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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.

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.

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ERKETU v WILSON, 2012 ABQB 748 (MASTER WACOWICH)
Rules 1.2 (Purpose and Intention of These Rules), 5.35 (Sequence of Exchange of Experts' Reports) and 5.41 (Medical Examinations)

The question before the Court was when Expert Medical Reports should be exchanged by the Parties. The Defendant argued that a determination as to whether he would make a Rule 5.41 Application for a Medical Examination of the Plaintiff was not required until the Plaintiff provided his Experts' Reports pursuant to Rule 5.35—Rule 5.35 provides that if a Party intends to rely on expert evidence at Trial, the Experts' Reports must be served in a specific sequence. The Party who bears the primary burden of proof must serve their Experts' Report first, followed by the rebuttal Experts' Reports of the other Parties. The Party who served the initial Experts' Report may then serve surrebuttal Experts' Reports. Master Wacowich noted that no such sequence was required under the former Rules, which provided that each Party had to serve their primary Experts' Reports not less than 120 days before Trial.

Experts are required to provide their honest opinion as to the state and extent of the Plaintiff's injuries. It is more likely that the Defendant's expert will provide a fresh opinion if he or she is not influenced by another expert opinion. As such, there was no reason why the Defendant could not or should not make a determination on the Rule 5.41 Application within a reasonable period of time after Questioning. Master Wacowich held that the old practice should be continued, and that the Plaintiff should not be required to produce its reports until the Defendant has obtained its Rule 5.41 report or waived its right to apply for one. Although Rule 5.41 does not clearly provide for such an approach, it does not preclude it. Pursuant to Rule 5.35(2), Master Wacowich ordered that the Plaintiff was not required to serve his Experts' Reports without further Court Order.

Master Wacowich also noted that Rule 5.41 does not include a provision for the Court to direct the Defendant to make an election under Rule 5.41. However, Rule 1.2 provides that the Rules are intended to facilitate the quickest means of resolving a Claim at the least expense.

Master Wacowich directed that within two months the Defendant was required to either make a Rule 5.41 Application or advise Plaintiff's counsel that he would not be making such an Application. Failing that, the Plaintiff's Experts' Reports would be provided. Should the Defendant thereafter attempt to make a Rule 5.41 Application, Master Wacowich recommended that members of the Court refuse the Application on the basis that such an Application is not in good faith and not in harmony with the preferred and longstanding practice of the Court.

KENT v MARTIN, 2013 ABQB 36 (TILLEMAN J)
Rules 1.2 (Purpose and Intention of these Rules), 5.25 (Appropriate Questions and Objections) and 6.11 (Evidence at Application Hearing)

The Applicant proposed to have in-Court cross-examinations on the Affidavits of four Parties that had made Applications for Summary Judgment. The Applicant claimed that, due to the complexity of the litigation and a multitude of problems arising from Discovery, this step was necessary to resolve the claim in a timely and cost effective way. Counsel for each of the Respondents argued that Rule 6.11(1)(g) gives the Court considerable discretion, but since there is no case law on the new Rule, the limiting principles under former Rule 276(1) should apply, and that oral examination at Application hearings should only be allowed in "exceptional" or "extraordinary" circumstances.

The Court agreed with the submissions put forward by the Respondents, stating:

> I have contemplated the options including the normal approach (Rule 5.25) and the exceptional approach under Rule 6.11(1)(g). I have thought through the time demanded of the proposed judicial role, which would mean I supervise examination and objections, giving rulings "on the spot". While … there would be some efficiency to having any objections ruled on simultaneously, that would also be unpredictable and very time consuming process. In the result, the proposed use of Rule 6.11(1)(g) risks significantly extending the discovery process. I do not consider that appropriate.

The Court concluded by dismissing the Rule 6.11 Application:

> For the reasons above, the application to invoke Rule 6.11(1)(g) is dismissed. The new Rule, while written somewhat differently than previous Rule 267, is still a discrete option that should be used only if other methods of resolving objections or questioning difficulties have failed. Judicial resources are indeed scarce.

BOHN v PG&E CORPORATION, 2013 ABQB 77 (MASTER HANEBURY)
Rules 1.2 (Purpose and Intention of These Rules), 7.3 (Summary Judgment) and 13.6 (Pleadings: General Requirements)

The Plaintiffs brought an Action for wrongful dismissal against the Defendant Corporation. The Defendant applied for Summary Judgment, and argued that the Plaintiffs were terminated for cause for converting company funds.

Citing *Forwest Development Enterprises Ltd v High River Regional Airport Ltd*, 2012 ABQB 785, Master Hanebury held that a Plaintiff responding to a Summary Judgment Application need not prove each element of its cause of action. Rather, a Plaintiff need only raise enough evidence to justify the Action going to Trial. A Respondent may defeat a Summary Judgment Application by demonstrating disputes with respect to questions of fact, or with respect to points of law that are unsettled or cannot be easily resolved in the context of the factual disputes. The existence of a question of law will not, without more, defeat a Summary Judgment Application.

Master Hanebury held that, while it was clear that the Plaintiffs converted company funds, it was not clear that the conversion ended the trust relationship between the Parties in a way that justified the Plaintiffs' immediate termination. The facts demonstrated that the Plaintiffs were allowed continued access to the Defendant's offices and e-mail, and continued as signing authorities on the Defendant's bank accounts. As such, Master Hanebury dismissed the Summary Judgment Application because the

Defendant had not demonstrated that there was no genuine issue for Trial.

The Defendant further argued that Summary Judgment should be granted on the basis that the Plaintiffs failed to demonstrate any damages. In a Summary Judgment Application, the Respondent need only demonstrate a genuine issue for Trial, and is not required to prove its damages. Although the Plaintiffs' provision of an unsubstantiated estimate of damages and a bare assertion that expert evidence would be proffered at Trial was insufficient to defeat a Summary Judgment Application, anomalies in the Defendant's evidence with respect to damages were an insufficient basis upon which Summary Judgment could be granted.

The Defendant further argued that Summary Judgment should be granted on the basis that releases executed by the Plaintiffs immunized the Defendant from their claims. Rule 13.6(3) requires that a pleading set out any matter on which a Party intends to rely, including payment and release. The purpose of Rule 13.6(3) is that a Plaintiff not be caught by surprise by unanticipated defences. Master Hanebury held that because the requirements of Rule 13.6 were not met with respect to this defence, the Defendant's argument relating to the release would not be considered. However, the Summary Judgment Application would be renewed on the release issue after the Statement of Defence was amended to include this defence.

CHISHOLM v LINDSAY, 2013 ABQB 157 (KENNY J)
Rules 1.2 (Purpose and Intention of These Rules), 4.24 (Formal Offers to Settle), 4.29 (Cost 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 a Costs Award)

The Defendant applied to have a settlement offer, that was neither a Calderbank offer nor a formal offer pursuant to the Rules, considered by the Court in determining costs. The Plaintiff argued that the basic rule was that the successful Party was entitled to costs, pursuant to Rule 10.29, and that the Court could not even consider a settlement offer unless it was a Calderbank offer or a formal offer. The Defendant, on the other hand, argued that Rules 10.31 and 10.33 gave the Court the discretion to consider any kind of settlement offer in determining an award of Costs.

Kenny J. referred to and relied on *Mahe v Boulianne*, 2010 ABCA 74, and *Koma v Tomich Estate*, 2011 ABCA 257, and held that the Court had discretion to consider informal settlement offers, in whatever form, when determining an award of Costs. Further, Kenny J. stated that this was in keeping with Rule 1.2 and facilitating the quickest means of resolving a claim and encouraging Parties to resolve a Claim themselves. Kenny J. also held that "without prejudice" privilege as it relates to settlement offers expires once the merits of the dispute have been settled. The Defendant's Application was granted and the Court held that the informal settlement offers could be considered by the Court in the overall determination of costs between the Parties.

