAYCOCK)
Rules 3.26 (Time for Service of Statement of Claim), 3.28 (Effect of Not Serving Statement of Claim in Time), 9.15 (Setting Aside, Varying, and Discharging Judgments and Orders) and 13.18 (Types of Affidavits)

The Plaintiffs filed a Statement of Claim on December 29, 2011. On December 6, 2012, an Order was granted by Master Breitkreuz granting the Plaintiffs an extension until March 6, 2012 to serve the Statement of Claim, and also to serve, *ex-juris*, a copy of the Statement of Claim on the Defendant located in the United States of America (the "US Defendant"). The US Defendant was not served with a copy of the Statement of Claim until July 3, 2012, and applied to have the Order of Master Breitkreuz set aside and a Declaration that no further steps could be taken against any of the Defendants.

The US Defendant argued that the Plaintiffs' Affidavit in support of their December 6, 2011 Application ("Affidavit") should be struck out on the basis that the deponent did not have personal knowledge of the facts and did not disclose the source of her information and belief. Master Laycock agreed with the US Defendant and struck out the bulk of the Affidavit because sections of the Affidavit:

1. Repeated allegations found in the Statement of Claim and did not provide any factual evidence to the Court;
2. Failed to provide a source of information and belief; or
3. Consisted of legal opinion or conclusion.

Master Laycock then applied the test for extending the time for service of a Statement of Claim pursuant to Rule 3.26, and considered case law regarding former Rule 11(6). Master Laycock disagreed with the Plaintiffs' argument that an Order to extend time for service can be made without any Affidavit evidence, and further stated that any Rule that does not explicitly mention the need for an Affidavit still requires Affidavit evidence to be considered by the Court. Master Laycock found that there were no material facts contained in the Affidavit and there was no evidence upon which the Court could rely. As a result, Master Laycock struck out the provision of Master Breitkreuz's Order extending time for service of the Statement of Claim, and declared that no further steps could be taken against the US Defendant.

GINGRICH v GINGRICH, 2012 ABCA 371 (O'BRIEN, SLATTER, AND ROWBOTHAM JJA)
Rules 3.35 (Judgment or Order by Agreement), 9.2 (Preparation of Judgments and Orders) and 9.6 (Effective Date of Judgments and Orders)

The Parties believed they had arrived at a settlement during a Judicial Dispute Resolution (JDR) session. The Respondent's Trial counsel subsequently drafted an Order and sent it to the Appellant's counsel.

However, as a result of communication difficulties and vacation time, there was some delay in relaying the Order to the Appellant for comment. The Respondent's Trial counsel sent a letter to the JDR Justice invoking Rule 9.2(2)(c), asking the Court to sign and enter the Consent Order as drafted as there had been no request for changes. The Court did so. After reviewing the draft Order the Appellant proposed some changes, however, the Order was already in the hands of the Court. When these circumstances were explained to the Justice he declined to set aside or open up the Order. The Appellant appealed the Order.

The Court found that the Order was clearly irregular and should not have been signed by the JDR Justice. Rule 9.2 "only applies to orders and judgments that are 'pronounced'". An Order that is pronounced is effective from the moment of pronouncement (Rule 9.6). A Consent Order, such as the one at issue in this case is not pronounced, it is created through the Parties' agreement and specifically dealt with by Rule 3.35. In this case, an Order lacking the endorsement of counsel for the Appellant (there were only two parties to the litigation) should not have been characterised as a "Consent" Order.

Rule 9.2(2)(c) authorises "a type of *ex parte* procedure", requiring counsel to make full disclosure of the relevant circumstances to the Justice. The Court held that the JDR Justice had not been provided with a full explanation of the circumstances. Moreover, the process followed in the Court below jeopardised the integrity of the JDR process and the process for entering Orders. The Court of Appeal allowed the Appeal and set aside the Order.

BREITKREUZ v HOLST, 2012 ABQB 632 (GATES J)
Rule 3.44 (When a Third Party Claim May be Filed)

The Plaintiffs, brothers, claimed an equitable interest in the shares of the corporate Defendant, controlled by the individual Defendant, arising from an agreement between the individual Defendants and their father. The Defendants unsuccessfully applied to add the father as a Third Party.

The Court articulated the test as "whether the facts as alleged in the Third Party Claim, if proved, would result in a finding that the alleged third party was liable to the defendants". Gates J. found that there was no air of reality to the Third Party allegations. Even if there was, the allegations would defeat the Plaintiffs' Claim, rather than entitle recovery against the Third Party. There were additional allegations that the alleged Third Party owed a duty to the Defendants, however, the Court found that no facts were pleaded to support the Claim.

Finally, the Court took issue with the Defendants' claim as to damages. Gates J. found that if the Plaintiffs were successful the Defendants would not suffer a loss, rather they would be required to return to holding trust property as required by the agreement.

FUFA v UNIVERSITY OF ALBERTA, 2012 ABQB 594 (MARCEAU J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Appellant appealed a Master's Decision dismissing his suit against the Respondent University. The Action was commenced via a Statement of Claim, and alleged tort and breach of contract. The Action related to the Appellant's forced withdrawal from a doctoral program due to academic issues.

The Court upheld the Master's Decision. The grounds for dismissal were:

(a) The Court had no jurisdiction regarding Claims of an academic nature [Rule 3.68(2)(a)];
(b) The allegations regarding tortious conduct were

frivolous [Rule 3.68(2)(c)];

(c) The Claim was an attempt to circumvent Legislation granting Universities autonomy, and thus was an abuse of process [Rule 3.68(2)(d)]; and

(d) There was no merit to the Claim [Rule 7.3(1)(b)].

DIXON v CANADA (ATTORNEY GENERAL), 2012 ABCA 316 (BERGER, O'BRIEN AND ROWBOTHAM JJA)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

The Claim against the Attorney General of Canada and Her Majesty the Queen in Right of Alberta related to the surrender of reserve lands to Canada and the subsequent sale thereof. In the context of a Summary Judgment Application by the Appellants (Defendants), the Respondents (Plaintiffs) filed 15 constitutional questions. The Appellants applied to strike the constitutional questions. The Justice in Chambers struck 14 of the 15 questions. The Appellants submitted that the Justice in Chambers ought to have struck the remaining question.

The Appellants submitted that the Amended Statement of Claim did not support the constitutional question. The Court held that although the Pleading was not very clear, there was enough pleaded to support the raising of the constitutional question.

Additionally, the Appellants submitted that the raising of the constitutional question was an abuse of process. The Appellants argued that to allow the constitutional question effectively amended the Pleading, and there was no opportunity to oppose this. The Court held that there was no amendment. There was simply a notice that based on the Pleadings and evidence the Court would be asked to consider a constitutional question. The Appellants also submitted that the raising of the constitutional question six years after commencement of the Action was an abuse of process that prejudiced them. The Court held that the Justice in Chambers addressed the issue of prejudice in a not unreasonable manner, and thus was entitled to appellate deference.

The Appeal was dismissed.

NEXXTEP RESOURCES LTD v TALISMAN ENERGY INC, 2012 ABQB 708 (POELMAN J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle), 10.31 (Court-Ordered Cost Award) and 10.33 (Court Considerations in Making Costs Award)

Nexxtep applied to strike portions of the Affidavit of Talisman pursuant to Rule 3.68. Nexxstep argued that the Affidavit contained testimony and attached exhibits which Talisman should have produced at Trial and allegations of damages for which Talisman did not Counterclaim. Talisman submitted that it was entitled to Costs of the Action, while Nexxtep maintained that each party should be responsible for its own Costs.

