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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. 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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SHAWESH v PAHL, 2013 ABCA 321 (CONRAD AND SLATTER JJA, O'FERRALL JA CONCURRING IN THE RESULT)
Rules 1.1 (What These Rules Do), 6.11 (Evidence at Application Hearings) and 8.17 (Proving Facts)

The Appellants appealed the dismissal of their Summary Judgment Application. The Respondent sued various Parties, including some police officers, alleging an assault against him. The Respondent was self-represented. The Police Officers sought Summary Judgment. The Chambers Judge dismissed the Action against some of the officers for lack of service and lack of merit, but allowed the Action to continue against two officers, holding that there was some evidence of contact between the Respondent and those officers.

The Majority granted the Appeal and held that the Chambers Judge erred in:

1. Relying on the unsworn evidence of the Respondent;
2. Holding that mere contact could constitute an assault; and
3. Holding that Constable Downing made contact with the Respondent, as Constable Downing deposed that he did not have any contact with the Respondent, and the Respondent did not offer any sworn evidence.

Justice O'Ferrall held that it was not clear whether the opportunity was given to the Respondent to present evidence, and thus he would have remitted the matter to the Chambers Judge.

KWOK v CANADA (NATURAL SCIENCES AND ENGINEERING RESEARCH COUNCIL), 2013 ABQB 395 (MAHONEY J)
Rules 1.2 (Purpose and Intention), 3.62 (Amending Pleading), 3.65 (Permission of Court to Amend Before or After Close of Pleadings) and 5.25 (Appropriate Questions and Objections)

There were eight Defendants in this Action, including the National Sciences and Engineering Council of Canada ("NSERC") Defendants and certain Media Defendants.

The Applicant, Dr. Kwok, was employed as an assistant professor with the University of Alberta and received research grants from NSERC. In 2005, after an investigation, the University of Alberta concluded that Dr. Kwok violated the University's Research and Scholarship Integrity Policy. Dr. Kwok resigned; however, the University of Alberta again investigated him and determined that he had misappropriated NSERC grant money. The parties reached a settlement, but the University of Alberta provided its investigation reports to NSERC. NSERC terminated the grants it awarded to Dr. Kwok and banned him from receiving further funding. Additionally, in 2010, Canwest and National Post published articles that accused Dr. Kwok of plagiarism and misusing grant funds.

In July 2010, Dr. Kwok filed a Statement of Claim and then, in January 2011, filed an Amended Statement of Claim. Between January and November 2011, the Parties participated in Questioning and, in February 2012, Dr. Kwok filed a Second Amended Statement of Claim. In March 2012, Dr. Kwok requested the consent of the Defendants to file a Third Amended Statement of Claim, but the Defendants refused.

Several issues were raised in this Application: whether Dr. Kwok should be granted leave to amend the Second Amended Statement of Claim; whether the Defendants should be required to provide answers to questions posed during Questioning; and whether the Media Defendants should be ordered to produce documents previously withheld on the basis of journalistic source privilege.

Referencing Rule 1.2, Mahoney J. stated that the Rules of Court were to be liberally construed in a civil proceeding to "secure the just, most expeditious and least expensive" result based on the merits. The Court then considered whether Dr. Kwok should be granted leave to amend the Second Amended Statement of Claim pursuant to Rules 3.62 and 3.65 and the legal principles referred to in *Manson Insulation Products Ltd v Crossroads C & I Distributors*, 2011 ABQB 51 and *869120 Alberta Ltd v B & G Energy Ltd*, 2011 ABQB 209 - an amendment should be allowed no matter how careless or late, unless there is prejudice, and unless clear exceptions (such as those noted in *Manson*) apply.

The Court was persuaded that Dr. Kwok's claims satisfied the general rule, and none of the exceptions applied. Where there was a dispute as to documentary evidence supporting a proposed amendment, Mahoney J. noted that the merit of the evidence needed to be weighed by the Trial Judge; therefore, this was not a reason for denying an amendment.

The Parties also disputed whether the questions posed during Questioning were relevant and material to the issues identified in the Statement of Claim in effect at the time of Questioning. The Court considered what was meant by "pleading" and concluded that it referred to all of the pleadings, not just the version in effect at the time

a question was asked. Mahoney J. noted that, under Rule 5.25(1)(a), a person was required to answer only relevant and material questions during Questioning and stated:

> A question, record or information is relevant and material only if the answer could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings, or ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

Mahoney J. remarked that counsel ought to be given wide latitude in posing questions and that, under Rule 5.25(2), a party being questioned may object to questions, but only for one or more of a specific list of reasons. The questions did not need to be directly linked to a pleading; an examining lawyer could indirectly approach a subject and go beyond the pleadings if the question reasonably related to the matter. Finally, Mahoney J. stated that there ought to be a generous approach to relevance; if counsel could disclose a rational strategy, that was sufficient.

The Court then considered each of the disputed questions and noted that the use of repetitive questions, utilized sparingly, might be part of an examination strategy. Mahoney J. held that repeating a question was not oppressive and did not amount to intimidation. The Defendants were ordered to answer the majority of the disputed questions.

Lastly, the Court considered whether the Media Defendants should be directed to provide answers to questions, which were objected to on the grounds of "journalistic source privilege". Mahoney J. was satisfied that three of the four "Wigmore criteria" set out by the Supreme Court of Canada in *R v National Post*, 2010 SCC 16, were met. Further, it was noted that the relationship between professional journalists and their sources ought to be "sedulously" fostered and no persuasive reason was offered to reduce the value of this relationship; therefore, the Application to compel answers from the Media Defendants was denied.

GREATER ST. ALBERT ROMAN CATHOLIC SEPARATE SCHOOL, DISTRICT NO. 734 v BUTERMAN, 2013 ABQB 485 (GRECKOL J)
Rules 1.2 (Purpose and Intention), 3.15 (Originating Application for Judicial Review), 3.18 (Notice to Obtain Record of Proceedings), 3.19 (Sending in Certified Record of Proceedings), 3.20 (Other Circumstances When Record of Proceedings May Be Required) and 3.68 (Court Options to Deal with Significant Deficiencies)

In October of 2009, the complainant, Mr. Buterman, filed a complaint with the Alberta Human Rights Commission alleging that the School Board had discriminated against him in its Decision to remove him from the substitute teacher list, and from consideration for permanent positions with the School Board. The Director of the Alberta Human Rights Commission dismissed the complaint on May 20, 2011. The complainant then appealed to the Chief of the Commission, who overturned the Director's Decision and directed that a tribunal hear the complaint on July 16, 2012. The School Board filed an Application for Judicial Review seeking, *inter alia*, an Order directing that the Director determine whether a settlement had been reached or the complainant had rejected a reasonable settlement. Following the Chief's Decision on July 16, 2012, the School Board wrote both the Director and the Chief asking that the Director consider the settlement question. Neither the Director nor the Chief found it appropriate to consider that issue at that juncture.