PTL BOBCAT AND LANDSCAPE SERVICES LTD v 1149218 ALBERTA LTD, 2013 ABQB 158 (GERMAIN J)
Rules 1.2 (Purpose and Intention of These Rules) and 7.3 (Summary Judgment)

The Plaintiff filed a Builders' Lien against the Defendant's lands due to a dispute relating to payment. The Plaintiff subsequently filed a Statement of Claim, and a *Certificate of Lis Pendens* was registered on title. The Defendant applied for Summary Judgment, arguing that the Action was bound to fail because the Statement of Claim was deficient and did not claim Builders' Lien relief in the customary manner. The Master held that because the Claim was drafted as a debt action and not as a Builders' Lien action, the *Certificate of Lis Pendens* and the Lien should be struck from title, but the Claim should not be summarily dismissed. The Plaintiff appealed, arguing that the Statement of Claim adequately pleaded a Builders' Lien Action.

Germain J. held that the purpose and intention of the Rules, including Rule 1.2, prioritizes resolving the real issues between the Parties. This is reflected in the drafting of the Rules, in that many defects are capable of rectification, provided it occurs without prejudice.

Indeed, the Court is less formalistic with respect to the specific form and wording of documents than was the case historically, as demonstrated by Rule 1.2(4), which provides that a remedy or sanction granted by the Court will be proportional to the reason for granting or imposing it.

Germain J. further held that most lawyers have always understood the requirement that some causes of action, such as fraud, must be specifically pleaded. However, in *581257 Alberta Ltd v Augla*, 2013 ABCA 16, the Court of Appeal held that it was not absolutely necessary that fraud be pleaded specifically and particularly, provided the Statement of Claim asserted fraudulent conduct which was sufficient to advance a cause of action in fraud.

The Plaintiff's reluctance to apply to amend the Statement of Claim to incorporate a more traditional Lien drafting approach was puzzling, particularly given that disputes regarding the wording of a Statement of Claim are costly, inefficient, and do not aid in resolving the real issues between the Parties, as required by Rule 1.2(3)(a). However, Germain J. held that it was not strictly necessary that a Statement of Claim include words to indicate that it was brought pursuant to the *Builders' Lien Act*, provided that was otherwise clear from the facts pleaded. Although the Statement of Claim was poorly drafted, sufficient facts were pleaded to ground a Builders' Lien action. In this context, Germain J. allowed the Appeal and directed that the *Certificate of Lis Pendens* would remain on the title.

COOPER v GANTER, 2012 ABQB 695 (PARK J)
Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities), 3.2 (How to Start an Action), 3.15 (Originating Application for Judicial Review) and 7.3 (Summary Judgment)

The Defendant, Her Majesty the Queen in Right of the Province of Alberta (the "Crown"), applied for Summary Judgment to dismiss the Plaintiffs' Action against it, arguing that there was no merit to the Plaintiffs' claim. The Crown argued that the Amended Statement of Claim sought a public law remedy in the nature of a Writ of Mandamus against it, which had to be pursued via Judicial Review. The Crown further submitted that any such Judicial Review was barred by the six month limitation period set out under Rule 3.15, as the original Statement of Claim was filed some 16 months after the Plaintiffs became aware of the Crown's Decision affecting them.

The dispute arose over a license for a Registered Fur Management Area which was given by one of the Plaintiffs, Marvin Boucher, in 1999 to his sister, Bertha Ganter ("Ms. Ganter"). After Ms. Ganter's death, the Crown concluded that the license was vacant and awarded it to the Defendant, Stephen Ganter ("Mr. Ganter"). Boucher argued that Ms. Ganter intended to have the licence revert back to him. In the Amended Statement of Claim, Boucher requested an Order directing that the licence be returned to him.

The Plaintiffs argued that a constructive or express trust existed by virtue of Ms. Ganter's letter, and that the licence should not have reverted to the Minister under the *Wildlife Act*. The Plaintiffs also submitted that the remedy of a Declaration, as sought in the Amended Statement of Claim, was a situation to which Rules 3.15(1) and (2) did not apply; therefore, there was no time limitation of six months. Justice Park held that the Plaintiffs' attack on the Crown's Decision formed the basis for Judicial Review and was in form and substance a Writ of Mandamus. The Claim was therefore subject to the six-month limitation period in Rule 3.15, and the limitation period had expired prior to the claim being filed.

Justice Park also noted that the Court had discretion under Rule 1.5(1) to convert the Amended Statement of Claim to an Originating Application for Judicial Review, but declined to exercise this discretion as there was no Application by the Plaintiffs for such relief. Further, it was held that to do so would circumvent the operation of the six month limitation period for Judicial Review under Rule 3.15. Justice Park granted Summary Judgment in favour of the Crown, holding that there was no merit to the Plaintiffs' claims.

CHUTSKOFF ESTATE v BONORA, 2013 ABQB 119 (ROSS J)
Rules 2.11 (Litigation Representative Required) and 2.15 (Court Appointment in Absence of Self-Appointment)

The Applicants applied for advice and direction from the Court with respect to the appointment of a Litigation Representative to represent the Respondent. The Respondent had commenced the Action as Executor and Trustee of his uncle's Estate. During enforcement proceedings, an Application was brought to hold the Respondent in contempt, but during the course of the Application, the Court received advice that the Respondent was hospitalized for a psychiatric condition. The Contempt Application was adjourned *sine die*, requiring the Applicant to give 30 days' notice to continue the Application so the Respondent could file an Affidavit detailing his psychiatric condition. The evidence regarding capacity was admitted with the consent of the Parties. It was in the form of unsworn physician letters and reports and a physician's Affidavit which indicated that the Respondent suffered from several serious psychiatric conditions. Justice Ross first noted that the definition of capacity under the Adult Guardianship and Trusteeship Act was incorporated in Rule 2.11(c), which provided that "an adult is presumed to have the capacity to make decisions until the contrary is determined". The admitted fact that the Respondent suffered from a psychiatric condition did not mean that he lacked capacity as defined in Rule 2.11(c). Lack of capacity in the defined sense must be proved on a balance of probabilities.

None of the letters or reports directly addressed the Respondent's capacity to understand relevant information or to appreciate the consequences of decisions relating to the Action. The evidence suggested that the Respondent's condition might affect his ability to control his actions and, if this was the case, the Respondent might require strict Case Management to enforce timelines and to deal with repeated Applications. The Court held that there was no basis, on the evidence before the Court, to conclude that the Respondent lacked capacity as defined in Rule 2.11(c) and did not direct the appointment of a Litigation Representative under Rule 2.15.

Justice Ross noted that Rule 2.15 put adverse Parties in a difficult position by imposing an obligation on them to seek Court appointment of a Litigation Representative when an opposite Party lacks capacity to make decisions about a claim in an Action. The determination of a Party's capacity must be based on proper evidence, and the adverse Party might not have the ability to provide that evidence. In this case, the Applicants asked the Respondent to obtain an up-to-date letter from his doctor, but the Respondent did not do so. Based on this, the Court held that the Applicants fulfilled the obligation imposed by Rule 2.15 and were free to pursue their intention to bring a Summary Dismissal Application.