Justice Poelman noted that the Court may consider any matter relevant to Costs under Rule 10.33, and that there are many matters relevant to Costs that are not relevant to liability and relief. Such matters may be adduced by way of representations of counsel, Affidavit evidence, and *viva voce* testimony. The Court found that the evidence was admissible as it was relevant to determining Costs, and the Application to strike the Affidavit or portions of it was dismissed.

Nexxstep argued that each party should have been responsible for its own Costs because the basis of the original Judgment was not argued by either party, which amounted to divided success. His Lordship stated that the result of the Trial was in favour of Talisman on all issues of substance between the parties. The Court concluded that Talisman, as the successful party, was entitled to its Costs.

Before Trial, Talisman served a Formal Offer to Settle pursuant to former Rules 169(3), 170(5), and 174. Neither Justice Poelman nor the parties suggested that the difference in wording between the aforementioned former Rules and their new Rules counterparts, Rules 4.24 and 4.29, should alter the determination of Costs consequences in this matter.

Talisman argued that it was entitled to Double Costs

under Rule 4.29(3) because: (a) Nexxstep did not accept Talisman's Formal Offer to Settle; and (b) Talisman received an award more favourable than the Offer. The Court found that Talisman's Offer to Settle contained too many alternatives when issues associated with the pending Trial remained undetermined. There was no evidence at Trial to confirm the practical difference of many geological terms used in the Offer to Settle, and Justice Poelman said that Nexxtep was "entitled to precision in the terms of an Offer, particularly at the stage when it has to make its decision". The Court found that it was not proper to award Double Costs in favour of Talisman.

Finally, Nexxtep argued that Talisman's claims for expert charges should have been significantly reduced because of the experts' unclear or unhelpful contribution to the proceedings. The Court found that Talisman's expert charges were reasonable and proper, stating:

> The fact that an expert's evidence was not referred to in my reasons or an expert did not testify … or that some were found not particularly helpful, is not determinative.

RAMPERSAUD v BAUMGARTNER, 2012 ABQB 673 (BURROWS J)
Rules 4.16 (Dispute Resolution Processes) and 15.3 (Dispute Resolution Requirements)

The central issue before Justice Burrows was whether participation in a Dispute Resolution Process under Rule 4.16 could be waived on the consent of the Parties. Counsel for the Plaintiff presented a Consent Order in morning Chambers, which provided that leave of the Court was granted to waive the mandatory Dispute Resolution Process required by Rule 4.16. No evidence was proffered to establish that any of the reasons upon which a waiver could be granted, as set out in Rule 4.16(2), were met. Further, neither of the Parties appeared at the Application, despite the attendance requirement in Rule 4.16(3). Although the Action was commenced in 2006, the new Rules applied because, pursuant to Rule 15.3, discoveries were not completed before the new Rules came into effect.

Counsel for the Plaintiff argued that engaging in a Dispute Resolution Process would be futile, and a waste of resources. However, Justice Burrows was not satisfied that a Dispute Resolution Process would be futile. Even where an immediate resolution is not achieved, a Dispute Resolution Process is useful where it clarifies the issues and gives the Parties a clear sense of how an independent judicial officer assesses the Parties' respective risk.

Justice Burrows held that an Order under Rule 4.16(2) cannot be granted on the basis of consent alone. Rule 4.16 renders engaging in a Dispute Resolution Process nearly mandatory. Such a process was entirely voluntary under the old Rules. If Rule 4.16 could be waived by the consent of the Parties, the intent of the Rule, that Pre-Trial Dispute Resolution would no longer be voluntary, would be frustrated. In any event, Justice Burrows held that the Order could not be granted where the mandatory attendance requirement in Rule 4.16(3) was not satisfied. The Application was dismissed.

KYLE v KYLE, 2012 ABCA 374 (HUNT AND ROWBOTHAM JJA, O'FERRALL JA IN DISSENT)
Rule 4.21 (Involvement of Judge after Process Concludes)

The Parties attended a Judicial Dispute Resolution with Foster J. on April 29, 2011. On May 10, 2011, the Appellant's counsel sent an Interim Corollary Relief Order to the Respondent's counsel. The covering letter indicated that the draft reflected the Agreement reached by the parties at the JDR. The May 10, 2011 form of Order was never signed.

On November 17, 2011, the Parties appeared before Foster J. They worked through a number of issues and appeared to be working toward a form of Order somewhat different from the one sent out on May 10, 2011. The Parties, their counsel and the Justice all participated in the session. Although there was confusion as to whether this was a JDR or a Special Chambers Application, the Court of Appeal found this was a JDR process, but was not a binding JDR.

No Consent Order or Agreement was signed at the JDR on November 17, 2011. On January 23, 2012, the

Respondent's counsel and the Appellant appeared in chambers before Foster J. The Appellant's counsel had ceased to act for him. Foster J. signed an Order presented by the Respondent's counsel. The preamble to the Order stated: "Upon noting that the parties attended a Judicial Dispute Resolution session with the Honourable Justice James L. Foster on April 29, 2011 and again appeared before Justice Foster on November 17, 2011 wherein the parties reached an agreement on the record of the within issues". The Appellant's consent was not endorsed on the Order. The Appellant claimed that the Order did not reflect the Agreements reached November 17, 2011. With regards to this Order, the Court of Appeal stated that:

> The JDR process contemplates that if an agreement is reached, that agreement is documented by way of a consent order or a written agreement [...] Unfortunately, in this case there was neither a consent order nor a written agreement. Two months later the respondent's counsel presented the JDR judge with an order but it was not a consent order. Moreover, it is apparent from the transcript that while there was agreement on some issues, there was no agreement on others. In the result, the November 17, 2011 Order must be set aside.

At the January 23, 2012 appearance, Foster J. signed another Order (the "Second Order") dealing with matters that were not consented to in either of the previous sessions before him. This second Order was granted by the same Judge who conducted the JDR. There had been no agreement on the issues contained in the Second Order.

In its decision to set aside the Second Order, the Court of Appeal made the following comment:

> Rule 4.21 of the Rules of Court deals with the involvement of a judge after the JDR process concludes. The judge facilitating a JDR process in an action must not hear or decide any subsequent application, proceeding or trial in the action without the written agreement of every party and the agreement of the judge. There was no such agreement here. The chambers judge exceeded his jurisdiction and the order must be set aside ...

ZAHN v TAUBNER, 2012 ABQB 636 (VERVILLE J)
Rules 4.29 (Costs Consequences of Formal Offer to Settle) and 10.29 (General Rule for Payment of Litigation Costs)

This was an Application for Costs following the Trial of a matter where the Defendant was ultimately successful in defending the validity of a Will. The Defendant was seeking Costs against the Plaintiff, whereas the Plaintiff was seeking their Costs to be paid out of the Estate on a Party-Party basis. In determining whether or not the Costs would be paid out of the Estate, Verville J. relied on the test outlined in *Babchuk, Petrowski v Petrowski Estate*, 2009 ABQB 753, and found that the Plaintiffs acted reasonably in challenging the Will. Further, the amount of the Plaintiffs' Costs would not significantly deplete the assets of the Estate.