The Court began by addressing standing and found that the Director has standing to argue issues concerning his role in the administration of the Act and, in particular, whether he was required to consider settlement issues when dismissing a complaint, and whether the School Board's Application was filed within the six month time limit prescribed by the Rules.

The Director applied to strike the Originating Application for Judicial Review as against the Director on the basis that it was brought outside the prescribed time limit, and the Director was *functus officio*. Greckol J. expressed doubt as to whether an Application to strike under Rule 3.68(1)(a) should be available in the case of judicial review,

particularly given the primacy of cost effectiveness and efficiency set forth in Rule 1.22 (b). Notwithstanding these doubts, the Court determined that it could dispose of the Application before it on its merits.

In assessing the Application to strike the Originating Application for Judicial Review on the basis that it was out of time, the Court examined each aspect of Rule 3.68(2). Greckol J. affirmed that the test for striking out a pleading remains whether, assuming the facts in the pleading can be proved, it is plain and obvious that the pleading discloses no cause of action. Greckol J. held that the question of whether the time limit for filing a judicial review had passed was one concerning the availability of defences, and not grounds for striking a pleading. Similarly, the concern that the Director was *functus officio* engaged questions of mixed fact and law, and it was consequently not possible to determine from the pleadings whether the claim could be struck on that basis.

The Court went on to find that it was not plain and obvious that the pleading constituted an abuse of process or was vexatious or frivolous in any way, nor that any other grounds under Rule 3.68(2)(a) applied.

The School Board also brought an Application seeking an Order that the Chief file an expanded record, and that the Director file a record. Justice Greckol then turned to the School Board's Application for a further and better record. The Court held, at para. 82, that:

> … what is required under Rule 3.18(2) is the written record of the decision, the reasons given for the decision, the originating document (here, the complaint), the evidence and exhibits filed with the Chief, and anything else relevant to the decision in the possession of the person or body …

Noting that there were no concerns of bias or abuse of process raised in the instant Application, the Court found that the Chief had included in the record all things relevant that were in his possession when he made his Decision. The Application by the School Board for an Order requiring the Chief to file a further and better certified record was dismissed. In light of the Court's determination that judicial review might be available against the Director, the Application for the Director to produce a record was granted.

HILL v HILL, 2013 ABCA 313 (CÔTÉ AND COSTIGAN JJA, AND HUGHES J (AD HOC))
Rules 1.2 (Purpose and Intention of These Rules) and 10.33 (Court Considerations in Making a Costs Award)

The Court heard an Appeal and Cross-Appeal of a Costs Decision following a lengthy Trial. The dispute related to a discretionary trust in respect of the ownership of businesses previously owned by the late father of the Appellant Plaintiff and one Respondent. Throughout the Action, the Appellant raised many causes of action and allegations, including claims that virtually everyone on the opposite side had engaged in fraud and other misconduct. After Trial, the Trial Judge awarded two sets of Costs, one to the Corporate Defendants and one to the Individual Defendants, who had been represented separately for some years. The Trial Judge awarded both sets of Respondents Costs calculated on four times Column 5 of Schedule C up to the close of the Appellant's case at Trial, and on single Column 5 thereafter. The Trial Judge lowered the scale of Costs after that point because the Appellant then dropped one of his claims. The Appellant appealed Costs separately from his (unsuccessful) Appeal on the merits. The Respondents cross-appealed the restriction of Costs to single Column 5 for the latter part of the Trial.

The Appellant appealed on a number of grounds. The Appellant objected to any fees in excess of single Column 5 of Schedule C, on the basis that some of the matters the Trial Judge considered with respect to Costs were irrelevant, including the quantum of the successful Party's legal fees. However, the Court of Appeal held that actual legal bills were relevant. Party-party Costs were designed to amount to approximately half of a reasonable legal bill. Schedule C was not binding on a Judge, nor was it presumed to be correct. Whether actual legal bills are too high may go to weight, but not to the relevance of such bills.

The Appellant further argued that the Respondents' legal

bills were not, in fact, paid by the Respondents. However, the legal test to recover party-party Costs is not what has been paid, but rather whether the Party was liable to pay the lawyer. Payment of fees by a third party such as an insurer was not a bar to recovering Costs.

The Court further held that the Trial Judge, in assessing Costs, did not err in considering the many wasteful motions brought by the Appellant. The Court held that prolonged interlocutory warfare was not irrelevant in the assessment of a Costs award. Rule 10.33 expressly provides that unnecessary conduct, or conduct lengthening or delaying the Action, is relevant in an assessment of Costs.

The Appellant further argued that the Trial Judge erred in relying on the Appellant's unshakeable belief in a valid trust. However, the Court held that the Trial Judge's point was not the Appellant's motivation, but rather his extraordinary persistence and continual searching for new reasons to reach the same conclusion. The Court held that while the Appellant's motivation or beliefs were not relevant, his conduct was. The Court further rejected the Appellant's argument that the Trial Judge should not have considered the Appellant's constant, unfounded accusations of impropriety by the Respondents in his assessment of Costs. The Court was not aware of any Canadian authority questioning the relevance of that factor. Moreover, consideration of that factor was mandated by Rule 10.33.

The Appellant further argued that the two groups of Defendants, who were separately represented, should share a single set of Costs. The Court held that the issue was whether separate counsel or defences were reasonably necessary. The test in respect of this issue does not relate to the end result of the Claim. Rather, if the interests of the various Parties' were not the same across the board, separate counsel was needed. The Court held that although there was some overlap in the various Defendants' interests, the issues facing each set of Defendants were distinct. Moreover, that the Appellant consistently alleged misconduct by certain Parties and regularly changed his grounds of suit, made separate counsel even more important. A Party accused of dishonest conduct, such as fraud, is entitled to his or her own counsel. The Appellant continually added to his list of alleged misconduct, and for the most part, not all Parties were alleged to be guilty of a single accusation. That alone showed diversity of interest. The Respondents were not obliged to dismiss or not take seriously the allegations by a persistent litigant involving individual reputations and significant sums of money. Moreover, no unnecessary duplication of work was alleged between the two sets of counsel for the Respondents. In this context, the Court dismissed the Appeal.

With respect to the Cross-Appeal, the Respondents argued that they should not have been restricted to single Column 5 after the close of the Appellant's case. The Court held that, although the Appellant dropped one of his claims at that stage, he did not drop any factual allegations. Moreover, the pleas of misconduct were never formally withdrawn.