DASH DISTRIBUTORS INC v POWLIK, 2012 ABQB 770 (MASTER SCHLOSSER)
Rule 3.2 (How to Start an Action)

The Applicant, by way of an Originating Application, sought an Order compelling the Respondent to transfer shares. The Respondent made a Cross-Application submitting that the Action should have been commenced via a Statement of Claim. The Respondent also argued that the matter was not appropriate for summary disposition.

The dispute centred on a release that set out a distribution of shares. The Applicant argued that the release was the agreement. The Respondent argued that the release was only a release, and the agreement was made orally. Further, the release did not fully reflect the oral agreement.

The Court held that there was a substantial factual dispute, and thus the Action could not be decided summarily and had to be converted to a Statement of Claim.

PRAGER v CANADA HOMES 4 RENT.COM INC, 2013 ABQB 3 (KENT J)
Rules 3.2 (How to Start an Action) and 10.31 (Court-Ordered Costs Award)

The Applicant filed an Originating Application seeking a declaration that he was a shareholder in the Respondent Company. The Application was based on an agreement purportedly signed by the Applicant and a Principal of the Respondent Company. The Principal swore an

Affidavit in which she stated that she did not recall discussing or signing the agreement. The Action proceeded through Questioning on the Affidavits and was set down for Argument. One week before Argument was set to commence, the Respondent filed a Statement of Claim against the Applicant.

Justice Kent noted that Rule 3.2 sets out how an Action may be commenced. Rule 3.2(2) provides that an Action must be commenced by Statement of Claim, unless one of several conditions is met. Unlike the former Rule, there is no provision in Rule 3.2(2) that permits an Action to be commenced by Originating Notice if the Claim is based on a written instrument where there are no material facts in dispute.

Justice Kent held that the Statement of Claim gave rise to issues beyond simply whether there was an agreement to give shares to the Applicant, including issues relating to consideration and limitations. Justice Kent held that while the Originating Application may have been the appropriate document at the time it was filed, the operative document in the matter had become the Statement of Claim.

In this context, Justice Kent declined to grant the Applicant the declaration sought in the Originating Application. However, Justice Kent further held that the Applicant was not precluded from seeking other Summary Relief in the future, provided additional issues raised in the Statement of Claim were addressed. Finally, Justice Kent held that although the Respondents were successful, thrown away Costs would be awarded to the Applicant.

SIGGELKOW v CANADA (ATTORNEY GENERAL), 2013 ABQB 116 (STREKAF J)
Rules 3.15 (Originating Application for Judicial Review), 13.5 (Variation of Time Periods), 825 (Judicial Review in Criminal Matters) and 830 (Judicial Review in Criminal Matters)

On August 19, 2010 a search warrant was granted against the Plaintiff, who then applied for Judicial Review of the search warrant at the Federal Court, and was ultimately unsuccessful. Following the Decision of the Federal Court of Appeal, issued on April 24, 2012, the Plaintiff made the present Application to set aside the search warrant in the Court of Queen's Bench.

Because it was not expressly stated in the materials, Strekaf J. assumed that the Application was brought under either Rule 3.15 or Rules 830 and 825, pursuant to Part 60 of the Rules that apply in relation to criminal matters. The Defendants argued that the Application was not brought within the six month time period contemplated by Rules 3.15 and 830. In response to the Defendant's argument, the Plaintiff brought a preliminary Application to extend the time for filing its Application to set aside the search warrant.

Rule 3.15 requires that an Originating Application for Judicial Review be brought within 6 months after the date of the decision or act. Rule 13.5, which permits the Court to extend any time period specified in the Rules, does not apply to Rule 3.15. As a result, Strekaf J. held that the Application, to the extent it was brought under Rule 3.15, was out of time as the Court had no jurisdiction to extend the six month time period contemplated by the Rule. Strekaf J. then held that Rule 13.5 granted the Court the ability to extend the time period considered under Rule 830, and proceeded to apply the test outlined in *Cairns v Cairns*, [1931] 26 Alta LR 69, used to determine whether to extend the timeline for filing an Appeal. Justice Strekaf held that the Application did not have a reasonable prospect of success and denied the Plaintiff's preliminary Application to extend the time for bringing the Application pursuant to Rule 830. As a result, the Application was dismissed.

NIXON v TIMMS, 2013 ABCA 84 (PAPERNY, WATSON AND BELZIL JJA)
Rule 3.27 (Extension of Time for Service)

The Statement of Claim, which sought recovery with respect to a failed real estate transaction, was filed on February 23, 2007. A process server swore an Affidavit that he had effected personal service on the Defendant on December 20, 2007. On the basis of that Affidavit, the Defendant was Noted in Default and Judgment was entered. The

Defendant received notice of the Judgment in May, 2011 and applied to set it aside. The Trial Judge held that the Statement of Claim had not been served because the Affidavit of Service had been sworn fraudulently and was untrue. The Trial Judge set aside the Default Judgment, but declined to strike the Statement of Claim or find that it had expired. Rather, the Trial Judge ordered the Defendant to file a Statement of Defence within 20 days. The Defendant appealed the Trial Judge's Decision on this point.

The Court of Appeal held that Rule 3.27 was not capable of reviving a Claim that had expired under Rule 11 of the former Rules of Court. Former Rule 11 provided that a Statement of Claim was in force for 12 months after filing. Pursuant to former Rule 11, the subject claim would have expired on February 23, 2008. The Statement of Claim was never properly served on the Defendant, no renewal was sought while it was in force, and the claim could not be renewed under any other provision of Rule 11. The Court held that upon the expiration of a Statement of Claim, the Plaintiff was barred from taking any further action on it. The new Rules could not retroactively revive an Action that expired in 2008.

The Court held that if a claim could be renewed at any time after expiration, the Courts would have limitless discretion to restore a Claim. The drafters of Rule 3.27 did not intend to create such discretion or the perpetual ability to renew expired Claims. The Court allowed the Appeal and held that the Statement of Claim expired in February 2008, and that no further action could be taken under it.

ALBERTA TEACHERS' ASSOCIATION v ALBERTA (INFORMATION AND PRIVACY COMMISSIONER), 2013 ABQB 106 (ROSS J)
Subdivision 2 (Additional Rules Specific to Originating Applications for Judicial Review) and Rule 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

Following a Supreme Court ruling in respect of timelines prescribed by the relevant legislation, this matter was remitted to the Alberta Queen's Bench to address the other issues raised in the initial Originating Application for Judicial Review. The Applicant filed an Amended Originating Application for Judicial Review. The Respondent challenged the amendments.

The Court held that "the discretion to define the proper scope of a judicial review application rests with the judge hearing the judicial review application". To determine that scope, Justice Ross addressed the principles governing the Court's discretion to permit amendments pursuant to Rule 3.65. The onus is on the party objecting to the amendment to show irreparable prejudice. Amendments are permitted to assist the Court in determining the real question in issue between the Parties. Justice Ross considered circumstances under which amendments would not be permitted (as articulated in *Manson Insulation Products Ltd v Crossroads C & I Distributors*, 2011 ABQB 51). Taking the circumstances into consideration, Justice Ross allowed the amendments.

KNISS v ELLIOTT, 2012 ABQB 732 (MACLEOD J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

This was an Appeal from a Master's Decision to strike an Originating Notice for Judicial Review, as well as to strike an Action for defamation. Both were struck pursuant to Rule 3.68.

The Appellant was an employee of Telus and a member of the Telecommunications Workers Union (the "Union"). Following the Appellant's termination, the Union brought a grievance on his behalf against Telus for wrongful termination. An Arbitrator found that the Appellant was not wrongfully terminated. The Union did not seek Judicial Review of this Decision.