The Court also found that there were numerous Formal Offers to Settle made by both the Plaintiffs and Defendant, including a Formal Offer by the Defendants that was better than the result obtained by the Plaintiffs. However, Verville J. concluded that, because of the "factual matrix of this case and the somewhat unusual circumstances", the failure of the Plaintiffs to beat a settlement offer was not a factor that weighed significantly against them. The Plaintiffs were awarded their Costs on a Party-Party basis from the Estate, and the Defendant's Application for Costs was dismissed.

HOSACK v WIEGERS, 2012 ABQB 739 (MASTER BREITKREUZ)
Rule 4.33 (Dismissal for Long Delay)

The Plaintiff commenced a Civil Action against a Police Officer for head injuries sustained during an arrest. According to the Defendant, the last significant step in the proceeding was a Pre-Trial Conference which took place on October 10, 2006. The Plaintiff was later arrested and held in custody for murder in British Columbia in 2009.

The issue was whether the Civil Action should be Dismissed in accordance with Rule 4.33. The Court considered the issues of whether the Plaintiff was mentally fit to instruct

counsel, as well as whether it was physically possible for him to stand Trial (being that he was in custody in British Columbia). After reviewing the Plaintiff's psychiatric report, Master Breitkreuz determined that the Plaintiff was likely fit to instruct counsel; however, he was not physically able to do so as long as he was imprisoned in British Columbia. The Master then determined that the Plaintiffs ability to advance this Action would depend almost entirely on his being found not guilty of murder. Under the circumstances, Master Breitkreuz made the following Order:

> … that if the plaintiff is acquitted of the murder charge he will have 45 days after the expiry of the appeal period, to take the next significant step in these proceedings. If he is convicted of the murder charge, this action will be dismissed upon the expiry of the appeal period.

In dealing with the strict requirements imposed on the Court by the new drop dead rule, Master Breitkreuz quoted 4.33(2) and made the following comment:

> Rule 4.33(2) provides as follows:
> (2) If the Court refuses an application to dismiss an action for delay, the Court may still make whatever procedural order it considers appropriate.
>
> It is apparent to me that this sub-rule is intended to moderate the harsh effect of 4.33(1).

LAY v LAY, 2012 ABCA 303 (ROWBOTHAM and O'FERRALL JJA, BROOKER J (AD HOC))
Rules 5.1 (Purpose of this Part) 5.2 (When Something is Relevant and Material) and 5.6 (Form and Contents of Affidavit of Records)

The Case Management Judge refused to order further production and particulars. The Appellants appealed on 44 grounds; however, the Court combined the 44 grounds into four.

The Appellants submitted that a party is entitled to inspect any Record referred to in a Pleading. The Pleading read "… all of the records of Steep Rock were sold as assets". The Court held that the Pleading did not refer to a Record; the Pleadings described a chronology of events.

The second ground of Appeal was that the Case Management Judge erred in determining whether Records were relevant and material. The Appellants sought Records that related to a sale of shares to assist in valuating what those shares were worth at the time of a past transaction. The Court held that in determining the value of shares, events that were unknown at the time of the sale, or that occurred afterwards, are not relevant to the determination of the fair value of the shares on the valuation date.

The third ground of Appeal related to redacted records and claims of privilege. The Respondent's Affidavit of Records described certain Records as redacted, and the Respondents claimed privilege over the redacted portion of those Records. The Appellants submitted that the Respondents waived privilege over Records listed in the Respondent's Affidavit of Records. The Respondent's counsel explained that the production was done electronically and portions of otherwise producible Records were subject to a claim of privilege, and that privilege was asserted. The Court held that privilege was properly claimed.

The fourth ground of Appeal was that the Case Management Judge erred in failing to order further particulars. The Case Management Judge held that the Appellant's request was premature as Pleadings had closed, but Questioning had not commenced. The Court held that the Case Management Judge is uniquely placed to appreciate the progress of the litigation and upheld the Case Management Judge's Decision.

TORONTO-DOMINION BANK v SUITEL CANADA EXECUTIVE SUITES CORPORATION, 2012 ABQB 699 (GATES J)
Rules 5.2 (When Something is Relevant and Material), 5.25 (Appropriate Questions and Objections) and 5.30 (Undertakings)

Toronto-Dominion Bank ("TD Bank") brought an Application to compel the Defendant, John Collins ("Collins"),

to provide answers to Undertakings arising from his Questioning. TD Bank also sought an Order declaring that the subject of the Undertakings was relevant and material and allowing TD Bank to question Collin on these matters. Gates J. first noted that the wording of Rule 5.2(1) was identical to the wording of former Rule 186.1 and case authority interpreting the former Rule was applicable to interpreting the new Rule. Under the former Rule, oral Examinations for Discovery were confined to eliciting primary facts which were directly at issue, or facts from which the existence of primary facts might be directly inferred. The question was to be determined by reference to the issues raised by the Pleadings. Gates J. cited *Weatherill (Estate of) v Weatherill*, 2003 ABQB 69 [*Weatherill*], which set out that relevance must be determined with respect to the issues defined in the Pleadings. The Pleadings are also relevant to the issue of materiality. Gates J. quoted from *Weatherill*:

> In deciding whether a particular document is material, one must take a very pragmatic view, viewing the situation from the perspective of the party who must prove the fact in question. At an interlocutory state of proceedings, the Court should not measure counsels' proposed line of argument too finely; if counsel can disclose a rational strategy in which the disputed document plays a material part, that should be sufficient.

In this case, Collins acknowledged during Questioning that he was mistaken as to the then current value of the property when he swore the Affidavits of Value. Gates J. held that Collins opened the door to further Questioning relative to other Affidavits of Value sworn in relation to properties that were subject to earlier foreclosure proceedings. Based on this, Gates J. accepted TD Bank's argument that Questioning relative to earlier transactions could significantly help determine an issue raised in the Pleadings. While the Court was prepared to direct that Collins respond to questions related to earlier foreclosure proceedings, it was not prepared to go so far as to allow TD Bank to question Collins on all 56 foreclosure-type Actions against Collins, or the corporation he solely owned. Gates J. stated that permitting such a broad range of Questioning would serve little purpose other than to unnecessarily delay the proceedings. It was left up to TD Bank to identify a reasonable number for the purposes of Questioning. The Court also directed that TD Bank obtain any of the relevant documents from the earlier foreclosure-type Actions that it wished to present during the continued Questioning, as TD Bank was not to use the Order from this Application to indirectly require Collins to expand his document production obligations.

ATTILA DOGAN CONSTRUCTION v AMEC AMERICAS LIMITED, 2012 ABCA 379 (BERGER, MARTIN AND O'FERRALL JJA)
Rules 5.2 (When Something is Relevant), 5.6 (Form and Contents of Affidavit of Records) 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 Appeal the Court upheld the Case Management Judge's Decision to impose additional Security for Costs to account for the expense of translating some 25,000 documents from Turkish to English.

In response to a challenge under Rule 5.2, the Court noted that "notwithstanding that the disclosure of a document is not an acknowledgement of its relevance or materiality", in accordance with Rule 5.6, "the disclosing party still has the obligation to assess what records it considers may be or are relevant and material". Counsel have an obligation to make a *prima facie* determination of relevance and materiality guided by Rule 5.2.