The Court held that the application of Schedule C is purely optional for a Judge. The huge sums of money at issue in the Claim were far higher than those contemplated in Column 5. Further, the Schedule C amount did not change with the new Rules; rather, it was drafted by an *ad hoc* Committee approximately 16 years ago. The Court held that the Trial Judge reduced Costs after the close of the Appellant's case on the basis that even a late narrowing of the issues should be encouraged, and was consistent with the principles set out in Rule 1.2. The Court held that although the Trial Judge's discretion to reduce Costs after a Claim is withdrawn should be respected on Appeal, a three-quarters reduction was not proportional, and could not be justified.

The Court further held that the Respondents did not lead evidence at Trial that was unnecessary. Further, the Trial Judge's Reasons demonstrate that the Respondents won the Trial largely because of the witnesses they called. Further, single Column 5 would be inadequate for any suit respecting such sizeable assets, even if it ran smoothly and without misconduct. However, the Trial Judge gave that factor no weight whatsoever. The Court further noted that the undoubted, incessant misconduct by the Appellant received no weight at all during the second part of the Trial, which was the point at which the Respondents defended

themselves against such allegations. The Trial Judge further failed to give any weight whatsoever to the great complexity of the Claim.

The Court held that it was entitled to interfere with discretionary decisions such as Costs where improper weight was given or not given to relevant factors. The Trial Judge's Reasons showed that a number of important factors received no weight at all. In this context, and given that the Costs award was well over $300,000.00, the Court determined that it was appropriate to intervene. The Court allowed the Cross-Appeal and increased Costs for the latter part of the Trial from single Column 5 to triple Column 5.

321665 ALBERTA LTD v HUSKY OIL OPERATIONS LTD, 2013 ABCA 326 (MARTIN, WATSON AND McDONALD JJA) Rules 1.9 (Conflicts and Inconsistencies with Enactments), 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle), 14.1 (Application), 601 (Awarding Costs) and 608 (Costs on Appeal)

In this case, the Trial Judge had awarded triple column 5 Costs and a second counsel fee to the Respondent, 321665 Alberta Ltd. Although the Appellant was successful on the Appeals, the Respondent requested that the Court of Appeal vary from the usual Costs consequences of Appeals.

The Respondent acknowledged that the Appellant was completely successful on the outcome of the Appeals, but argued that this was a special case where the parties should bear their own costs on Appeal and the Court should affirm the Court of Queen's Bench Costs award. Further, the Respondent submitted that the language of s. 36 of the *Competition Act* created a "one-way" entitlement to Costs which operated against the effect of Rule 601(3).

The Court of Appeal noted that former Rule 601 continued to apply to Costs. Further, the Court highlighted that, where no Costs Order on Appeal was made, "the costs follow the event" and, under Rule 608, the applicable tariff and column on Appeal should usually match what was selected at Trial. The Court of Appeal also noted that the Trial Costs award was within the scope of the Trial Judge's discretion due to the quantum of the claim and the complexity and duration of the litigation.

Regarding the Trial Judge's award of a second counsel fee, the Court of Appeal noted that the submissions from each of the (Appellant) Defendants' counsels on Appeal were consistent with one another and the Court was not given a reason for departing from awarding a single set of Costs that included a single set of counsel fees for each successful party.

The Court noted that Rule 1.9 provided that if there was an inconsistency between the Rules and an enactment, the enactment prevailed; therefore, the Respondent argued that Rule 1.9 meant that s. 36 of the *Competition Act* prevailed over Rule 601(3). The Appellants disagreed with the Respondent's arguments regarding the effect of the *Competition Act*, stating that such an approach would permit risk-free litigation contrary to the principles in Alberta of awarding Costs to the successful party.

The Respondent also argued that this litigation was a public interest litigation that had *prima facie* merit and involved complex issues of importance to the public generally.

In addition, the Appellants had made a Formal Offer under Rule 4.24 and were seeking Double Costs. The Respondent claimed that the Offer was not a serious offer of compromise; however, the Appellants contended that the unambiguous wording of Rule 4.29(1) was such that the Appellants should not be denied their Costs except for good reason.

In making its Decision, the Court of Appeal first noted that, "*limitations* on the compensatory role of costs aris[ing] from litigation success in a purely private action should generally be grounded in statute or in established legal principle" [Emphasis in original]. The Court also highlighted the standard characteristics of Costs awards as mentioned in *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at paras. 20 to 26, and noted that entitlement to Costs can be limited by statutory direction or by legal principles, such as those that relate to misconduct of the party or miscarriage in procedure. After considering several previous decisions and the *Competition Act*, the

Court held that the Respondent did not refer to any statute which permitted it to bypass the applicable Rules and s. 36 of the *Competition Act* did not set-up a "one-way" Costs regime.

Finally, the Court held that the dispute in this case was a private commercial dispute between corporate parties that did not raise unusual issues or trigger any special consideration as to Costs. With respect to the submission for Double Costs in light of the Formal Offer, the Court held that there was no reason for bypassing that Rule, as the Formal Offer was intended to encourage resolution and was not derisory or abusive. The Appellants were each entitled to a set of Costs at triple Column 5, but with single counsel fees, and subject to the effect of Rule 4.29(1).

FILL v SOMANI, 2013 ABQB 572 (SHELLEY J)
Rules 1.7 (Interpreting These Rules), 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award), 10.39 (Reference to Court), and 10.41 (Assessment Officer's Decision)

A little over a month before Trial, the Defendants made Formal Offers to Settle, which the Plaintiffs accepted. The Parties agreed to Consent Judgments which provided for party-party Costs as agreed or, failing agreement, to be taxed with reference to the relevant column of Schedule C. The Parties were unable to agree on Costs and attended before an Assessment Officer who referred six issues to the Court for determination.

Before addressing the issues, the Court analyzed whether the wording of the Consent Judgment operated to limit its discretion in awarding Costs. Shelley J. found that the Parties had agreed to submit disputes to taxation which inherently implied the discretion of the Court to award Costs. The Court held that clear and strong language is required to contradict that implication. Shelley J. then addressed in turn each of the six issues referred by the Assessment Officer.

First, the Court assessed whether the Plaintiffs were to be awarded an inflationary factor. The Court found that the Rules of Court Committee's recent request for comment and its ongoing review of the tariff of recoverable fees in Schedule C was a relevant consideration. In addition, the Plaintiffs had provided an economist's report evidencing the rate of inflation. The Court was satisfied that this was an appropriate case to award an inflationary factor and did so on the basis of the economist's report, at the rate set forth in that report.

