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Jensen Shawa Solomon Duguid Hawkes LLP is pleased to provide summaries of recent Court Decisions which consider the Alberta Rules of Court and commentary related to the Rules. Our website, www.jssbarristers.ca, also features a Cumulative Summary of Court Decisions which consider the Alberta Rules of Court. The Cumulative Summary is organized by the Rule considered.

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VECKENSTEDT v YOUSSEF, 2011 ABQB 735 (MASTER PROWSE)
Rules 1.2 (Purpose and Intention of These Rules) and 5.41 (Medical Examinations)

The Defendant requested that the Plaintiff attend a defence medical examination ("DME") pursuant to Rule 5.41. The physician conducting the DME required the Plaintiff to sign a consent form. The Plaintiff argued that the Rules of Court did not require him to sign a consent form and therefore declined to do so. He further argued that any Order compelling him to attend for a DME should state that he was not required to sign or execute any authorization, consent or release.

Master Prowse questioned whether the parties were failing to fulfil their responsibilities under Rule 1.2(3), to identify the real issues in dispute and facilitate the quickest means of resolving the Plaintiff's claim at the least expense. If a reasonable request from a member of the medical profession can be accommodated in a way that is not contrary to the Rules of Court, that accommodation should be provided. Indeed, medical examiners should be left to conduct examinations as they see fit unless there is a compelling reason for the Court to interfere. The Court cannot compel a doctor to conduct an examination under circumstances that the doctor objects to. If the Court constrains how particular plaintiffs are examined, the number of doctors willing to perform medical examinations will decline, raising both the price and length of time to complete the Discovery process in personal injury Actions.

Master Prowse held that this was not a circumstance in which an independent physician was seeking to conduct a DME in a manner contrary to the express provisions of the Rules of Court. When a DME is sought, counsel may agree, pursuant to Rule 5.41, that the Plaintiff will attend. Master Prowse held that it was appropriate for the Plaintiff, when attending for a DME, to sign a consent form. Alternatively, the DME may take place under a Court Order issued pursuant to Rule 5.41(2). Such a Court Order should expressly state that the physician is entitled to touch the Plaintiff for the purpose of conducting the examination. However, the examination will ordinarily take place weeks or months after the Court Order has been issued, and as such, it is reasonable for the physician conducting the DME to obtain consent on the day of the examination.

GALLANT v FARRIES, 2012 ABCA 98 (CÔTÉ J)
Rule 1.2 (Purpose and Intention of these Rules) and 7.1 (Application to Resolve Particular Questions or Issues)

The Defendant appealed an Order splitting up a medical malpractice Action into two Trials, one for Liability and one for Quantum. In Chambers the Plaintiff was successful in obtaining an Order splitting these issues. The Court noted that the Chambers Justice and the Plaintiff relied heavily on *Envision Edmonton Opportunities Society v Edmonton (City)*, 2011 ABQB 29 (*Envision*). The Court said that the split may have been proper in *Envision* but that the suggestion in *Envision* that the new Rules, and specifically Rule 1.2, reversed all of the case law on splitting trials was incorrect. The Court noted:

> … Alberta's new Rules merely recite what every one took for granted under the prior Rules;

> that speed and economy are important objectives. So that statement of the tradition is no excuse for discarding all or even big parts of Alberta precedent.

The Court also stated that Rule 1.2 could not supersede the clear criteria outlined in Rule 7.1. The Court explained that if read "mechanically and literally" Rule 7.1 offers "no criteria, only aims." However, if Rule 7.1 is read in a purposive manner it means that a trial split must achieve the aims listed, not "thwart them".

The Court analysed whether splitting the Trials would lead to economic savings or loss and the issue of overlapping evidence. Ultimately, the Court allowed the Appeal to set aside the severance. The Court also noted in *obiter* that "[t]here is much unnecessary litigation in instalments in Alberta today", and that past case law warns that splitting issues "are a dangerous but alluring siren, often ending by wasting everyone's time and money, not saving it".