The Court also noted that the general rules governing Costs, found in Rules 10.29, 10.31 and 10.33, enable the Court to "order any reasonable and proper cost that a party incurs to carry on an action payable to the other side". This could include Costs for translation if a Trial Judge deems it appropriate.

NGUYEN v KOEHN, 2012 ABQB 655 (MOREAU J) Rules 5.3 (Modification or Waiver of this Part), 5.42 (Options during Medical Examination) and 5.44 (Conduct of Examination)

Koehn appealed the dismissal of his Application to dispense with videotaping the Defence medical examination of Nguyen. Nguyen had retained an orthopaedic specialist to complete a medical examination and Koehn selected an Edmonton orthopaedic specialist, Dr. Russell, to conduct a Defence medical examination of Nguyen. Nguyen wished the examination to be videotaped, but Dr. Russell refused the request and indicated that he would not permit a nominee health care professional to be present during the medical examination. Koehn's counsel contacted six specialists to determine if they would perform the Defence medical examination with videotaping; four responded that they would not, while two others said that they would. Counsel for Koehn did not wish to retain any of the four specialists who indicated they would allow videotaping, providing reasons that related to potential bias, credibility issues and not knowing the specialists as he had not previously retained them.

Moreau J. began by noting that Rule 5.44(5) pertained to the conduct of the medical examination itself and not to how the medical examination was recorded. Next, Moreau J. went on to consider Rule 5.3(1) and observed that it is similar to former Rule 216.1(1), which was contained in Part 13, Division 1 of the former Rules, under the title "Discovery of Records". In contrast, former Rule 217(5), which permitted a party being examined to have a nominee medical practitioner present during the examination, was contained in Part 14, rather than Part 13 of the former Rules. Moreau J. stated that this made it appear that former Rule 216.1 did not apply to permit waiver of a party's right to have a nominee present. Further, Alberta case law supported the conclusion that there was no recourse to Rule 216.1 under the former Rules to deprive a party of his or her election to have a nominee present during the medical examination.

In the current Rules, Rule 5.3(1) is contained in Division 1 of Part 5 and Part 5 also contains Rule 5.42(1) in relation to Defence Medical Examinations, which suggested to Moreau J. that the Court now has the power under Rule 5.3(1) to modify or waive the Plaintiff's right of election under Rule 5.42(1) if the conditions set out in Rule 5.3(1) (a) or (b) are met. Moreau J. interpreted Subrule 5.42(1) and (2) as authorizing the Court to limit the manner in which a Plaintiff may exercise his or her options under Rule 5.42(1) in relation to recording or witnessing of a Defence Medical Examination. Based on the inclusion of these specific provisions that do not expressly limit the circumstances in which the Court may exercise its discretion, the Master was not constrained by the conditions set out in Rule 5.3(1).

Further, Rule 5.42(1) does not require that a Plaintiff demonstrate the potential for a *bona fide* concern as to the reliability of the doctor's account of any statements made by the Plaintiff during the examination. Moreau J. was of the view that it was for the party seeking to dispense with videotaping to justify the Court exercising its discretion to deprive the person being examined of his or her entitlement to have the examination videotaped under the new Rule. Moreau J. stated that Rule 5.42(1) now secures the entitlement of a Plaintiff to elect in favour of video and audio-recording of the Defence medical examination, unless the Court orders otherwise.

In this case, there was no evidence indicating why the six specialists refused videotaping and no evidence that it might impair their ability to conduct a proper and effective medical examination. Moreau J. noted that it was the refusal of the specialists to permit videotaping that was limiting Koehn's choices, not the actions of Nguyen in insisting on an option the Legislature determined he could elect to exercise. While Moreau J. stated that, in an appropriate case, where there was cogent reasons provided to justify dispensing with videotaping, the Court had discretion under Rule 5.42(1) and (2) to do so. In this case, the Court was not satisfied that asking for videotaping had a mischievous purpose.

Further, Koehn did not provide specific reasons why he did not wish to select any of the specialists from the pool of those that would allow the examination to be videotaped.

One specialist had even signed a form indicating that while he would not permit the examination to be videotaped, he would permit a nominee to be present and this specialist was one of those counsel for Koehn favoured. Moreau J. held that the Master did not err in declining to confirm the appointment of Dr. Russell to perform the Defence medical examination as requested by Koehn. Such a selection would have deprived Nguyen of all the options set out in Rule 5.42 and in these circumstances, Koehn had not established that Nguyen should be deprived of all of those options. The Appeal was allowed to the extent of entitling Koehn, at his election to be exercised within 30 days of the release of the reasons, to choose a specialist to conduct the examination who would allow videotaping or to choose one who would agree to the presence of a nominee.

BUDD v MBE JET LTD, 2012 ABQB 714 (WILSON J)
Rules 5.5 (When Affidavit of Records Must be Served) and 5.12 (Penalty for Not Serving Affidavit of Records)

After reviewing counsels' written submissions, Justice Wilson awarded the Plaintiffs Costs of $3,500.00, $3,000.00 of which was a penalty for failure to serve an Affidavit of Records in accordance with Rule 5.5.

McALLISTER v CALGARY (CITY), 2012 ABCA 346 (PAPERNY and SLATTER JJA, BROOKER (AD HOC))
Rules 5.6 (Form and Contents of Affidavit of Records) and 5.13 (Obtaining Records from Others)

The Respondent sued the City of Calgary for breach of statutory duty, negligence and bad faith for damages arising from his injuries, which allegedly resulted from a failure by the City to implement adequate security measures at C-Train stations. The Respondent sought disclosure from the City of records that were in the possession of the police, and the City refused disclosure on the basis that they were not the City's records. The question was whether police records were under the "control" of the City such that they were required to be disclosed pursuant to Rule 5.6.

Paperny J.A., writing for the Court, first considered the meaning of "control" and noted that the language under the previous Discovery Rules was different than the language under Rule 5.6. The former Rules required disclosure of records in a party's "possession, custody or power", while the current Rule 5.6 requires a party to disclose all relevant and material records that "are or have been under the party's control". Under the former Rules, for a Party to have power over a record being held by a non-Party, the Party had to have a legal right to access the record or to get copies of it from the non-Party. Paperny J.A. held the view that this test for disclosure under the former Rules remained the same under the current Rules, despite the fact that the language in the current Rules had been simplified to "control". Further, Paperny J.A. stipulated that the right to access the record must be specific to the Party from whom disclosure was sought; merely having the ability to bring an Application for Third Party Disclosure under the Rules of Court was not sufficient to indicate control. It was also not enough that the Party be able to request the record from the non-Party because of an existing relationship between them. There had to be a corresponding ability to enforce compliance with the request, in order to constitute "control" over the record.

The Respondent relied on *Hunter v Eck* (1977), 8 AR 508 (CA), in support of the proposition that police records were in the possession and under the power of the municipality that established the police service. The Court of Appeal focused its deliberation on whether it should overrule this precedent, taking a balanced consideration of certain criteria, including the age of the precedent, whether it had been relied upon so as to create settled expectations, whether it contained an obvious, demonstrable flaw, and whether it was classified as Reasons for Judgment Reserved or a Memorandum of Judgment.