Second, the Court addressed Costs for Notices to Admit. The Plaintiffs sought Costs for each of the Notices to Admit Opinions, Notices to Admit Documents, and Replies to the Defendants' Notices to Admit Documents. The Defendants argued that in the Notices to Admits identical opinions were unnecessarily duplicated. The Court found the Notices to Admit were likely helpful in settlement and the Experts' Reports were lengthy. Accordingly, it was appropriate to award a fee in respect of each Notice to Admit Opinion. The Plaintiffs served a Notice to Admit eleven documents which resulted in the Defendants admitting nine of them. The Court found that this would have significantly shortened Trial and awarded the Plaintiffs the Costs thereof. Finally, the Plaintiffs sought Costs for Replies to Notices to Admit Documents served by the Defendants. The Plaintiffs relied on Rule 1.7 to assert that a Reply to a Notice to Admit was analogous to a Notice to Admit for the purposes of a Costs award. The Court was not satisfied that the Replies to Notices to Admit were appropriate or warranted, and determined that it would be inappropriate to award Costs based on the proposed application of Rule 1.7.

Third, the Plaintiffs sought to recover the disbursement expense for Costs of a mediation. The mediation had occurred under the old Rules. However, the Court found that Rule 10.41(2)(d) was relevant. Shelley J. explained that the rationale for the Rule was "that dispute resolution processes benefit both parties and promote early settlement". Finding that Parties should be encouraged to seek alternative dispute resolution, the Court declined to award Costs for the mediation.

Fourth, the Court addressed costs awards for nominee physicians at Rule 5.41 Examinations. The Plaintiffs sought to recover disbursements for fees paid to nominee physicians. The Defendants argued that the Plaintiffs must

first establish a need. The Court held that nominee medical expert fees should be awarded if the fees are reasonable and appropriate. Shelley J. held that, in this case, they were, and awarded the Plaintiffs Costs. The Court went on to note that there is no need to prove necessity to justify an award of Costs for a nominee's attendance.

Fifth, the Defendants disputed the Plaintiffs' entitlement to recover the Costs of an Expert's Report from PricewaterhouseCoopers, arguing that the fee was unduly high. The Court noted that the Defendants presented no particular evidence on this point, but rather relied on general principles from case law. Shelley J. found that the Expert's Report at issue had been complicated by the difficulty of assessing a fledgling business, and was a key factor in settlement. Her Ladyship also noted that the fee had already been reduced. The Court rejected the generalized arguments for a reduction of the fee for the Expert's Report from PricewaterhouseCoopers and awarded the Plaintiffs full Costs for this disbursement.

Finally, the Plaintiffs sought disbursements for photocopying in-house at the legal firm at $0.28 per page. The Defendants argued that photocopying costs should be restricted to $0.15 per copy in accordance with amounts set by jurisprudence. The Court held that the $0.15 per copy rate applies only in the absence of evidence substantiating a higher rate. In this case, the Plaintiffs provided the Affidavit of a legal assistant which showed an actual cost of photocopying of $0.38 per page. Accordingly, the Court held that $0.28 per page was supported on the evidence and granted costs of photocopying at that rate.

AGRICULTURE FINANCIAL SERVICES CORPORATION v ZABORSKI, 2013 ABCA 277 (ROWBOTHAM, MCDONALD, AND O'FERRALL JJA)
Rules 3.36 (Judgment in Default of Defence and Noting in Default) and 3.37 (Application for Judgment Against Defendant Noted in Default)

The Defendant appealed an Order of Wilson J, granting the Plaintiff a renewal of a Judgment against the Defendant for general damages, punitive damages and pre-judgment interest. The Defendant claimed that the Application for renewal was not brought within the 10 year limitation period, and therefore the Application for renewal should have been dismissed. The Defendant had been Noted in Default on October 31, 2001. The Plaintiff brought an Application for Judgment, pursuant to former Rule 152, and obtained Judgment on January 10, 2002. The Order for renewal was obtained by the Plaintiff on January 9, 2012, subject to the Defendant's right to challenge the renewal on the basis that it was not renewed within the 10 year limitation period.

The Defendant argued that the 10 year limitation period began running on October 31, 2001, the date upon which the Defendant was Noted in Default, whereas the Plaintiff argued that the limitation period began running on January 10, 2012, the date upon which Judgment was granted. The Court agreed with the Plaintiff and stated that:

> …A Praecipe to Note in Default is not a judgment or an order for the payment of money. A praecipe is nothing more than a direction to the clerk of the court signed by a party or his lawyer (as in this case) requesting that a notation be made on the court file that the defendant is delinquent in some respect. …

The Court held that there was no Judgment or Order for payment of money against the Defendant until the January 10, 2002 Judgment was pronounced, and that the Noting in Default was not a Judgment or an Order for the payment of money. The Order for renewal was therefore granted within the 10 year limitation period and the Appeal was dismissed.

ARCELORMITTAL TUBULAR PRODUCTS ROMAN S.A., (MITTAL STEEL ROMAN S.A.) v CANADIAN NATURAL RESOURCES LIMITED, 2013 ABQB 578 (HUGHES J)
Rules 3.65 (Permission of Court to Amendment Before or After Close of Pleadings) and 3.68 (Court Options to Deal with Significant Deficiencies)

The case involved a defamation action for release of a document (the "Quality Alert") by the Defendant, CNRL, which stated that piping defects had been discovered in the pipes manufactured by the Plaintiff, Mittal, and that

those materials should be quarantined until an investigation of the cause was complete. Mittal sought to substantially amend its Statement of Claim, from 26 paragraphs to 111 paragraphs. The Defendant submitted that Mittal had not met the test under Rule 3.65 for many of the proposed amendments because there was no evidence to support the amendments and/or some of the amendments raised new claims which were past the limitation date. Pursuant to Rule 3.68(2)(b), the Defendant applied to strike the pleadings related to the allegation that the Quality Alert was defamatory and/or an injurious falsehood.