LAMEMAN v ALBERTA, 2012 ABQB 195 (BROWNE J)
Rules 1.2 (Purpose and Intention of These Rules), 3.68 (Court Options to Deal With Significant Deficiencies) and 15.12 (New Test or Criteria)

The Applicant applied pursuant to old Rule 129(1), now Rule 3.68, to strike portions or all of the Plaintiff's Amended Statement of Claim. Because the Application was filed but not heard prior to the new Rules coming into force, Browne J. applied Rule 15.12 and held that the Application would be pursuant to Rule 3.68. Furthermore, Browne J. stated that the new and old Rules are of similar effect, and relied on the case law established under Rule 129(1). However, in applying the case law, Browne J. also relied on Rule 1.2 in order to achieve a timely and cost effective resolution of the matter. Upon a review of the facts and case law, Browne J. held that it was not plain and obvious that the claim would not succeed. The Application was partially successful as two paragraphs from the Amended Statement of Claim were struck, but the remaining paragraphs were left to stand.

OLEYNIK v UNIVERSITY OF CALGARY, 2012 ABQB 286 (VEIT J)
Rules 1.2 (Purpose and Intention of These Rules), 9.2 (Preparation of Judgments and Orders), 9.3 (Dispute Over Contents of Judgment or Order) and 9.4 (Signing Judgments and Orders)

The self-represented Applicant objected to the Respondent's unilateral request to the Court that a form of Order representing a decision be signed by Veit J. The Respondent had sought a waiver of Rule 9.2(2), given the history of the matter and the Respondent's inability to obtain comments from the Applicant related to previous Orders. The Respondent had written directly to the Court seeking such a waiver, and had provided the Applicant with a draft Order at that time. The Applicant did not specify any particular complaint with the substance of the proposed Order, but instead asserted that the Rule 9.2(2) procedure was not followed by the Respondent. The Applicant informed the Court that he would not be able to appear in front of Veit J. for a number of months to resolve the contents of the form of Order.

The Court indicated that parties may apply to the Court to resolve a dispute (pursuant to Rule 9.3), but that in this particular case it was not clear whether there was a dispute about the contents of the draft Order. Although the Respondent had relied on Rule 9.4(2)(c) in its request that Veit J. sign the form of Order, Veit J. noted that, strictly speaking, this was not a Rule 9.4(2)(c) situation, in which a party might request that a Clerk of the Court sign an Order. The Court also pointed out that when a Justice is asked to sign a form of Order, while the time limits in Rule 9.2(2) may not apply, the process of consultation set out in Rule 9.2(2) does apply in principle.

In the circumstances of this case, given the timeline of communication between the Applicant and Respondent as it related to the form of Order, the Court was not concerned with any procedural unfairness to the Applicant. Veit J. signed the form of Order as presented, concluding that the Court was acting in the interest of achieving a timely and cost-effective resolution of the matter.

ROYAL BANK OF CANADA v LEVY, 2012 ABQB 310 (ROMAINE J)
Rules 1.2 (Purpose and Intention of These Rules), 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

The Plaintiff advanced a Claim against a number of Defendants on the basis that they had participated in or executed real estate transactions that defrauded the Plaintiff Bank of mortgage loan proceeds. The Plaintiff brought concurrent Applications to strike portions of the Statements of Defence of certain Defendants, and for Summary Judgment with respect to certain Defendants and properties identified in the Statement of Claim.

Pursuant to Rule 3.68, the Plaintiff applied to strike parts of the Statements of Defence of certain Defendants on the basis that those portions were frivolous, irrelevant or improper, and did not disclose a reasonable defence to a Claim. Romaine J. held that Rule 3.68 was similar to former Rule 129, and is to be interpreted in accordance with Rule 1.2, to fairly and justly resolve Claims in a timely and cost-effective way. Romaine J. further held that Rule 1.2 does not sacrifice due process for efficiency. Citing *First Calgary Savings and Credit Union Limited v Perera Shawnee Limited*, 2011 ABQB 26, Romaine J. held that the test to be applied in an Application under Rule 3.68 is whether it is plain and obvious that there is no reasonable defence to a Claim. In making such a determination, the Court must assume that all allegations of fact in the Statement of Defence are true, and then determine whether those facts disclose a defence to the claim.

The Plaintiff also applied for Summary Judgment pursuant to Rule 7.3, citing the two-step test set out in *Eng v Eng*, 2010 ABCA 19. This test provides that the Plaintiff bears the evidentiary burden of proving its cause of action on a balance of probabilities. The evidentiary burden then shifts to the Defendant who can avoid Summary Judgment by proving that there is a genuine issue for Trial. Romaine J. held that the Plaintiff had established a *prima facie* claim, and the evidentiary burden therefore shifted to the Defendants to demonstrate that there was a genuine issue to be tried. Romaine J. held that, with respect to a number of the Defendants, she was satisfied that there were legally relevant facts which were disputed and could not be summarily disposed of. As such, Romaine J. refused Summary Judgment with respect to a number of Defendants, and dismissed the Application to strike the pleadings of those Defendants. She reserved her decision with respect to the Summary Judgment Application of one Defendant, and granted Summary Judgment against another Defendant who failed to appear or make submissions.