In the end, the Court of Appeal held that the *Hunter* Decision could not serve as the basis for any conclusion that the City had a legal right to access the records of the Police, so as to give the City "control" over those records for the purpose of Rule 5.6. The Respondent did not point to any other basis on which the City could be said to have control over those records, and no such basis could be found in the *Police Act*. Paperny J.A. emphasized that while the City could make an Application for the records under Freedom of Information legislation or in a Court Application

for Non-Party Records, pursuant to Rule 5.13, both of those options were equally available to the Respondent and as such, did not suffice to establish control on the part of the City. The Appeal was allowed and the Order directing the City to request the records of the Police was set aside. Either Party was left with the option of making an Application pursuant to Rule 5.13 to obtain relevant and material records from the Police.

JAMES v NORTHERN LAKES COLLEGE, 2012 ABQB 588 (MARCEAU J)
Rule 6.14 (Appeal from Master's Judgement or Order)

Upon the Application of the Defendants, the Master summarily dismissed the Plaintiff's Action. The Plaintiff Appealed the Master's Decision, which was based on the finding that the Court had no jurisdiction over the essential character of the dispute, because it was governed by a collective agreement between the parties and the *Post-Secondary Learning Act*, SA 2003, c P-19.5.

Marceau J. stated that the standard of review on an Appeal of a Master's Decision on all issues is correctness. Marceau J. reviewed the relevant facts and law and held that the Master made no error of law or fact. The Appeal was dismissed.

EDMONTON POLICE SERVICE v ALBERTA (INFORMATION AND PRIVACY COMMISSIONER), 2012 ABQB 595 (ROSS J)
Rules 6.28 (Restriction on Media Reporting and Public Access to Court Proceedings) and 6.32 (Notice to Media)

This was a Judicial Review Application by the Edmonton Police Service ("EPS") to quash a Decision of an Adjudicator in the Office of the Information and Privacy Commissioner ("OIPC"), ordering the EPS to disclose portions of its Professionalism Committee's Final Report (the "Report") to the Criminal Trial Lawyers' Association ("CTLA"). The Committee issued its report in 2006, which included information from various outside agencies, including Alberta Justice. CTLA made an access request for the Report. EPS released most of the Report to the CTLA, but withheld some sections, pursuant to the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*"FOIPPA"*). CTLA requested a review by OIPC. The OIPC Adjudicator held that, pursuant to *FOIPPA*, the Report should be disclosed in its entirety. The EPS brought an Application for Judicial Review on the basis that the Adjudicator incorrectly interpreted the relevant sections of *FOIPPA*, and that the evidence before the Adjudicator established that the outside information was supplied to the Committee in confidence. The EPS further argued that the Adjudicator breached the requirements of procedural fairness.

Ultimately, the Application for Judicial Review was dismissed on the basis that the Adjudicator did not breach the rules of procedural fairness, and on the basis that the Adjudicator's conclusion that the outside information was not supplied in confidence was reasonable. Before coming to a decision on these issues, Justice Ross held that the records that were the subject of the CTLA access to information request, the *in camera* documents referred to by the Adjudicator, should be sealed. Justice Ross waived the requirement under Rule 6.32 for Notice to the Media of the Application to seal the *in camera* documents, pursuant to the Court's discretion under Rule 6.28. Justice Ross held that sealing records that are subject to an access to information request, and documents that would reveal the content of those records, is mandated by *FOIPPA*.

STATOIL CANADA LTD v CADILLAC FAIRVIEW CORPORATION, 2012 ABQB 618 (KENT J)
Rules 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

The Plaintiff, Statoil, leased several floors of an office building from the Defendant, Cadillac Fairview. The lease was conditionally assigned by Statoil, with the authorization of Cadillac, to Homburg, and Homburg subsequently signed subleases with several companies. Statoil commenced this Action claiming that it and the subtenants were co-sureties, each having guaranteed Homburg's obligations to Cadillac. The Claim was based on the different rent rate that was contained in the head lease and the rent rate in the subleases to the subtenants. The Application before the Court was brought by the subtenants for Summary Judgment, pursuant to Rules 7.2 and 7.3.

Kent J. first noted that the test for Summary Judgment that the subtenants were required to meet was a high one which required that it be plain and obvious that the Action could not succeed. Statoil argued that there needed to be a full hearing because of the number of documents that needed to be considered to determine the obligations of the parties; however, Kent J. did not agree. Kent J. stated that this case was about the interpretation of several documents and the facts required to set the context within which to interpret the contracts were not contentious facts. Based on this finding, Kent J. reviewed the documents submitted for each of the five issues raised by the subtenants and made a finding for each of the issues. As a result of this review, Kent J. dismissed the Statoil Action.

TORONTO DOMINION BANK v POON, 2012 ABQB 606 (KENT J)
Rule 7.3 (Summary Judgment)

The Defendant, Poon, was a straw buyer of a residential property. In return for a payment of $11,000, Poon agreed to be the legal owner of a property and sign a mortgage to the Plaintiff. Poon argued that he was told by the corporation that orchestrated the scheme that the transaction was legal. Poon further argued that he insisted that a lawyer be involved in the transaction, in order to ensure that it was legal. Poon attended at the law offices of the Third Party Defendant, Blumell, to sign papers, including the Mortgage, a Purchaser's Acknowledgement and a Statutory Declaration. The documents signed by Poon included statements that Poon was personally liable for default under the Mortgage, and that the property must be owner-occupied. Poon did not tell Blumell about the circumstances surrounding the purchase of the property.

Blumell brought an Application for Summary Judgment, arguing that the Claim was bound to fail on the basis of the principle of *ex turpi causa non oritur actio* [from a dishonorable cause an action does not arise]. The Application was granted by a Master, and Poon appealed.

Justice Kent held that a Party moving for Summary Judgment must show that there is no genuine issue for Trial, or that it is plain and obvious that the Claim cannot succeed. In order for the *ex turpi* doctrine to apply, the act forming the basis of the Claim must be causally linked to the illegal act. Justice Kent held that the foundation of the doctrine is that the wrongdoing must be related to the loss for which recovery is claimed.

Poon argued that Summary Judgment should not be granted because there had not been a finding that Poon was a willing participant in the illegal act. Poon argued that only a Judge, at Trial, weighing the evidence, can make such a finding of fact. Poon argued that his Claim was for indemnity, and that he sought compensation to put him back into the position he would have been in but for the conduct of Blumell.

Blumell argued that a finding could be made that Mr. Poon was a willing participant in the fraudulent scheme. Poon had not provided any explanation for why he thought it was legal to sign documents stating facts that were not true, and accept $11,000 for a couple of hours of work. Further, if the Claim against Blumell merely related to compensation rather than the illegal act, Poon would be overcompensated because he had received $11,000 for his participation in the fraudulent scheme.

Justice Kent held that Blumell had no knowledge that Poon was receiving a payment to buy the property for someone else. Justice Kent further held that Poon was a willing participant in an illegal act. Poon was an educated man who had previous experience in the real estate market. In the circumstances, Justice Kent determined that Poon's claim of innocence was not credible.