The Appellant sought Judicial Review of the Arbitrator's Decision on his own behalf. Telus applied for an Order pursuant to Rule 3.68 to strike out the Originating Notice on the basis that the Appellant had no standing to seek Judicial Review of the Arbitrator's Decision. The Master granted the Order.

The Appellant Appealed again, this time arguing that he

had not received fair representation by the Union. MacLeod J. concluded that the Master was correct in striking the Originating Notice, stating:

> ...The [Canadian Industrial Relations Board] has the exclusive jurisdiction to determine whether Mr. Kniss received fair representation, and it found that he did Had it found otherwise, the panel could have ordered the [Union] to seek judicial review of the decision [...] Mr. Kniss cannot now ask this Court to make a new finding on essentially the same issue...

The Defendants to the Appellant's defamation Action also filed an Application pursuant to Rule 3.68 for an Order striking out the Statement of Claim. They claimed the comments were made in the course of employment, and thus the allegations constituted employment grievances and fell within the sole jurisdiction of the Arbitrator under the terms of the collective agreement. The Master granted the Order. MacLeod J. dismissed the Appeal of the Master's Order.

ORR v ALOOK, 2013 ABQB 86 (MASTER SCHLOSSER) Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Applicants sought summary dismissal. The Plaintiff, Andrew Orr, and the Defendant, James Alook, had been rivals for leadership of the Defendant, Peerless Trout First Nation, since the mid-nineteen nineties. There were three parts to the Action: defamation, conflict of interest and breach of contract.

The defamation allegation related to the posting of a "draft" Statement of Claim at the band office. The Court dismissed the defamation allegation holding that there was no merit to the Claim. The Court also held that the alleged defamation was not sufficiently particularized.

The Applicants alleged that when James Alook was the Chief of Peerless Trout First Nation he used a non-profit corporation for his personal benefit, instead of the benefit of Peerless Trout First Nation. Relating to alleged conflicts of interest, Master Schlosser held that:

> In a summary dismissal application, the Applicant bears the legal burden throughout. Once the Applicant has discharged its evidentiary burden of, in this case, showing that there is no merit to a portion of the claim, the evidentiary burden then falls to the Respondent to show that there is at least an arguable case. The law in this area is well settled. In this case, the Respondent tendered no evidence. There is nothing to displace the Applicant's position that the conflict allegations and the claims in paras. 18-21 are without merit. Accordingly, this portion of the claim is dismissed.

The last issue related to an alleged breach of contract relating to the negotiation of land claims. Peerless Trout First Nation submitted that it could not be held liable because the alleged breaches occurred before its formation as a band under the *Indian Act*, RSC 1985, c I-5. The predecessor groups were community associations registered under the *Societies Act*, RSA 2000, c s-14. Peerless Trout First Nation argued that it could not be sued for any contracts formed prior to it becoming a band. The Court undertook an extensive analysis. The Court held that the acquisition of band status is very different than the formation of a corporation. The Court did not strike this portion of the Pleading, holding that it was not plain and obvious that the corporate analogy argument would doom the Respondent's claim.

ONISCHUK v ALBERTA, 2013 ABQB 89 (ROOKE ACJ) Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

Onischuk initiated various court Actions over several years stemming from allegations that he was exposed to toxic chemicals, as a result of voluntarily participating in a cleanup of chemicals following the derailment of a train in 2005. The majority of the Actions and subsequent Appeals were struck. On January 6, 2011, Onischuk filed this claim and also filed a nearly identical claim in the Federal Court, but the Federal Court struck the Action. To begin, Justice Rooke noted that, with two exceptions, the Pleadings in the current Action were, in essence, a duplication from the first Court of Queen's Bench Action and the Federal Court Action.

The Court considered whether Onischuk was a vexatious litigant under Sections 23 and 23.1 of the *Judicature Act*, RSA 2000, c J-2. Justice Rooke stated that an accurate description of a vexatious litigant was one who repeatedly brought Pleadings containing extreme, unsubstantiated, unfounded, and speculative allegations against a large number of individuals to exploit or abuse the Court process for an improper purpose or to gain an improper advantage. The Court declared the Plaintiff to be a vexatious litigant, as his conduct had been improper and an abuse of Court processes.

The Defendants requested that Onischuk's claims be struck pursuant to Rule 3.68 on the basis that they disclosed no reasonable claim, were frivolous, irrelevant or improper, and constituted an abuse of process. Regarding whether there was a reasonable claim, Justice Rooke stated that a Pleading should be struck only when it was plain and obvious that it disclosed no reasonable Cause of Action. In making this determination, the Court must assume that the allegations of fact made by the Plaintiff are true, unless the Statement of Claim contains bare allegations with no facts stated, speculative facts incapable of proof, facts found against the Plaintiff in earlier stages, or patently ridiculous allegations. The Plaintiff must plead facts, not a bare duty of law, and the general rule is that where a Statement of Claim is unclear, it should be construed generally. Justice Rooke considered the allegations against each of the Defendants and, even assuming the allegations to be true, found that no Cause of Action lay against any of the Defendants. Based on this, all the Pleadings were struck.

The Court also considered whether the Claim was frivolous, irrelevant or improper. Justice Rooke noted that a frivolous Pleading was one that was indicative of bad faith or factually hopeless, or "so palpably bad that the Court needs no real argument to be convinced of that fact". In this case, it was held that the complete lack of alleged facts to support the Plaintiff's allegations rendered his claims so palpably bad that they were properly classified as frivolous. Based on this, the Defendants' Applications to strike were also granted on this ground.

The final factor considered for striking the Statement of Claim was whether it was an "abuse of process". The Court noted that the doctrine of abuse of process engaged the inherent power of the Court to prevent the misuse of its procedure in a way that would be manifestly unfair to a party to the litigation or would in some other way bring the administration of justice into disrepute. Abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. In this case, Justice Rooke held that the Plaintiff's Pleadings complained about the actions of lawyers and judges, alleging, among other things, conspiracies and tampering, and advanced no reasonable Cause of Action. Based on this, it was held that the proceedings contained the hallmarks of vexatious litigation and, if the Action was allowed to proceed, it would bring the administration of justice into disrepute.

Finally, Justice Rooke considered whether, in the alternative, the Defendant should be granted Summary Judgment. Justice Rooke held that the Plaintiff's Pleadings disclosed no reasonable Cause of Action; therefore, there was no genuine issue for Trial. Having found that there was no merit to the Plaintiff's claims, the onus shifted to the Plaintiff; however, he did not put forward any evidence. Justice Rooke held that if the claims against the Defendants were not already struck, the Court would have found Summary Judgment was warranted.

PANICCIA ESTATE v TOAL, 2012 ABCA 397 (CÔTÉ and BERGER JJA, HILLIER J)
Rules 4.10 (Assistance by the Court), 4.14 (Authority of Case Management Judge), 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle), 10.33 (Court Considerations in Making Costs Award), 13.6 (Pleadings: General Requirements), 13.12 (Pleadings: Denial of Facts), 15.2 (New Rules Apply to Existing Proceedings), 15.6 (Resolution of Difficulty or Doubt) and 519 (New Trial)

The original dispute arose over alleged medical negligence regarding a stomach cancer diagnosis. The Trial Judge found that the initial diagnosis and investigation did not meet the required standard of care, but also found that

the cancer was not curable at or shortly after the time the Plaintiff consulted the physician with the problem. The Plaintiff died a little over a month before the Trial, but his evidence was recorded *de bene esse*.