With regard to the Application to amend the pleadings, the Court addressed each of the proposed additional paragraphs. The proposed amendments that CNRL did not oppose were allowed. Some amendments identified the names of the recipients of the Quality Alert who were described more generally in the original pleadings. Therefore, those amendments particularized the original pleadings and were allowed. Paragraphs which identified the projects and customers who allegedly avoided the pipes as a result of CNRL's Quality Alert were supported by Affidavit evidence and allowed. However, the majority of the proposed amendments were not allowed. In a prior application – *Canadian Natural Resources Limited v Arcelormittal Tubular Products Roman S.A. (Mittal Steel Roman S.A.)*, 2012 ABQB 679, aff'd 2013 ABCA 87 – CNRL was denied amendments to its Statement of Defence. Some of the paragraphs that the Plaintiff now proposed were essentially identical to those sought by CNRL in its proposed Amended Statement of Defence. Therefore, Hughes J. denied those amendments. Other proposed paragraphs were denied for the following reasons:

(a) The amendments pleaded no material or relevant facts with respect to the elements of defamation or injurious falsehood;

(b) The amendments were wholly argument and therefore improper pleadings;

(c) The amendments were not supported by the evidence;

(d) The original pleadings did not provide sufficient detail of the specific claims. Therefore, the amendments did not further particularize the original pleadings, but brought new claims which were out of time; and

(e) Those claims out of time could not be saved because they did not relate to the conduct, transaction or events described in the original pleading. The original Statement of Claim simply made general allegations and did not adequately plead republication or the harm arising therefrom.

With respect to CNRL's application to strike out pleadings pursuant to Rule 3.68(2)(b), the test was whether it was "plain and obvious" that the Plaintiff's claim must fail. The ultimate issue came down to whether the words that Mittal complained of were in fact defamatory. The ordinary meaning of the language and the evidence presented by the attached photographs were considered. Hughes J. found that a reasonable, thoughtful and informed person of average intelligence, with a degree of common sense, would not find the words in the Quality Alert to be defamatory, and that it was plain and obvious the Plaintiff's claim in injurious falsehood was bound to fail. The Application to strike the pleadings related to the Quality Alert was granted.

AG CLARK HOLDINGS LTD v HOOPP REALTY INC, 2013 ABQB 402 (GILL J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

Previously, the Applicant (Defendant) sought to have the Claim struck on the basis that arbitration had not been commenced within the two year limitation period pursuant to the *Limitations Act*, RSA 2000, c L-12. Alternatively, the Applicant sought a Stay pursuant to the *Arbitration Act*, RSA 2000, c A-43.

The Court found that arbitration was not mandatory and dismissed the Application. The Decision was appealed and overturned. The Court of Appeal found that there was a mandatory arbitration clause and the matter was referred back to the Court of Queen's Bench to resolve the remaining issues.

The Respondent (Plaintiff), relying on section 7(2)(d) of the *Arbitration Act*, submitted that the proceedings should not be stayed as the Application for the same had been unduly delayed. The Respondent also argued that the issuance of a Statement of Claim could be considered an arbitration-commencing document: *Lafarge Canada Inc v Edmonton (City)*, 2012 ABQB 634 [*Lafarge*].

The Court dismissed the Action. The Court held that *Lafarge* was distinguishable, and stated that:

> Section 7(2) of the *Arbitration Act* does not assist HOOPP. Once it has been determined that there is a mandatory arbitration clause and that the applicable party failed to commence an arbitration within the limitation period, the *Arbitration Act* ceases to have any further application and the Court's role comes to an end.

ARCELORMITTAL TUBULAR PRODUCTS ROMAN SA v FLUOR CANADA LTD, 2013 ABCA 279 (MARTIN AND MCDONALD JJA, AND HORNER J(AD HOC))
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

Two Actions related to the supply of pipe to Canadian Natural Resources Limited ("CNRL") for one of its oil sands projects were commenced in March and April 2007. On November 29, 2007, CNRL commenced a Third Party Action against Fluor Canada Ltd. ("Fluor") which was discontinued a month later. In June and July 2010, other Defendants in the two Actions issued Third Party Notices against Fluor. Fluor brought an Application in each Action to strike out the Third Party Notices pursuant to Rule 3.68, but the Applications to Strike were dismissed by the Case Management Judge. On Appeal, Fluor argued that the Case Management Judge erred in not striking out allegations that Fluor breached its contract with CNRL, allegations of a duty of care owed to CNRL, and allegations that Fluor breached a duty to warn or supervise the Defendants.

The Court referred to former Rule 129 and held that discretionary Decisions of a Case Management Judge, and Decisions related to whether a pleading should be struck, are reviewed on a reasonableness standard and should be given a high level of deference. However, the question of whether a pleading discloses a cause of Action is a question of law, reviewable on a correctness standard.

The Court held that, in an Application to Strike, the applicable test is whether, assuming the facts as pleaded are true, there is a reasonable prospect that the Claim will succeed. With respect to the independent duties alleged to be owed by Fluor to the Defendants, the Court stated that unless there is binding authority that either there was no cause of action in law as alleged, or that such a cause of action could not apply to the facts, it could not be said that the claim had no "reasonable prospect" of success.
The Court further held that, although the claims related to a novel duty of care, whether there was any merit to the allegations was a question that could only be determined at Trial. Accordingly, the Court held that it could not be said that the Claim had no reasonable prospect of success.

Fluor further argued that the expiry of CNRL's limitation period against Fluor barred contribution claims pursuant to the *Tort-feasors Act*, RSA 2000, c T-5. Fluor argued that no liability could be found against Fluor pursuant to Section 3(1)(c) of the *Tort-feasors Act* on the basis that, by the time the Third Party Notices had been filed, CNRL itself was precluded from commencing an Action against Fluor. The Court agreed and held that the Chambers Justice erred. However, the Court rejected Fluor's position that any alleged breach by Fluor of its contract with CNRL could not found a claim for contribution at common law. Ultimately, the Court dismissed the Appeal, with the exception of any Claims for contribution against Fluor pursuant to the provisions of the *Tort-feasors Act*.

1251165 ALBERTA LTD v WELLS FARGO EQUIPMENT COMPANY LTD, 2013 ABQB 533 (GRAESSER J)
Rule 4.22 (Considerations for Security for Costs Order)

The Plaintiffs appealed the Decision of Master Breitkreuz ordering payment of Security for Costs. The dispute arose over a lease agreement whereby the Plaintiff and a related corporation (the "Customer") leased a trailer from the Defendant. The Customer went into arrears after having

made 37 payments and the Defendant seized the trailer. The trailer was sold for $15,000; however, the Plaintiffs alleged that the trailer was worth more and brought a claim alleging that the Defendant sold the trailer for a price significantly under fair market value and that it did not act in good faith or in a commercially reasonable manner. The Defendant applied for Security for Costs on the basis of a good defence on the merits and the impecuniosity of the Plaintiffs. The Plaintiffs acknowledged that they were without money sufficient for posting Security for Costs, but argued that they intended to use the proceeds of the sale of the trailer to pay off their debts, as they estimated the value of the trailer at $200,000

The Court considered Rule 4.22, stating that there was no substantive difference between the current Rule and the former Rule, with the exception that the current Rule invited the Court to consider the merits of the Action. In this case, there was evidence that the Plaintiffs were individually and collectively unable to pay Security for Costs, but Graesser J. noted that Rule 4.22 gave the Court discretion to set the amount and terms of any Security Order, including determining whether any Order should be granted. Additionally, the Court highlighted that there was nothing to prevent the Defendant from obtaining Security for Costs simply because it filed a Counterclaim. The Court acknowledged that the basis for an Order for Security for Costs was to protect a Defendant, who has an arguable defence, from facing a situation where a Plaintiff is unable to pay Costs.