Justice Kent held that the ex turpi doctrine applied, because allowing the Claim to succeed would create an inconsistency in the law. Poon engaged in an illegal act. Had the real estate market continued to rise, the property may have been resold, and Mr. Poon would have earned $11,000 for his actions. However, by intentionally not disclosing to Blumell that he was a straw buyer when there was a risk the real estate market would fall, Poon had a claim in his back pocket against his lawyer. Poon hedged his bets. If this was permitted, straw buyers effectively had no risk. The Court would, in essence, be saying that such an

act is both illegal and legal. Such an approach would create an inconsistency in the law which attacks the integrity of the legal system. The Appeal was dismissed.

INTACT INSURANCE v LEUNG, 2012 ABQB 608 (BELZIL J)
Rule 7.3 (Summary Judgment)

Intact Insurance applied for Summary Judgment against the Defendant, O'Onna Leung, a former employee. Intact Insurance alleged that Ms. Leung and her husband, also a former employee, defrauded Intact Insurance while they were employees. Mrs. Leung admitted to defrauding the Plaintiff, and consented to Summary Judgment.

Ms. Leung denied that Mr. Leung was involved or had any knowledge of her fraudulent conduct. Mr. Leung maintained that he had no knowledge of his wife's conduct and sought Summary Dismissal of the Claim against him on this basis.

Justice Belzil confirmed that Summary Disposition is not available where credibility is genuinely at issue. The Court noted that while Mr. Leung claimed he had no knowledge of his wife's conduct, he made numerous withdrawals and purchases out of the bank account containing the converted funds over an extended time period. Justice Belzil concluded that these evidentiary issues could not be resolved without findings of credibility as to what Mr. Leung knew or ought to have known. Mr. Leung's Application for Summary Dismissal was dismissed.

ARBUTUS CAPITAL LEASING LTD v CSM MEDIA INC, 2012 ABQB 650 (MASTER SCHLOSSER)
Rule 7.3 (Summary Judgment)

This was a Summary Judgment Application by a lender against an individual. One of the individual Defendants, Steven Agar, was the principal and 45 percent owner of CSM Media Inc. ("CSM") and negotiated a loan with Arbutus Capital Corporation. This contract was immediately assigned "for value" to Arbutus Capital Leasing Ltd. and payments were made for a while before the loan went into default. Another individual Defendant, Gary Nash, who worked with CSM and was considered a part owner, claimed that he thought he was signing the loan agreement for the company and would not be held personally liable. After briefly considering the evidence presented by Mr. Nash, Master Schlosser noted that a Respondent to a Summary Judgment Application only had to demonstrate that he had an "arguable case" in order to avoid Judgment. Further, he did not have to prove his case on the ordinary civil standard. Master Schlosser held that Mr. Nash demonstrated an arguable case only by the smallest of margins, as there was just enough to make the Plaintiff's case fall short of the very high standard required of a Plaintiff in a Summary Judgment Application. Master Schlosser did note that some of the evidence seemed to be "incredible or contradictory" and had the potential to detract from, rather than enhance, Mr. Nash's position; however, the Court was not permitted to assess credibility or weigh evidence in a Summary Judgment Application.

Finally, Rule 1.2(2)(c) was peripherally referred to by Master Schlosser, but not considered. Master Schlosser concluded by stating that Mr. Nash should reflect on Rule 1.2(2)(c) and consider the possibility of settlement. Master Schlosser stated that Mr. Nash rolled the dice once by not reading the contract and was about to "roll them again when the lawsuit proceeds".

ELBOW RIVER MARKETING LIMITED PARTNERSHIP v CANADA CLEAN FUELS INC, 2012 ABCA 328 (PICARD, BIELBY and O'FERRALL JJA)
Rule 7.3 (Summary Judgment)

The Court of Appeal reviewed a Chambers Judge's decision to allow an Appeal from the Decision of a Master, overturning a grant of Summary Judgment. The Chambers Judge held that the allegation that the two Defendant corporations were in a partnership raised an issue to be tried.

The Court noted that Summary Judgment must only be granted "if there is no genuine issue of material fact requiring a trial … the question is whether an issue of law can fairly be decided on the record before the court". The Court upheld the Chambers Judge's Decision holding that the Defendant corporations had failed to meet their burden and prove that it was plain and obvious that there was no partnership between them.

However, the Court found that the Chambers Judge erred in granting Summary Dismissal of the Plaintiff's claim in agency. The Chambers Judge improperly required proof of all the requirements for a finding of agency. The Court found that there was sufficient evidence to warrant a Trial on the issue. Similarly, the Court found that it was premature to rule that the Plaintiff's claim to pierce the corporate veil could not succeed and overturned the grant of Summary Dismissal on that issue as well.

SHN GRUNDSTUECKSVERWALTUNGSGESELLSCHAFT MBH & CO SENIORENRESIDENZ HOPPEGARTEN-NEUENHAGEN KG v HANNE, 2012 ABQB 624 (ERB J)
Rules 7.5 (Application for Judgment by Way of Summary Trial), 7.8 (Objection to Application for Judgment by Way of Summary Trial) and 7.9 (Decision After Summary Trial)

In Summary Trial proceedings, the Plaintiff sought recognition and enforcement in Alberta of a Judgment issued by the Berlin Regional Court of Germany, as well as the associated Costs Judgment. The Defendant raised a preliminary issue, arguing that Summary Trial proceedings were inappropriate to determine the enforceability of the foreign Judgment.

The Plaintiff argued that Summary Trial would be inappropriate because (1) *viva voce* evidence was necessary to determine the issues, (2) the translation of documents was unreliable, (3) expert evidence would be required to understand the German Court system, and (4) conventional pre-trial procedures and a full civil Trial were necessary to resolve conflicts in the expert evidence before the Court. The Court disagreed.

The Court affirmed that jurisprudence decided under the old Rules remains relevant in determining the suitability of Summary Trial. Thus the Court was guided by the test articulated in *JN v GJK*, 2004 ABCA 394, and the factors identified in *Pecek v Fedun*, 2007 ABQB 133 and *Duff v Oshust*, 2005 ABQB 117. Summary Trial is appropriate if (1) the Court can decide disputed questions of fact through the means available in a Summary Trial, and (2) It would be just to decide the issues through those means.

In determining whether the test for Summary Trial is met, a Court should consider, *inter alia*, the amount of money involved, the complexity and urgency of the matter, prejudice, costs, the import of Questioning in the context of the case, and whether resolution will depend on findings of credibility.

In this case, the Court found that although the Judgment for over 1.5 million put a large amount of money in issue, Summary Trial proceedings were inappropriate. Erb J. found that the protracted nature of the proceedings resulted from the Defendant's conduct, rather than the complexity of the case. Noting that counsel for the Defendant characterised Questioning in this dispute as a fruitless exercise, the Court held that there was little likelihood that Questioning would bolster the Defendant's evidence. The Defendant had also failed to examine other potential witnesses when given the opportunity. Although there were differences of opinion in the expert Affidavits explaining the German legal system, the Court held that these differences were not sufficient to require a full Trial to resolve issues of credibility. Furthermore, Erb J. held that the conflict in the Affidavit evidence did not have to be resolved to determine the issues before the Court.

TU v ZISCHE, 2011 ABQB 775 (LEE J)
Rule 8.5 (Trial Date: Scheduled by the Judge)

The Court had previously 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. Following that Decision, the Plaintiff requested additional time to allow for an expert's report to be completed. The Defendant objected to any further delay, and argued that the Plaintiff's proposed expert's report may not even be admissible. Justice Lee agreed that the matter had already endured a lengthy delay and confirmed his previous Order that the matter be set down for Trial. However, Justice Lee further directed that the Defendant had 60 days from receipt of the expert's report to formally object to its admissibility.