The Appellant Defendant did not plead two points of law raised in Argument after Trial in their Amended Statement of Defence, specifically that there could be no claim by dependants for shortening life and no special damages. Though the Statement of Claim was issued by the Plaintiff himself, it was amended to substitute the executrix as Plaintiff and to include full details regarding his death and why it occurred. The Appellant Defendant's Amended Statement of Defence used at Trial was filed in reply to the revised Statement of Claim, but failed to plead either of the two points of law raised in the Appeal.

The Court stated that, under Rule 13.6(2)(b), a Party was required to plead a matter that defeated or raised a defence to a Claim of another Party. The Court also noted that Rule 13.6(3) was very similar to former Rule 109, specifically in that it required that a Party plead "lack of capacity or authority". The Court also noted that new Rule 13.12(2) was very similar to old Rule 126, which provided that a denial of fact must answer the point of substance and not be evasive.

Considering the transitional Rule 15.2(2), the Court noted that everything done in an existing proceeding was to be considered to have been done under the new Rules and had the same effect under the new Rules as it had under the former Rules. Further, under Rule 15.6, the Court was allowed, in case of difficulty, to apply the old Rules instead of the new Rules or to modify the operation of the new Rules.

The Court of Appeal contemplated the Rules of Court and the Queen's Bench Practice Directions, which not only permitted, but positively encouraged and directed the efforts by the Trial Judge and counsel to clarify, settle and simplify the issues, and remove issues not seriously contested. In this case, Case Management was ordered some time before the Trial. Under former Rule 219, simplification of issues, obtaining admissions and considering any other matter which would aid in the disposition of the Action was required. Because of this, the issues were firmly and clearly fixed before and during the Trial. Argument after Trial was too late to inject two large, new, unpleaded issues which would entitle or require the other Party to lead new evidence. Rules 4.10 and 4.14 called for simplifying or clarifying issues, and for Case Management. The Court held that because a Case Management Judge had the power to clarify and refine issues and go behind a vague Statement of Defence, the Court of Appeal would not lightly upset Case Management Decisions, nor allow them to be reopened later.

On the issue of Costs, the Court specifically noted that in Alberta there was a well-settled rule which gave discretion to award larger-than-usual Costs for significant misconduct during litigation. The Court acknowledged that the categories of misconduct entitling a party to larger than usual Costs awards were significant and this list of categories was not closed. The Court held that Rule 10.33(2)(b) allowed a Trial Judge to impose or vary a Costs amount because of a Party's refusal to admit facts and this was not confined to Notices to Admit. In the result, the Court of Appeal refused to interfere with the Trial Judge's award of Costs. The additional lump sum award of $11,000 on top of ordinary Schedule C costs could not be said to violate any Rule or principle.

Finally, the Court also considered the Trial Judge's Decision to double the Costs figure because of an unaccepted Informal Offer made on the eve of Trial. The Court noted that, under Rule 4.29(4)(c), Formal Offers had no mandatory Costs consequences if the offer was made within ten days of the start of the Trial. The Court stated that an Informal Offer is just one factor to consider when awarding or assessing Costs. Other factors were whether there was anything significant to litigate over and whether the offeree would have trouble assessing the Informal Offer at that late date. The Court stated that, had the Rules intended to forbid Informal Offers, they could have said so, but they did not. The Court concluded that there was no reversible error in doubling Costs because of the offer on the eve of Trial. The Costs award was affirmed and the Appeal was dismissed.

HAMILL v KUDRYK, 2013 ABCA 37 (CÔTÉ, MCDONALD, BIELBY JA)
Rule 4.22 (Security for Costs)

The Appellant sued his sister over their mother's Estate. The sister asked the Court to summarily dismiss the suit. In the alternative, she sought Security for Costs. The Master did not dismiss the suit, but held that because the "chances of succeeding in this are so remote" the Appellant should post Security for Costs.

After the Security was not posted, the Master ordered the Appellant's Caveat discharged *ex parte*. The Appellant did not Appeal in time, but later moved to extend the time to Appeal. The presiding Justice determined that the test for extending time to Appeal was not met, primarily because the proposed Appeal appeared to have no merit. The Appellant then appealed the Judge's Decision to the Court of Appeal.

The Court of Appeal unanimously agreed that there was no legitimate ground on which the Court could upset the Decision of the Chambers Judge. Citing Rule 4.22, the Court stated that the Appellant was not living in Alberta and gave no evidence of assets in Alberta. Further, the Court stated that Rule 4.22:

> …expressly provides that whether to order security for costs is discretionary. The chambers judge plainly decided that this was a fit case for it, as he found that the appeal from the Master and resisting security for costs here lack "any reasonable chance of success" and "would be doomed to fail in any event." The standard of review on appeal from a discretionary decision is well settled: it is deferential.

The Court also discussed the practice of ordering Security for Costs in situations where there is only barely enough doubt to not dismiss the Claim summarily:

> In the case of "near misses" in summary judgment (or summary dismissal) motions, [ordering security for costs] is a very wholesome practice. Many decisions of the Court of Queen's Bench can be found giving or withholding summary judgment on terms such as security.

TLM v MGH, 2013 ABQB 14 (JONES 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)

This Domestic Special Application was a consolidation of Applications with both Parties seeking an Order for various forms of relief. Four of the five requests for relief by MGH were dismissed and two of the five requests for relief by TLM were dismissed. TLM sought Double Costs, arguing that a proposed Consent Order constituted a Formal Offer, and the Order of the Court was more favourable to TLM than the proposed Consent Order. Jones J. held that the Court's Order was different than the proposed Consent Order in ways that favoured both Parties. Thus, Double Costs were not awarded. However, TLM was awarded Costs as the Court held that TLM was more successful than MGH.

AECON INDUSTRIAL WESTERN v INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL LODGE NO. 146, 2013 ABQB 122 (MASTER SCHLOSSER)
Rule 5.13 (Obtaining Records from Others)

An enforcement creditor applied to have the Respondent Union disclose employment information about a Union member. The Union was not a Party to the underlying Action. The central issue was whether the *Personal Information Protection Act*, RSA 2003, c P-6.5 prevented the Union from being required to disclose the requested information. After reviewing the applicable legislation and case law, Master Schlosser concluded that the Union was in fact required to disclose the information:

> […] it cannot have been the intent of the PIPA to tie up information and thereby create a modern version of civil debtor's prison so as to frustrate an execution debtor's timely satisfaction of their debts. The purpose of the Act is to protect reasonable and

legitimate expectations, not illegitimate ones.

In relation to Costs and Rule 5.13 Master Schlosser stated:

> The concept in Rule 5.13, with respect to compensating an outsider to an action for providing information, is useful in determining the costs of this application. Privacy Act law is not settled. It was appropriate that the Union attend and make what were very helpful submissions. Accordingly, it is appropriate that the Union receive costs under column 1, item 7(1) for attendance at this application together with any reasonable costs necessarily arising from the production of the information requested by the Applicant.

WILDE v LANGTON, 2012 ABQB 742 (LEE J)
Rules 5.34 (Service of Expert's Report) and 7.3 (Summary Judgment)

The Defendants applied for an Order for Summary Judgment against the Plaintiffs. The Defendants filed evidence in the form of Affidavits and Expert Reports. The Plaintiffs did not file any evidence in response to the Defendants' Application. At the Application, the Plaintiffs provided the Court with an Expert Report that was not in the proper form. The Defendants argued that such a Report should not be considered by the Court as evidence in the Summary Judgment Application. Justice Lee, however, held that the Expert Report, while not in the proper form, was still evidence before the Court. The Expert Report provided evidence in defence of one of the Defendants, but not the other. Justice Lee ordered the Claim struck as against the Defendant that the Plaintiffs' Expert Report did not address, and dismissed the Summary Judgment Application of the other Defendant. Justice Lee further ordered that the Plaintiffs serve all of their Expert Reports in the proper form and within four months.