After canvassing case law, Graesser J. set out factors to consider when determining whether or not to order Security for Costs: the existence of a Counterclaim; the merits of the Action; the likelihood of success for the Plaintiff (the greater the likelihood of success for the Plaintiff, the more the Court should consider the injustice of preventing the claim from proceeding); and any connection between the Plaintiff's financial situation and the Defendant's conduct.

Graesser J. considered the merits of the Parties' arguments and could not determine which Party was more likely to succeed. Based on this, the Master's Order was upheld and it was also ordered that if the Plaintiffs were unable to post Security for Costs in accordance with Rule 4.23, the Claim and Counterclaim would be dismissed.

FRANCHUK v SCHICK, 2013 ABQB 532 (MASTER SCHULZ)
Rules 4.31 (Application to Deal with Delay) and 15.4 (Dismissal for Long Delay: Bridging Provision)

The Applicant (Defendant) sought dismissal for long delay, or alternatively, dismissal for delay causing significant prejudice.

The Action alleging defamation was brought in 2006. The issue was whether an Affidavit filed in 2009 advanced the Action. The Affidavit was filed in support of the Defendant, and outlined details on the defences of qualified privilege and whether the Defendant acted maliciously. The Affiant died shortly after the filing of the Affidavit. The Affiant had not been questioned on the Affidavit.

The Court held that the filing of the Affidavit was similar to the provision of information to an opposing party. The Court also held that the Defendant had acknowledged, in previous correspondence, that the filing of the Affidavit moved the Action closer to Trial. The Court held that the filing of the Affidavit significantly advanced the Action. Additionally, the Court held that the Defendant had not been significantly prejudiced. The Application was dismissed. However, the Court granted a procedural Order requiring the Plaintiff to either file a completed Form 37 or bring an Application to set a Trial date.

MILAVSKY v 353396 ALBERTA INC, 2013 ABCA 253 (BERGER, O'BRIEN AND SLATTER JJA)
Rule 5.33 (Confidentiality and Use of Information)

In 2009, the Respondent, Ms. Milavsky, commenced divorce proceedings against her husband, who died in 2012. Ms. Milavsky claimed she was entitled to a share of the assets that were conveyed by her husband to certain Trusts, or in the alternative, to compensation for the services he provided to the Trusts. Ms. Milavsky also sued the Trustees, claiming unjust enrichment, and sought to set aside conveyances to the Trusts. In October 2012,

the Appellants applied to the Case Management Judge to sever the issue relating to the liability of the Trusts from the issues of unjust enrichment and the Respondent's entitlement to damages. The Appellants argued that the factual underpinnings of the entitlement issue were distinct from the remedies that may be engaged. As such, the issues were severable and distinct. The Chambers Judge characterized the issue as whether Mr. Milavsky's transfers to the Trusts defeated the Respondent's Claim for an equitable division of matrimonial property and spousal support. Having considered the broader context of the litigation, the sheer volume of evidence, Rule 5.33, and other Court decisions on the issue of severance, the Chambers Judge dismissed the Application for severance.

The Court of Appeal held that Decisions "ordering or refusing severance of issues involve an element of discretion and should not be interfered with on Appeal unless they reflect an error of law or principle or are unreasonable", particularly when such Decisions are rendered by a Case Management Judge who has detailed knowledge of the litigation. The Court held that the Respondent was required to establish, *inter alia*, whether she had any entitlement to the funds used to settle the Trusts. There was no clear demarcation between entitlement and remedy. As such, the Court dismissed the Appeal.

ADACSI v ADMIN, 2013 ABCA 315 (HUNT, PAPERNY AND O'FERRALL JJA)
Rule 5.44 (Conduct of Examination)

The Appellant Plaintiff sought damages for injuries from a house fire. Three people died in the fire. The Appellant survived, but was hospitalized for several months and claimed compensation for debilitating injuries preventing employment, resulting from the alleged negligence of the Defendant landlords. The Plaintiff was in her late thirties with a significant family history of Huntington's disease.

Certain medical professionals had opined that some of the Plaintiff's symptoms could relate to Huntington's disease. The Respondents successfully applied in Chambers for an Order under Rule 5.44(2), requiring the Plaintiff to submit to a blood test for the presence of the Huntington's disease mutant gene. The Chambers Judge granted the Order, finding that the proposed test was reliable and useful, and though a blood test was intrusive, it presented no real health risks.

On Appeal, the Appellant argued first that blood samples as ordered did not fall within the text of Rule 5.44(2), the Rule was not broad enough to include blood samples, the examining health care professional's ability to take samples meant that a laboratory technician could not do so, the Rule did not explicitly say that a Court could require a person to attend for a test, and the Rule's phrasing required samples to be taken contemporaneously. The Court dismissed these arguments as either at odds with the context, purpose, or a logical reading, of the Rule.

The Appellant also argued that the Chambers Judge erred in exercising her discretion to Order the Appellant to submit to blood tests. The Court dismissed the Appeal, holding that the possibility of the Appellant having Huntington's disease was not frivolous in this case. The Appellant chose to sue for damages and could not deprive the Respondents of the opportunity to acquire evidence that might assist in their defence of the damages claimed against them.

BOYD v COOK, 2013 ABCA 266 (CÔTÉ, CONRAD AND WATSON JJA)
Rule 6.14 (Appeal from a Master's Judgment or Order)

The Parties in this Action returned to the Court of Appeal for a direction as to Costs. In the final result, the Appellant won at the Court of Appeal.

The Respondents agreed that they should repay the Costs which they collected for the Motions before the Master and Chambers Justice, but argued that they ought to pay nothing for those two Motions.

The Respondents submitted that Costs would not be appropriate under the circumstances because a second Affidavit was filed on Appeal from the Master to the Chambers Justice and the Appellant's Court of Appeal Factum contained a new argument.

The Court of Appeal rejected this argument, stating:

> …Neither act is misconduct or sharp practice, and both are frequently done. The new argument was not an entirely fresh topic, and was very relevant and foreseeable, and required no new evidence. Rule 6.14(3) gives a very lax test for such new evidence. Lack of due diligence is **not** one of the tests. … [emphasis in original]

The Appellant was granted party-party Costs for the Motions in question.