PANICCIA ESTATE v TOAL, 2012 ABQB 367 (SHELLEY J)
Rules 1.2 (Purpose and Intention of These Rules), 4.24 (Formal Offers to Settle), 4.29 (Costs Consequences of Formal Offer to Settle), 9.13 (Re-opening Cases) and 10.33 (Court Considerations in Making Costs Awards).

In a medical malpractice Action, Justice Shelley concluded that the Defendant doctor was negligent and had caused the Plaintiff to die of cancer six months earlier than ordinarily would have happened. The Plaintiffs had requested that the Defendant doctor negotiate a settlement before the death of the individual Plaintiff. This request was rebuffed. The Defendant made an informal "Calderbank" offer to discontinue the Action with each party covering its own Costs, and if the offer was refused the Defendant would seek double Costs at the conclusion of the Trial. This was refused by the Plaintiffs. The Plaintiffs counter-offered informally, but the offer was not accepted.

The parties disagreed about several issues after the Trial concluded. Costs were awarded on a solicitor-client basis because the Defendant introduced the issue of Special Damages in a procedurally incorrect manner and at a late date. Several issues relating to Costs remained in dispute. In a follow-up decision, Shelley J. outlined Rule 10.33, which gives the Court the broad authority to order the payment of Costs, in order to determine the preliminary issue of whether an elevated Costs award was appropriate. The Court concluded that an elevated Costs award was fitting since the expert evidence was extensive and substantial and it was often interrelated. The Trial was also long, though Justice Shelley noted that the complexity of the issues was not necessarily reflected in the length of the Trial.

Justice Shelley also considered the calculation of solicitor-client Costs and then the offers to settle made by both parties. The Court reviewed Rule 4.29 and the case law decided under the former Rules. Her Ladyship noted that the formal offer process is the same under the current Rule as it was under the former Rules: absent special circumstances, a formal offer to settle would result in elevated costs when a litigant bested the offer. The characteristics of a formal offer had been changed in the current Rules in that a formal offer was required to be made at least 10 days prior to the start of the Trial (Rule 4.24(1)(b)). Justice Shelley concluded that the offers to settle made by each of the parties were informal on this basis. Justice Shelley noted that under the former Rules the Court was able to order double costs at its discretion after an informal offer, but that this had not been decided under the new Rules.

In deciding about whether the mechanisms used in prior cases, under the former Rules, were still relevant, Shelley J. considered whether the Defendant acted in a manner that would shorten the Action under Rule 10.33, and added that the amount could be varied under that Rule. Her Ladyship, informed by the "purpose and intention" principles under Rule 1.2, held that informal/Calderbank offers are an effective mechanism to meet the objectives set out in the Rules. The Defendant was ordered to pay double Costs for all steps in the Action that followed the offer.

SCOTIA MORTGAGE CORPORATION v MANZOURIE, 2012 ABQB 395 (MASTER PROWSE)
Rule 1.2 (Purpose and Intention of These Rules)

The Applicant, the mortgagee in a foreclosure Action, sought a Rice Order. The Respondents sought to have the purchase price in the Rice Order set at an earlier, higher, fair market value. The Applicant took the position that any delay should be attributed to the Respondent, and thus the present fair market value should be applied. The Applicant argued, in the alternative, that Rule 1.2 (3) requires all parties to an Action to facilitate the quickest resolution of disputes, so any losses from delay should be shared between the Parties.

The Court held that both parties were equally responsible for the delay. The Court did not apportion the losses due to delay. However, the Court halved the period of delay, to determine what point in time the fair market value should be calculated from. There was a 10 month delay, and the Court added 5 months from when the Rice Application should have been brought to determine the appropriate date to calculate the fair market value.

CONCREATE USL LTD v CALGARY (CITY), 2012 ABQB 400 (MCMAHON J)
Rules 1.2 (Purpose and Intention of Rules), 7.1 (Application to Resolve Particular Questions or Issues) and 7.3 (Summary Judgment)

The Plaintiff brought an Application for Summary Judgment. The Defendant responded with a Cross-Application for Severance of damages from liability issues.