GUAY ESTATE, 2013 ABQB 58 (BURROWS J)
Rules 5.34 (Service of Expert's Report) and 5.39 (Use of Expert's Report at Trial Without Expert)

The Executor of the Plaintiff Estate brought an Application seeking an Order allowing for the distribution of the Estate. Ms. Ivany, the daughter of the Testator, had previously brought a Dependants Relief Application. The Dependants Relief Application had been struck from the list as Ms. Ivany had not filed a Brief. Additionally Ms. Ivany did not appear for Questioning after being served with an appointment for the same.

The Court held that the evidence before the Court was insufficient to allow for a determination. In particular, Ms. Ivany relied upon a letter from a doctor outlining that she was not capable of handling work related responsibilities. The Court held that this was not evidence as it was not sworn, and was not converted to evidence by being attached to a signed Form 25. The Court directed Ms. Ivany to take specific steps, failing which an Order would be granted for the distribution of the Estate.

PRECISION DRILLING CANADA LIMITED PARTNERSHIP v YANGARRA RESOURCES LTD, 2013 ABQB 2 (MASTER PROWSE)
Rules 6.8 (Questioning Witness Before Hearing) and 6.20 (Form of Questioning and Transcript)

A procedural question arose in the context of a Summary Judgment Application brought by Precision against Yangarra. Yangarra sought to issue subpoenas to four Precision personnel, pursuant to Rule 6.8. The transcript of the examinations of those four witnesses would then be put in evidence in the Summary Judgment Application.

Master Prowse determined that Yangarra was entitled to Question the four witnesses pursuant to Rule 6.8. The only issue was "whether Yangarra's examination is an examination in chief or a cross-examination". The Law under former Rule 266 was settled: the Examination of the party issuing the subpoena was an Examination in Chief. According to Master Prowse, this has not changed in the new Rules: "A party calling a witness under Rule 6.8 must conduct the examination as an examination in chief, as previously under Rule 266".

Master Prowse noted that Rule 6.8 makes reference to Rule 6.20, which states that Questioning by Parties adverse in

interest may take the form of Cross-Examination:

> 6.20(2) Questioning and questioning again under this rule by parties adverse in interest may take the form of cross-examination.

Master Prowse stated that the correct way to determine if a Party is adverse in interest is as follows:

> The party who issues the subpoena is calling the witness as his/her witness – therefore it is the other party who is 'adverse in interest' and may cross-examine.

Master Prowse concluded by noting that: "[if] Yangarra chooses to subpoena a witness under Rule 6.8, then that is their witness. Yangarra cannot be considered 'adverse in interest' to their own witness".

P BURNS RESOURCES LIMITED v LOCKE, STOCK & BARREL COMPANY LTD, 2013 ABQB 129 (BENSLER J)
Rules 6.14 (Appeal from Master's Judgment or Order) and 7.3 (Summary Judgment)

The Parties disputed whether an oil and gas lease had terminated due to a cessation of production and working operations. Master Laycock granted partial Summary Judgment and the Applicants appealed.

The Court outlined the law in relation to Appeals of Masters' Decisions and Summary Judgment:

(a) An Appeal from a Master's Decision is a *de novo* hearing and the Standard of Review is one of correctness - the Justice may exercise any discretion anew and substitute their own views;

(b) Subrule 6.14(3) clearly provides that new evidence is admissible if it is relevant and material - the Rule is clear and is a continuation from the former Rules; and

(c) The test on an Application for Summary Judgment is equally clear: an Application for Summary Judgment requires the applicant to prove there are no genuine issues to be tried.

Based on the evidence that was before Master Laycock and new evidence presented, the Court held that the Applicant did not carry on working operations or produce oil, and thus the lease had been terminated.

EDMONTON FLYING CLUB v EDMONTON REGIONAL AIRPORTS AUTHORITY, 2013 ABCA 91 (SLATTER AND ROWBOTHAM JJA, O'FERRALL JA IN DISSENT)
Rule 7.1 (Application to Resolve Particular Questions or Issues)

This was an Appeal from an Order of a Justice in Chambers directing the severance of the Trial of related Actions into two parts. The Order under Appeal contemplated that the first Trial would determine if the Appellants were responsible for a breach of the Respondent Flying Club's sublease, and whether the Respondent was entitled to an injunction to prevent the Appellants from closing the Edmonton City Centre Airport. If it was determined that the Respondent was entitled to a remedy, but not an injunction, the second phase of the Trial would determine the Respondent's entitlement to damages, and the Appellants' liability for certain economic torts. After the Chambers Judge issued reasons for ordering the severance, but before the formal Order was entered, the City commenced expropriation proceedings. The Respondent argued that the expropriation was itself a breach of the covenant of quiet enjoyment; however, the Chambers Judge declined to revisit the Order.

The Majority of the Court of Appeal noted that interpretation of the Rules of Court was a question of law reviewed for correctness, but absent an error of law or principle, the Decision to order severance was a discretionary Decision that would only be varied on Appeal if it was unreasonable.

The Majority stated that, under section 8 of the *Judicature Act*, RSA 2000, c J-2, every Action will result in only one Trial, where all issues will be decided. Rule 7.1 permitted the severance of issues, but on an exceptional basis. An Applicant who proposed to sever issues was

required to demonstrate that it was clearly desirable to do so, and the legal test for severance acknowledged by the Majority was that there must be a "real likelihood" or "good probability" of savings. Further, a split Trial must be likely to achieve the aims listed in Rule 7.1 and must be likely to result in disposing of all or part of the Claim, substantially shortening the Trial, or saving expense, or some combination thereof.

The Majority then considered whether there was likely to be an overlap in the evidence. As part of that analysis, the theories of both Parties were considered. The Majority expressed concern that the Order under Appeal restricted the scope of discovery on damages, as severance should not be ordered in a way that prevents the Defendant from putting forward all its defences. The Majority also noted that section 19 of the *Judicature Act* provided that, where equitable relief was available, the Court could award damages in substitution; however, the severance Order restricted the ability of the adjudicator at Trial to exercise their jurisdiction under section 19.

After considering several of the issues that were likely to be disputed, the Majority stated that it was unrealistic to think that either Party would enter into an Agreed Statement of Facts conceding the fundamental premise of the other and extensive evidence would be required. Based on all of the above, the Majority concluded that the Chambers Judge's holding that the initial Trial on the availability of an injunction would be "much shorter than any Trial for damages" was unreasonable and reflected a reviewable error. The Appeal was allowed and the Order was set aside.

Justice O'Ferrall agreed with the Majority that an Applicant proposing to sever issues must demonstrate that it was likely to be advantageous, but disagreed with the Majority's conclusion that the Chambers Justice's Decision reflected an error of law. Justice O'Ferrall noted that Rule 7.1(1)(a) provided that a discrete question or issue may be tried or heard before, at or after Trial for any one of three purposes, only one of which was saving expense. Justice O'Ferrall stated that it could not be seriously argued that the Order would not substantially shorten any Trial which might follow the determination of the question of the Plaintiff's entitlement to a permanent injunction. Regardless, whether two Trials would take up substantially less time than one, was a matter the Trial Court was required to assess and deference ought to be accorded to that assessment. Further, the likelihood of saving time and expense, while sufficient reason to order issues to be heard before Trial, was not a necessary reason according to the plain wording of Rule 7.1(1)(a). Finally, Justice O'Ferrall noted that when property rights are appropriated or expropriated in the province of Alberta, a bifurcated process was often the rule, not the exception; therefore, severance was logical and accorded with legislatively-mandated severance schemes found in Alberta statutes. Justice O'Ferrall concluded by stating that severing the Trial of the question of the Flying Club's entitlement to an injunction would provide sooner certainty for the Airport Authority. Justice O'Ferrall would have dismissed the Appeal.