1301905 ALBERTA LTD v SWORD ENERGY INC, 2013 ABQB 444 (LEE J)
Rules 7.3 (Summary Judgment) and 10.31 (Court-Ordered Costs Award)

Previously, the Plaintiff Applicant was granted Summary Judgment and the assessment of damages was referred to a referee pursuant to Rule 7.3(3)(b). The Plaintiff Applicant sought direction regarding the assessment of damages and a full indemnification for Costs. The Defendant Respondent argued that, since the Court previously referred the matter to a referee, the Court no longer had jurisdiction to deal with the assessment of damages, and that there was no reason to depart from party-party Costs.

The Court held that it had continuing jurisdiction and gave further directions regarding the assessment of damages by the referee. Costs were awarded on a party and party basis as the exceptional circumstances, as outlined in *Jackson v Trimac Industries Ltd*, 1993 4 WWR 670 and *Evans v Sport Corp*, 2011 ABQB 616, required for solicitor and client Costs were not met.

DEGUIRE v BURNETT, 2013 ABQB 488 (BROWN J)
Rule 7.3 (Summary Judgment)

The Action involved neighbours who were disputing Mr. Deguire's construction of improvements on a portion of Mr. Burnett's land. Mr. Deguire sued Mr. Burnett for an Order under section 69(1) of the *Law of Property Act*, RSA 2000, c L-7, and Mr. Burnett counterclaimed in trespass, negligence and nuisance for damages. Each Party applied for Summary Judgment of their claims and at issue was whether the evidence supported Summary Judgment.

Brown J. first noted that there was no dispute between the Parties as to the onus and test to be met for Summary Judgment; however, Mr. Deguire emphasized that conflicting evidence on immaterial facts was not a bar to Summary Judgment, and Mr. Burnett stressed that a party could not rely on self-created evidence when determining if there was a genuine issue for Trial.

Brown J., at para. 19, held that "[i]t must be 'plain and obvious' that the claim or defence will fail; the claim or defence must be 'bound to fail', or have 'no prospect of success', or have 'no merit, or raise 'no genuine issue for trial'". After setting out the applicable test for an Order under section 69(1) of the *Law of Property Act*, Brown J. considered whether the evidence supported Summary Judgment for an Order under section 69(1). Regarding Mr. Deguire's Application, the Court held that the state of evidence rendered it very likely that Mr. Deguire would succeed in demonstrating the first part of the test set out for section 69(1); however, for the second portion of test, there was some evidence from Mr. Burnett that was sufficient to defeat an Application for Summary Judgment, since it could not be held that Mr. Deguire's position was so unassailable that the likelihood he would succeed was very high. There was clashing Affidavit evidence, and it was noted that even if no contradictory evidence was presented at Trial, Mr. Deguire's evidence might still be found to be insufficient. The Court's concern was with the sufficiency of the evidence, rather than the admissibility of the evidence.

Regarding the Application for Summary Judgment for the Counterclaim, Brown J. held that the plausibility and reasonableness of Mr. Deguire's evidence was unsettled; therefore, it could not be said that it was very likely that he would fail to demonstrate the honest belief necessary for a claim under section 69(1) of the Law of Property Act. Because of this, it could not be said that it was very likely that Mr. Burnett would succeed in his claims against Mr. Deguire.

Both Applications for Summary Judgment were dismissed.

ROYAL BANK OF CANADA v RAHMANI, 2013 ABQB 565 (MASTER MASON)
Rule 7.3 (Summary Judgment)

The Royal Bank of Canada applied for Summary Judgment. The Respondent straw purchaser asserted that he entered into the transaction at the urging of his former co-worker, who requested that the Respondent help him to purchase a house. The Respondent stated that he was told that the proposed transaction was completely legal, and that everything would be handled officially through a lawyer and banker. The Respondent thought he was helping out a friend and received no compensation for his role.

The Respondent defended the Action on the grounds that the Bank did not act with due diligence in lending him the money, a bank employee was involved in the fraud, and *non est factum*. He also issued a Third Party Notice alleging negligence against the lawyer that represented him in the transaction.

By an Order dated October 12, 2010, the property was sold to the Bank at its appraised fair market value. The Bank's Application for a Deficiency Judgment was adjourned and became the subject of the Application, which also included the lawyer's Application to summarily dismiss the Third Party Notice against him.

The Applications were dismissed in their entirety. Master Mason determined that there were genuine issues for Trial on all of the matters being considered.

TOLIVER v KOEPKE, 2013 ABCA 304 (CONRAD, SLATTER AND O'FERRALL JJA)
Rule 8.17 (Proving Facts)

After attending a Judicial Dispute Resolution, the Parties attended at a law office to negotiate a settlement. The settlement meeting lasted all afternoon, and the Parties agreed on a number of issues in dispute. The Respondent wife alleged that the settlement negotiations continued, and a deal was eventually reached. The Trial was cancelled, but the Minutes of Settlement were not prepared before the husband's counsel withdrew from the record. The Parties were then unable to agree that a settlement had been reached, and a Trial was ordered on the issue of whether the Parties had, in fact, arrived at a settlement. The Trial Judge held that a settlement had been reached.

The Appellant husband appealed on the basis that, *inter alia*, the Trial Judge erred in failing to ensure that all documents, particularly Affidavits, were entered as Exhibits at Trial. The Appellant argued that earlier Notices of Motion and Affidavits on which the Respondent was Cross-Examined had not been entered as Exhibits. The Trial Judge had advised the Parties that any issues regarding whether documents should be entered could be dealt with when the documents were raised in evidence. The Appellant argued that the Trial Judge had a duty to ensure that admissibility was dealt with when the Respondent was Cross-Examined on her Affidavits.

The Court of Appeal disagreed, and held that each litigant is responsible for tendering the evidence it seeks to have entered on the record. Pursuant to Rule 8.17, there is a presumption that evidence is given *viva voce*. If the Appellant wished to enter Affidavit evidence, he was required to provide an acceptable reason for doing so. The Appellant provided no such explanation. Further, the evidence at issue was not disallowed or entered over an objection. Rather, it was never tendered for entry on the Record. It is not the duty of a Trial Judge to determine whether a Party wishes to enter a particular document. The Appellant had the opportunity to elicit evidence in the Respondent's Affidavits during Cross-Examination, failing which he could have Cross-Examined on the Affidavits. In this context, the Court held there was no merit to this ground of Appeal. The Appeal was dismissed.