The Court referred to *Manufacturers Life Insurance Company v Executive Centre at Manulife Place Inc*, 2011 ABQB 189 as authority that the test for Summary Judgment under the "former" Rules has not been altered by Rule 7.3. McMahon J. referred to *Pioneer Exploration Inc v Euro-Am Pacific Enterprises*, 2003 ABCA 298, a Court of Appeal decision articulating the test for Summary Judgment as follows (paragraphs 18 and 19):

> First, the plaintiff bears the evidentiary burden of proving its cause of action on a balance of probabilities. Each and every fact necessary to support the claim must be proven…
>
> After the plaintiff has proved its case on a balance of probabilities, the evidentiary burden shifts to the defendant but the ultimate burden remains, as always, with the plaintiff. The defendant can avoid a summary judgment in favour of the plaintiff by proving that there is a genuine issue for trial. If the defendant meets this evidentiary burden, the plaintiff fails to meet its ultimate burden. It must be beyond doubt that no genuine issue for trial exists.

In this case, the Plaintiff did not meet the stringent test for Summary Judgment.

Turning to Rule 7.1, McMahon J. referred to *Gallant (Litigation Guardian of) v Farries* 2012 ABCA 98. His Lordship indicated that *Gallant* quashed any suggestion that the new Rules effected any significant change in the law regarding the splitting of Trial issues. McMahon J. noted that, according to *Gallant*, the question remains the same: would a severance of issues save time and money in the particular case? McMahon J. quoted the following excerpt from *Gallant* (paragraph 24):

> …[I]t has always been the presumption in our civil practice that all the issues are decided at once, in one trial or proceeding. Bitter experience has shown that searching for savings in time and money by chopping litigation up into little pieces simply does not work.

His Lordship also noted that the poverty of a party may sometimes influence a decision to sever an issue, though that was not a factor in this case.

The Court refused the Cross-Application for Severance of Trial issues, since there was no preliminary issue, no limitation period issue, no clear condition precedent to the suit – any of which may have been suitable for severance. Further, there was "no neat question of law or interpretation of any one document", as described in *Esso Resources Canada Ltd v Stearns Catalytic Ltd* (1991) 114 AR 27.

SCOTT & ASSOCIATES ENGINEERING LTD v GHOST PINE WINDFARM, LP, 2011 ABQB 630 (WITTMANN CJQB) Rules 1.4 (Procedural Orders), 1.7 (Interpreting the Rules), 11.25 (Real and Substantial Connection), 11.31 (Setting Aside Service), 15.2 (New Rules Apply to Existing Proceedings) and 15.6 (Resolution of Difficulty or Doubt)

An out-of-country Defendant applied to set aside Orders for Service *Ex Juris*. The Application was filed when the former Rules were still in force, but was made after the new Rules became effective.

At the heart of the Application was whether the "good arguable case" standard of proof requirement for Service *Ex Juris* under the former Rules was carried forward by the new Rules. The Court indicated that it was keenly aware of its obligation to prevent difficulty or injustice to either party stemming from the transition to the new Rules. Wittmann, CJQB noted that if applying the new Rules would benefit one party to the detriment of another, the difficulty or injustice referred to in Rule 15.6 had to be resolved. His Lordship pointed out, however, that if the requirement of a "good arguable case" continued and persisted under the new Rules, it would be unnecessary to determine which set of Rules applied.

The Court, in referring to Rules 1.4 and 1.7, and relying on case-law under the former Rules (including *Nova v Grove Estate*, 1982 ABCA 279 and *Vikpovice Horni a Hunti Tezirstro v Korner*, [1951] AC 869), determined that the standard of proof continues to be a "good arguable case" under the new Rules. Wittmann, CJQB defined "good arguable case" as that which is not fanciful or speculative but is grounded upon some evidence upon which an objective trier would say: "well, on the basis of the facts presented, the case is arguable and certainly is not to be dismissed out of hand". His Lordship had the following to say with respect to the suggestion by the Respondent that the "good arguable case" requirement no longer applied to the new Rules (paragraphs 39 and 40):

> For this court to do away with the good arguable case criterion and have no standard whatsoever, which is what [the Respondent] asserts, would in my view require that under the [new Rules] there should be express or implied a provision that a "good arguable case" is not required to be made out to support valid service outside of Canada pursuant to Rule 11.25(2). It is common ground that there is no express exclusion of the requirement in the [new Rules]. Nor is anything to be implied from the [new Rules] which would do away with this requirement.
>
> Logic and common sense dictate some standard of proof in addition to mere allegations in a statement of