KULAK v AG CLARK HOLDINGS LTD, 2012 ABQB 672 (VERVILLE J)
Rule 8.20 (Application for Dismissal at Close of Plaintiff's Case)

A.G. Clark Holdings Ltd., Giebelhaus Developments Ltd., 680262 Alberta Ltd. ("680262"), and Douglas Cannam ("Cannam") (collectively the "Defendants") applied for a Non-Suit against the Plaintiffs Laird Kulak and DLK Management Services Ltd. at the conclusion of the Plaintiffs' case. The Plaintiffs alleged that they held a partnership interest in the corporate partnership of the Defendants and that shares in 680262 were held in trust by Cannam on behalf of the Plaintiffs.

Rule 8.20 provides that at the close of the Plaintiff's case, the Defendant may request the Court to dismiss the Action on the ground that no case has been made, without being asked to elect whether evidence will be called. Justice Verville cited *Prudential Securities Credit Corp, LLC v Cobrand Foods Ltd*, 2007 ONCA 425, in setting out the test on a Non-Suit Motion:

> On a non-suit motion, the trial judge undertakes a limited inquiry. Two relevant principles that guide this inquiry are these. First, if a plaintiff puts forward some evidence on all elements of its claim, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a prima facie case, the judge must assume the evidence to be true and must assign 'the most favourable meaning' to evidence capable of giving rise to competing inferences.

The Plaintiffs produced financial statements which suggested that they received net profits from the Defendants' partnership and draws from the capital of the partnership. Also, the Plaintiffs produced organizational documents which contemplated that Cannam may have held shares in 680262 on behalf of the Plaintiffs.

The Court found that the Plaintiffs led some evidence to further their Claim against the Defendants, and added that Non-Suit Motions should be granted rarely unless there are the clearest of circumstances. Giving the Plaintiffs' evidence "the most favourable meaning", his Lordship concluded that the evidence was capable of giving rise to competing inferences and the Application was dismissed accordingly.

EDMONTON FLYING CLUB v EDMONTON REGIONAL AIRPORTS AUTHORITY, 2012 ABQB 664 (VEIT J)
Rules 9.3 (Dispute Over Contents of Judgment or Order), 9.13 (Re-Opening Case) and 508 (Stay of Enforcement)

Pursuant to the provisions of Rule 9.3, the Parties asked the Court to settle the minutes of an Order arising from the Court's written Decision issued on September 13, 2012. There were several contested issues. After reviewing each of the issues, the Court concluded that the form of Order proposed by the Edmonton Flying Club best reflected the Court's Decision.

One of the contested issues was whether the Order should take into account a new development which occurred after the September 13, 2012 Decision. The new development was the City of Edmonton's decision, on October 5, 2012, to serve a Notice of Intention to expropriate the interests of the Flying Club, and others, in the Edmonton City Centre Airport lands. In concluding that the Order should not take this into account, the Court stated that:

> …although the law allows a court to vary its order before it is entered … that power should not be lightly exercised [original citation omitted]

Further, the Court added that:

> …[B]ecause the court's [earlier] decision … was only an interlocutory decision, the City of Edmonton's application to vary that decision based on the intention to expropriate, can still be heard in a special chambers hearing as a normal application to vary an existing interlocutory decision based on a material change of circumstance. The court's [earlier] decision … was not a final decision or judgment in the matter; unless a final judgment is varied or struck before it is entered, it can only be appealed. However, an

> interlocutory order can easily be varied if material new circumstances justify a variance …

Another contested issue was whether, pursuant to Rule 508, the Court should stay its Decision of September 13, 2012 to allow the City to appeal that Decision. Veit J. first noted that: "pursuant to the provisions of Rule 508(3) a refusal by me, as the judge appealed from, will not prevent the respondents from applying for a stay to the Court of Appeal…". In concluding that the Decision should not be stayed, Veit J. cited the following two reasons:

(a) The City has not yet appealed Her Ladyship's Decision; and
(b) The Decision represented Her Ladyship's best understanding of the evidence and the law.

HESTBAK v HESTBAK, 2012 ABQB 633 (GRAESSER J)
Rule 9.4 (Signing Judgments and Orders)

The Plaintiff brought an Application to adjust Section 3 and Section 7 expenses for 2011, and to set ongoing support payments. The Defendant opposed the Application on the basis that any adjustments should be in accordance with the 2008 Minutes of Settlement. The Defendant also sought sole custody of the child.

One of the Defendant's positions related to objections surrounding an Order of Justice Graesser. The Defendant was self-represented and, as such, Justice Graesser invoked Rule 9.4(2)(c) when the Order was made. Rule 9.4(2)(c) provides that the Clerk may sign an Order if the Court directs that approval of the form of Order by a Party is not required. Justice Graesser held that although he did not invoke Rule 9.4(2)(c) explicitly, he clearly indicated to Plaintiff's counsel that the Defendant's signature was not required. The Order was prepared by the Plaintiff's counsel and submitted directly to Justice Graesser for signature. Justice Graesser held that although it may not have been explicit, Rule 9.4(2)(c) was invoked, and therefore the Defendant's signature was not required on the Order.

NORTHLAND MATERIAL HANDLING INC v PARKLAND (COUNTY), 2012 ABQB 586 (VEIT J)
Rules 10.29 (General Rule for Payment of Litigation Costs) and 10.31 (Court-Ordered Costs Award)

The Respondents sought an indemnity for Costs on the basis that the Applicants were unsuccessful in their claim alleging that the Respondents acted without good faith and for an improper purpose in making zoning decisions. In the alternative, the Respondents sought increased Costs on the basis that the Judicial Review Application was complex.

The Court noted that the plain reading of the Rules would require Costs to be calculated under Column 1, because the Originating Notice did not seek monetary relief. However, the Court also held that the awarding of Costs is discretionary. In relation to the unproven "bad faith" allegations, the Court held that usually unproven allegations of fraud attract Costs on an indemnity basis, or at least attract an obligation to pay heavy Costs. However, this principle does not apply to unproven allegations of "bad faith". Taking all of the submissions into consideration, the Court awarded the Respondents increased Costs on the basis that there was a lot at stake for both parties, and it was a complex matter.

HSBC BANK CANADA v LOURENCO, 2012 ABQB 648 (GOSS J)
Rules 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and 13.6 (Pleadings: General Requirements)

HSBC successfully sued Triple J Armature Inc. ("Triple J"), Lourenco, and Salokangas (collectively the "Defendants") for breach of trust. HSBC claimed that it was entitled to Solicitor and Client Costs pursuant to the General Security Agreement ("GSA"), which provided that the Defendants would pay any Solicitor and Client Costs in connection with the GSA. Justice Goss found that the language in the GSA was clear and unambiguous to sufficiently support a claim for Solicitor and Client Costs. The remaining questions before the Court were:

1. Whether the Defendants received sufficient

notice that the Costs covenants in the GSA would be relied upon by HSBC;
2. What the appropriate Costs award should have been in this case; and
3. Whether Costs should have been allocated between the Defendants.