AGF TRUST COMPANY v SOOS, 2012 ABQB 747 (MASTER SMART)
Rules 9.31 (Other Material to be Filed), 9.35 (Checking Calculations: Assessment of Costs and Corrections) and 10.49 (Penalty for Contravening Rules)

The Plaintiff's Bill of Costs in a foreclosure Action was reviewed by the Assessment Officer, as contemplated by Rule 9.35(1)(b). Pursuant to Rule 9.35(4), the Plaintiff's counsel re-attended before Master Smart for the purpose of settling Costs. Master Smart noted that the Action was a standard residential foreclosure with little out of the ordinary. The Statement of Claim consisted of 10 boilerplate paragraphs, and included incorrect mortgage information. The Affidavit of Default was also a boilerplate document, and included information inconsistent with the Statement of Claim. Current title was not filed as required by Rule 9.31(a), although a copy of title was stapled to the back of counsel's file folder. A Notice of Application was filed to accept an Offer to Purchase, but no material was filed in support of the Application, including the Offer to Purchase or a final Affidavit of Default.

The Plaintiff sought legal fees of $6,500.00, plus disbursements and other charges, representing 31 hours of time spent on the file, with no differentiation between

lawyer and paralegal time. The Assessment Officer allowed legal fees of just over $5,000.00. Master Smart held that lenders in foreclosure proceedings attempt to reduce costs by downloading responsibility to lawyers, including many administrative tasks. That lenders demand lawyers perform administrative work does not make such tasks legal services which are recoverable against a mortgagor. Master Smart held that there was a failure to comply with the requirements of the foreclosure Rules, and that there were concerns regarding overpayment to the mortgagee. Master Smart allowed legal fees of $3,850.00, with the balance for disbursements and other charges as approved by the Assessment Officer. Master Smart also held that a determination as to whether Costs should be assessed pursuant to Rule 10.49(1) for contravening the foreclosure Rules would be made once counsel filed a full explanation of the mortgage balance calculation along with supporting documentation.

CAG v SG, 2013 ABQB 12 (JONES J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and Schedule C (Tariff of Recoverable Fees)

Following a Judgment on a family law matter, the Parties were also directed to make written submissions respecting Costs. The Director of Maintenance and Enforcement and Child Support Services suggested that no Costs should be awarded against the Director, citing the decision in *Budge v Budge*, 2010 ABQB 608. The Court stated that this case suggested that when the Crown was a regular litigant, it paid Costs like any other litigant. However, the Crown was not characterized as a "regular litigant" when it was acting in a "child support environment to address the interests of the public and the children". In such a situation, it was only appropriate to grant Costs against the Director if there were special or unusual circumstances.

SG sought reimbursement for Costs associated with travelling to Calgary, and CAG sought reimbursement for legal services. Justice Jones noted that fees, determined in accordance with Division 2 of Schedule C of the Rules, would, as they related to matters that did not involve a monetary amount, be determined in accordance with Column 1. In this case, monetary amounts were in issue, however, the Parties were not seeking Costs computed in accordance with the various line item components of the columns under Division 2. Instead, each simply specified a total amount in respect of which they sought reimbursement.

Jones J. determined that each party should bear their own Costs. This finding was based on several factors. First, pursuant to Rule 10.29, SG was substantially successful in achieving his objectives and as such, was entitled to a Costs award against the unsuccessful party. That being said, Rule 10.29(a) provided that it was subject to the Court's discretion to award Costs under Rule 10.31, which was to take into account the factors set out under Rule 10.33. Jones J. considered the factors under Rule 10.33 and concluded that SG could have, in light of his medical condition, asked to participate in the Application before the Court by video link, which would have made it unnecessary for him to travel to Calgary. SG was required to bear the Costs incurred from travelling to Calgary because they were avoidable.

Jones J. also noted that CAG's much greater cost outlays were incurred so she could properly advance her argument that, among other things, earlier Orders which denied SG's request for extinguishment of arrears were *res judicata*. This issue was not canvassed in previous Decisions and SG advanced no argument to illuminate this point; therefore, with reference to Rule 10.33(1)(g), Jones J. held that it was appropriate to recognized CAG's contributions to the resolution of the issue by requiring SG to bear responsibility for his own Costs. The Court concluded by holding that SG and CG would bear their own Costs and no Costs were to be awarded in favour of or against the Director.

DBF v BF, 2013 ABQB 16 (JONES J)
Rules 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award) and Schedule C (Tariff of Recoverable Fees)

Justice Jones issued a Judgment implementing shared

parenting arrangements and ordered that the Parties retain joint custody of the child. The Parties were also directed to provide written submissions regarding Costs, including Costs incurred in connection with the direction of the Court that a Family Law Practice Note 7 Intervention be conducted, which resulted in a report issued by Glenda Lux, Registered Psychologist ("Lux Report").

Jones J. held that Costs should be awarded in favour of BF regarding the Application, computed in accordance with Column 1 of Division 2, Schedule C of the Rules. This Decision was based on consideration of Rule 10.29, which provided that the successful Party to an Application should be awarded Costs. In this case, BF was successful in securing the relief he sought. Jones J. also noted that Rule 10.29 was subject to the Court's discretion under Rule 10.31, which required that the Court take into account the factors specified under Rule 10.33. Jones J. considered the factors under Rule 10.33 and noted that none of those factors suggested a departure from the notion that a successful Party should be entitled to Costs.

Additionally, consideration of these factors did not suggest a departure from the commentary in the Rules where it was noted that, "[U]nless the Court otherwise orders, matters which have no monetary amounts, for example, injunctions, will be dealt with under Column 1". The Application in this case did not involve a monetary amount and, in his submissions, BF did not elaborate on why Column 2, should apply to this case. Jones J. noted that the Court was at liberty to depart from Column 1, but saw no reason to do so. Neither were the factors set out in Rule 10.33(2) seen as being of particular significance regarding this Decision on Costs.

Concerning the Costs of the Lux Report, Jones J. held that it they should be borne equally by the Parties. The notion of equal responsibility motivated the primary commitments of the Parties and the Lux Report helped the Court better assess how to respond to conflicting views; therefore, it was held as logical that the Parties share those Costs.

LIA SOPHIA CANADA, LP v PARKLANE JEWELRY LIMITED, 2013 ABQB 53 (KENT J)
Rule 11.25 (Real and Substantial Connection)

The Plaintiff served Parklane U.S. *ex juris* and Parklane U.S. brought this Application disputing service. Parklane U.S. stated that service was not valid because of a failure by the Plaintiff to attach a document or Affidavit that set out the grounds for service outside of Canada and also because there was no good arguable case. Kent J. began by stating that there was no dispute that the test for valid service *ex juris* was a good arguable case. Citing prior case law, Her Ladyship set out that a good arguable case was not fanciful or speculative, but grounded on some evidence upon which an objective trier would say that "on the basis of the facts presented, the case is arguable and not to be dismissed out of hand". In this case, it was held that the Plaintiff provided evidence that showed a relationship between the executives of Parklane U.S. and other Defendants which would allow a Trial Judge to draw inferences about what occurred. This was sufficient for demonstrating a good arguable case and Kent J. held that, given such a finding, the issue about the technical service deficiency became moot. Service of the claim on Parklane U.S. was valid.