EQUITABLE TRUST COMPANY v LOUGHEED BLOCK INC, 2013 ABQB 544 (ROMAINE J)
Rule 9.13 (Re-Opening Case)

The Plaintiff Applicant applied to Justice Romaine to vary the Reasons relating to Costs in order to reflect a previously overlooked contractual provision that Costs would be borne

by the Defendant Respondents on a solicitor and own client basis. The Defendant Respondents opposed the Application on the basis of jurisdiction and merits. The Defendant Respondents argued that the issue was *res judicata*, or that Rule 9.13 applied only in the limited circumstances of a "slip" or where fresh evidence was adduced. Justice Romaine noted that pursuant to Rule 9.13 jurisdiction to re-open the previous Decision was a non-issue; the Rule clearly allowed for the Order to be varied at any time before entry. The Justice further observed that the Costs Decision could not be *res judicata* since Rule 9.13 specifically provides that an Order may be varied, and the Rule was not limited to the narrow ambit suggested by the Defendant Respondents. The previous Costs Order was varied to accommodate Affidavit evidence that had not previously been considered. Costs were awarded to the Plaintiff Applicant on a solicitor and own client basis.

ELFAR v ELFAR, 2013 ABCA 258 (CÔTÉ JA)
Rule 10.29 (General Rule for Payment of Litigation Costs)

The successful Respondent to an Appeal sought Costs, as taxed, to be paid by the Appellant. These Costs included the Costs of a successful interlocutory Application in the Court of Appeal for Security for Costs. The Justice who heard the Security for Costs Motion had not made any direction with respect to Costs.

Justice Côté held that where not otherwise provided, the general *Rules of Court* apply both in the Court of Queen's Bench and in the Court of Appeal. The Court noted that Rule 10.29 affords each Judge and Assessment Officer discretion, but if that discretion is not exercised, Costs go to the winner. Since no direction was made in this case, the Court held that Costs should go to the winner of the Security for Costs Motion: the Respondent. The Court also noted that where a party obtains a monetary award of a lesser amount than sought, that party is generally taken to have been successful.

FORSYTH v FRASER, 2013 ABQB 557 (BROOKER J)
Rules 10.29 (General Rule for Payment of Litigation Costs) and 10.33 (Court Considerations in Making Costs Award)

A Provincial General Election was held in Alberta and the result indicated that Ms. Heather Forsyth of the Wildrose Alliance Party had obtained the largest number of votes, followed by Ms. Wendelin Fraser of the Progressive Conservative Party. The number of spoiled ballots in this case exceeded the number of ballots by which there was victory. Ms. Fraser requested a judicial recount on the basis that the votes had not properly been accepted, and the Certificate of Return did not accurately record the number of votes. The recount confirmed Ms. Forsyth's victory. The Court directed that the Parties resolve the matter of Costs. The Parties were unable to resolve this issue and Ms. Forsyth made an Application for a Costs award in relation to the judicial recount.

The Court completed an analysis of s. 148.1(1) of the *Election Act* in determining who should pay the Costs. The Court reviewed the factors set out in s. 148.1 (1) and determined that an award for Costs was a fact-specific endeavor. The Court also noted the general rule, Rule 10.29(1), that the successful Party to an Application is entitled to a Costs award against the unsuccessful Party. Rule 10.29(1)(d) provides an exception to this general rule where there is legislation governing who is to pay Costs. In this case, the Court acknowledged that ensuring public confidence in a fair and transparent electoral system outweighed the consideration that Ms. Fraser was personally invested in the outcome. The Court also noted that the margin of victory was very minimal and that there was no evidence that Ms. Fraser was taking the process lightly. Further, there was no indication that Ms. Fraser seemed to be motivated by anything other than a desire to ensure the voting record accurately reflected the ballots cast for each candidate. The Court held that the Crown would bear the Costs of the Application pursuant to s.148.1(1)(b)(ii) of the *Elections Act*.

The Court then determined the quantum of Costs to be paid by the Crown, noting that Rule 10.33(1) of the Rules of Court allows the Court to consider a variety of factors

in making a Costs determination. The Court found that solicitor-client Costs were not justified, and that a party-party Costs award was the correct approach. The Court determined that the appropriate Costs award given the facts would be calculated on single Schedule C Column 5, plus disbursements. However, in this particular case, the Crown had already negotiated a settlement with Ms. Fraser on Costs that the Court estimated to be around $10,000, an amount greater than the Costs for the recount that would be calculated under Column 5. The Court stated that it would offend one's sense of justice and fairness that the "loser" of a recount would receive a greater payment than the "winner". Thus, in exercising its discretion, the Court ordered the Crown to pay a sum of $12,500 plus reasonable disbursements for the judicial recount, and the Costs under Column 5 of Schedule C for the Application.

PRECISION FOREST INDUSTRIES LTD v COX, 2013 ABQB 524 (LEE J)
Rules 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

The Plaintiff signed a real estate purchase contract for nine parcels of forested land. The Plaintiff was interested in the lands and the timber located on the lands. An Action was brought by the Plaintiff seeking specific performance, or damages in lieu thereof, with respect to the real estate sale transaction which the Defendant refused to close. The lawyer performing the closing was named as a Third Party by the Defendant. The Defendant subsequently sold all the wood products to another party, kept the proceeds, and started to remove gravel product from the subject lands. Multiple attempts were made, including two court Orders, to compel the Defendant to answer Undertakings necessary to address the issue of damages. The Defendant still failed to provide answers. The Plaintiffs brought an Application for Contempt pursuant to Rules 10.52 and 10.53.

Lee J. noted that it was significant in relation to the Application that the two prior Court Orders referred to the same Undertakings. The standard of proof in civil contempt is proof beyond a reasonable doubt and is comprised of both the required action and the required mindset, i.e. an *actus reas* and *mens rea*. The requirements for finding civil contempt are:

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

Upon review of the two Court Orders to compel Answers to Undertakings, the history of the delays, as well as a review of the Undertakings and the answers in conjunction with the orders, Lee J. held that, pursuant to Rule 10.52, the alleged contempt was made out as it was clear that the Defendant had not answered the Undertakings in dispute.

In determining the appropriate remedy for the contempt, in accordance with Rule 10.53, Lee J. reviewed the basic nature of the claim. He held that a fine was not appropriate given that it would not achieve the answers to the questions sought. Nor was it appropriate to strike the Defence as the Plaintiff would still be in the current position of having to proceed to an Assessment Trial to prove its damages. Lee J. held that the appropriate remedy for contempt in this case was to require the Defendant to pay all fees and costs associated with the Application incurred by the Plaintiff and the Third Party on a solicitor-client basis.