Justice Goss wrote that "Rule 13.6 provides that a pleading must include a statement of any matter in which a party intends to rely that may take another party by surprise … To consider whether there would be surprise the Court must look to the sophistication of the parties and their negotiating power." Justice Goss found that the claim for Costs pursuant to the GSA did not take the Defendants by surprise. They were sophisticated businessmen and assisted by legal counsel, and it should not have been a surprise that the GSA contained a clause requiring payment of Solicitor and Client Costs. His Lordship added that in the event he was wrong in his conclusion, he would address Costs in the absence of the covenant in the GSA.

Considering Rule 10.33(1) and (2), Justice Goss found that there was no basis to award Solicitor and Client Costs based on the conduct of the parties. There was no misconduct during the litigation, and the pre-suit breaches of trust and fiduciary relationship were not serious enough to attract punishment and deterrence though an award of Solicitor and Client Costs.

The Court allocated Costs under Rule 10.31(3)(c) and (d) between Lourenco and Salokangas in accordance with the time expended in relation to HSBC's claim against each of them as directors of Triple J. Justice Goss found that apportioning 75% of the Costs to Lourenco and 25% to Salokangas was appropriate in the circumstances.

COURT v DEBAIE, 2012 ABQB 640 (ROSS J)
Rules 11.25 (Real and Substantial Connection) and 13.18 (Types of Affidavit)

The Action involved the posting of allegedly defamatory remarks by the Defendants on their Facebook pages. The Statements of Claim alleged that at the time the Defendants posted the comments on their Facebook pages, the Facebook options on the pages were set to open access. As a result, anyone with an internet connection could view the comments. As well, the posted comments would appear on the wall of the Defendants' Facebook friends.

The Defendants sought to set aside the service outside of Alberta of the Statements of Claim. Alternatively, the Defendants sought to dismiss or stay the Actions on the grounds that there was no real and substantial connection, or pursuant to the doctrine of *forum non conveniens*.

The Defendant, Debaie, filed an Affidavit stating that only seven of her 289 Facebook friends resided in Alberta. Six of the seven Facebook friends had no connection with the Plaintiffs and one was the Plaintiff, Ms. Court. The Defendant, Ms. MacKay, deposed that only one of her 51 Facebook friends resided in Alberta.

The Plaintiffs' Affidavits stated that they accessed the Defendants' Facebook pages and viewed posts containing defamatory statements against them. They gave evidence that the posts were visible to anyone with access to the internet. They also stated that they were advised by their sister who lives in Alberta that she viewed the Facebook pages and saw the defamatory comments. The Defendants took issue with this hearsay evidence.

The Court allowed the hearsay evidence. Rule 13.18 requires personal knowledge of the Affiant where the Affidavit is "used in support of an application that may dispose of all or part of a claim". In this Application, the hearsay evidence was used by the Respondent, so it was not used in support of an Application that may dispose of all or part of a claim. Additionally, setting aside service does not dispose of all or part of a claim.

The Court applied *Éditions Écosociété Inc v Banro Corp*, 2012 SCC 18 (*"Éditions"*). *Éditions* applied the jurisdiction framework to a defamation case. The Supreme Court of Canada in *Éditions* held that the tort of defamation is "crystallized upon publication of the libellous material" and "publication occurs when libellous material is read by a third party".

The Court held that the evidence supports an arguable case that the allegedly defamatory material was published in Alberta, and that is sufficient to establish the presumptive connecting factor of a tort committed in Alberta. Therefore, there was a real and substantial connection between this jurisdiction and the Action. Additionally, the Court held that the Defendants did not establish that there was a clearly more appropriate forum.

The Application was dismissed.

GEOPETROL INTERNATIONAL LTD v ALLIANZ INSURANCE COMPANY OF CANADA, 2012 ABQB 613 (MASTER SMART)
Rule 15.4 (Dismissal for Long Delay: Bridging Provision)

Allianz Insurance sought to have the Action dismissed for long delay. The Respondent, Geopetrol International, argued that a course of conduct leading to a signed Consent Order regarding the filing of an Amended Amended Statement of Claim significantly advanced the Action and, additionally, amounted to a Standstill Agreement.

The Consent Order was never entered, and the Amended Amended Statement of Claim was never filed and served. Under the circumstances, the Court held the Action was not significantly advanced and granted the Summary Dismissal Application. In relation to the argument regarding the existence of a Standstill Agreement, the Court held that although *Bugg v Beau Canada Exploration Ltd*, 2006 ABCA 201, opens the door to find a Standstill Agreement by implication, "it does not require express negativing in every communication to avoid such a consequence". The Court held that there was no Standstill Agreement.

PRINCE v EDMONTON (CITY), 2012 ABQB 637 (MASTER SCHLOSSER)
Rule 15.4 (Dismissal for Long Delay: Bridging Provision)

The Plaintiff was a passenger on an Edmonton Transit Service bus when it was struck by another bus. The City of Edmonton was served with the Statement of Claim and asked not to be Noted in Default without prior written notice. Plaintiff's counsel granted this indulgence to the City, but no Defence was ever filed.

The Plaintiff apparently lost interest in the lawsuit, and disappeared. Nothing further happened until the City of Edmonton told Plaintiff's counsel that the City was going to proceed with an Application for Dismissal for Delay. Plaintiff's counsel responded by Noting the City in Default.

The City of Edmonton applied for an Order Striking the Action for Long Delay. There had been a gap of at least seven years between the service of the Statement of Claim and the Application to Strike for Long Delay. The Court held that events after the gap do not count unless the Defendant participates. Further, a Defendant who has been Noted in Default may make an Application to Strike for Long Delay (as was the case under former Rule 244.1).

The Court noted that Rule 15.4 is mandatory, and that no exceptions apply to the circumstances. Accordingly, the Application was granted and the Action dismissed.

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION, LOCAL 707 v SUNCOR ENERGY INC, 2012 ABCA 307 (WATSON JA)
Rule 508 (Stay of Enforcement)

The Applicant unsuccessfully sought a stay pending the Appeal of an injunction which stopped it from implementing a random drug and alcohol testing policy for union workers at a worksite. The union had grieved the policy and successfully sought an injunction until the grievance was heard.

The Court outlined the three part test required for a Stay: (1) a serious question; (2) irreparable harm in the absence of a Stay; and (3) that the balance of convenience favours granting a Stay. In the instant case, both sides argued that there would be irreparable harm if they were unsuccessful before the Court.

Watson J.A. noted that the exercise of a stay discretion has its roots in equity, which engages a holistic view of the positions of the parties. However, the Court cautioned against delving into the substantive merits of the Appeal

when making a Decision on an Application for a Stay.

The Court was satisfied that the Applicant's expressed concern to ensure a safe workplace constituted a serious question. In assessing irreparable harm, the Court noted that the likelihood of the apprehended injury and its possible consequences must be part of the assessment. The Court was persuaded that relieving the injunction so that the new policy could be implemented in advance of the Appeal, to be heard a little over a month later, would not create a sufficient increase in the margin of worker safety to outweigh the potential harm to human dignity engendered by the potentially improper intrusion into workers' privacy. In light of the short time pending before the Appeal, the Court held that balance of convenience favoured upholding the injunction. The prospect of an actual increase in the margin of safety was outweighed by the very real and immediate impact upon Union members' privacy.