JOHNSON v JORDAN, 2013 ABCA 55 (ROWBOTHAM JA)
Rule 12.60 (Appeal from Decision of Court of Queen's Bench Sitting as Original Court)

During a Case Management hearing on October 30, 2012, Counsel for the Parties' children submitted that a risk assessment and psychological assessment of the father would be helpful. The Justice asked Counsel for the children to draft an Order reflecting Counsel's recommendations and advised the Parties that the Justice would consider the Order and, if appropriate, grant it "or something like it". The Order was entered on December 13, 2012 with a date of pronouncement shown as October 30, 2012.

The Appellant applied for an extension of time to appeal. As a preliminary issue, the Court considered whether a time extension was necessary. Justice Rowbotham found that the Case Management Judge did not pronounce the Order

on October 30, 2012. On that date, it was indicated that His Lordship would consider the draft Order and grant it or "something like it". Accordingly, the time for filing the Appellant's Appeal was governed by Rule 12.60(2)(b). The Court held that the Appellant was able to establish that he received notice upon receiving a copy of the filed Order. As the Appellant filed his Appeal within one month of that date no Application to extend time for filing a Notice of Appeal was required.

MURPHY v CAHILL, 2012 ABQB 793 (VEIT J)
Rule 13.18 (Types of Affidavit)

The Applicant sought to have the Affidavit of Margaret Cahill struck, and the Affidavits of Gerald Cahill and Alice Wilson redacted.

In relation to the Affidavit of Margaret Cahill, the Applicant argued that it should be struck because of the delay and obstruction of Margaret Cahill. The Court held that the striking of a Party's Affidavit in a contested Application, leaving that party with no evidence, is an extreme measure. The Court held that the evidence did not support a finding of delay and obstruction.

The Applicant argued that the Affidavit of Gerald Cahill contained hearsay and irrelevant and improper opinion evidence. The Court held that hearsay evidence can be used in a response to an Application that may dispose of all or part of a Claim. Rule 13.18 only prevents hearsay evidence in *support* of an Application that may dispose of all or part of a Claim. Additionally, the common law hearsay exceptions apply to Affidavits used in support of an Application that may dispose of all or part of a Claim. The Applicant's argument relating to irrelevance focused on evidence regarding credibility. The Court held that the absence of complete Pleadings, as the matter was commenced via Originating Application, made it unwise for a Court to rule precipitatedly on relevance. Additionally, subject to certain exceptions, credibility evidence was relevant. The Court held that the disputed opinion evidence should be dealt with via submissions when the matter was heard, and not via an Application to strike.

In relation to the Affidavit of Alice Wilson, the Court held that the use of the alleged inadmissible opinion evidence, relating to credibility, should be dealt with by the Judge who hears the matter. The Application was dismissed.

ALBERTA MEDICAL ASSOCIATION v ALBERTA, 2012 ABCA 391 (BIELBY JA)
Rule 506 (Notice)

The Alberta Medical Association ("AMA") and the Government of Alberta (as represented by the Minister of Health and Wellness and Alberta's Regional Health Authorities) ("Alberta") entered into a health care services agreement which expired on March 31, 2011. After two successive interim agreements expired, the AMA filed an Application for the appointment of an Arbitrator, seeking Arbitration with respect to all issues relating to the agreement, including the negotiation of a new agreement. Alberta filed an Application for a Declaration that the Parties could not arbitrate the terms of a new agreement. The AMA Application was dismissed, and the Declaration sought by Alberta was granted. The AMA applied for leave to Appeal and for a Declaration that the Application for leave was brought within time, or alternatively, for an extension of time to bring the Application.

Justice Bielby held that leave to Appeal was addressed by sections 47 and 48 of the *Arbitration Act*. However, the Appeal period was not set by the *Arbitration Act*. Rather, Rule 506(1) sets a 20 day Appeal period from the date the Order is filed and served, and provides that the Court has discretion to extend the Appeal period. Justice Bielby held that although it would have been prudent for the AMA to have filed its Notice of Motion seeking leave earlier, Alberta, in effect, had notice of the leave Application. Negotiations between the Parties continued throughout the Appeal period, and the Application for leave was brought shortly after the negotiations broke down. As such, Justice Bielby granted the extension of time to apply for leave, and considered the Application for leave under the *Arbitration Act*. However, Justice Bielby refused to grant leave on the basis that the AMA failed to establish that the Appeal was reasonably arguable.

AIRCO AIRCRAFT CHARTERS LTD v EDMONTON REGIONAL AIRPORTS AUTHORITY, 2012 ABCA 388 (BIELBY JA)
Rule 508 (Stay of Enforcement)

The City of Edmonton applied for a Stay of an Order which, amongst other things, severed a Claim for a permanent Injunction preventing the closure of the Edmonton City Centre Airport from other relief sought by the Edmonton Flying Club pending the hearing of an Appeal. Justice Bielby noted that the test for a Stay of Execution or Stay of Proceedings pending Appeal was analogous to the tripartite test considered on an Application for an Interlocutory Injunction.

The Respondents conceded that the first part of the test was met. There was a serious issue arising on the underlying Appeal.

Regarding the second factor, the City argued that it would suffer irreparable harm if the Injunction proceeded to Trial prior to the damages Claim because of the risk of duplicate Questioning in the separate Action by the Flying Club. The City also argued that potentially different findings of fact and liability on the same issues might be made in separate proceedings and the issue of a permanent Injunction might become moot. Bielby J.A. rejected the City's arguments and held that the risk of overlapping Questioning or joint Case Management was one of avoiding expense, rather than irreparable harm. Further, the Court noted that the risk of conflicting findings of fact on the same issue was always a concern; however, the Court stated that the chance of that occurring prior to the resolution of this Appeal was virtually nil.

On the third part of the test, the City argued that the balance of convenience favoured the imposition of the Stay. The City might be Questioned on the same issues twice and, if the Appeal was successful, time and cost inefficiencies were likely. The Court noted that if the Flying Club was successful when the Appeal was heard, and it obtained a permanent Injunction, there would be no damages action Trial, given that the Flying Club had undertaken to abandon that Claim if it obtained the Injunction. Bielby J.A. noted that the Appeal was set to proceed within six weeks and, considering the time typically required for document disclosure and Questioning, the latter would likely be at a preliminary stage by the date the Appeal was resolved. Based on this, it was held that the balance of convenience favoured the refusal of a Stay. The Application for a Stay of the Order of the Chambers Judge was dismissed.

DAGHER v STONE, 2013 ABCA 22 (HUNT JA)
Rule 548

The Applicant sought leave to extend the time for service of a Notice of Appeal and to deem service proper and to restore the Appeal to the General Appeal List. The Order which was the subject of Appeal was granted by a Chambers Justice, who had struck the Appellant's Pleadings. The Applicant's Notice of Appeal was filed in time, but it was not served, and deadlines for filing materials were missed, both due to problems with the diarization system in the Applicant's counsel's office.

Hunt J.A. described the test for extending the time period as follows:

> In order to extend the time under Rule 548 of the *Alberta Rules of Court*, Alta Reg 390/68, the applicant must show there was a *bona fide* intention to appeal within the relevant appeal period, and special circumstances to justify the delay. He must also show that the other party was not prejudiced; that he has not taken any benefit from the judgment; and that he has a reasonable chance of success on the appeal. The Court has some discretion to extend the times even if all these criteria are not satisfied.

The Appellant met this test and the Appeal was allowed.