> claim in order to support service of an originating document outside of the jurisdiction. … Thus, to resolve the issue in this case, namely whether the ex-juris orders ought to be set aside, I continue the requirement of a good arguable case, which requires some evidence. …

Chief Justice Wittmann also indicated that the requirement of a "good arguable case" is subsumed within the wording of Rule 11.25, namely, that the commencement document is "accompanied with a document that sets out the grounds for service of the document outside Canada, or ... the Court, on application supported by an affidavit satisfactory to the Court, permits service outside Canada".

The Court found that there was insufficient evidence presented by the Respondent to meet the threshold for a "good and arguable case" as against the foreign Defendant. As a result, the Orders for Service *Ex Juris* were set aside pursuant to Rule 11.31.

UNIVERSITY OF ALBERTA v ALBERTA (INFORMATION AND PRIVACY COMMISSIONER), 2012 ABQB 291 (LEE J)
Rules 1.4 (Procedural Orders) and 9.4 (Signing Judgments and Orders)

Judgment had previously been given regarding two Judicial Reviews. One of the parties, Dr. Oleynik, then sought a stay of the proceedings, and the University sought to dispense with the requirement that Dr. Oleynik approve the Order before filing of the Order.

As Dr. Oleynik was to be out of the country, he may have sought a stay of proceedings so that he could file an Appeal within the time limitations. However, he did not expressly make that request and the Court held that it would not be an appropriate basis for a stay in any event. Further, the Court directed that there was no need for a stay of proceedings and there was no need to obtain Dr. Oleynik's approval for the Order as the Court was prepared to approve the Order pursuant to Rule 9.4(3).

WARDILL v PEEBLES, 2012 ABQB 303 (MASTER SMART)
Rules 1.7 (Interpreting These Rules) and 3.26 (Time for Service of Statement of Claim)

The Applicants sought to set aside an ex parte Order that extended the time for service of the Statement of Claim. The Court held that *Oberg v Foothills Provincial General Hospital*, 1999 ABCA 76, is still applicable and thus the threshold to obtain an extension is low. However, in *obiter*, the Court reasoned that to give meaning via Rule 1.7 to Rule 3.26 extensions should not be granted as a matter of course; if extensions are automatically granted the time for service may as well be 15 months. The Application to set aside the *ex parte* Order was dismissed.

1985 SAWRIDGE TRUST v ALBERTA (PUBLIC TRUSTEE), 2012 ABQB 365 (THOMAS J)
Rules 2.11 (Litigation Representative Required), 2.15 (Court Appointment in Absence of Self-appointment) and 2.16 (Court-appointed Litigation Representatives in Limited Cases)

The Applicant applied to have the Public Trustee of Alberta (the "Public Trustee") appointed as the Litigation Representative for a group of minors potentially affected by proposed changes to the 1985 Sawridge Trust (the "Trust"), which was to be amended as a consequence of amendments to the Indian Act relating to Band membership.

Rule 2.11 states that a person under 18 years of age must have a Litigation Representative to participate in an Action, and Rule 2.15 grants the Court authority to appoint a Litigation Representative for these individuals. Rule 2.16 mandates that a Litigation Representative is required where the membership of a trust is unclear.

In applying Rule 2.16, Thomas J. appointed the Public Trustee as Litigation Representative for the minors because the number of potentially affected minors was unclear, namely, the children of applicants seeking to be admitted into membership of the Sawridge Band. The Court concluded that the affected minors under the Trust were persons who could have been readily ascertained, and that

their interests may have been at risk. For this reason, the Court charged the Public Trustee with determining which minors were affected by the amendments to the Trust, and enforcing their legal rights once they were identified.

OW v WP, 2012 ABQB 252 (MAHONEY J)
Rules 2.13 (Automatic Litigation Representatives) and 7.2 (Application for Judgment)

In early 1999, the Plaintiff filed a Statement of Claim alleging she had been sexually assaulted by the Defendant in the 1940s. The Defendant brought an Application for Summary Dismissal pursuant to Rule 7.2(a), arguing that admissions made by the Plaintiff in Questioning demonstrated that the limitation date for bringing her Action expired long before she filed her Statement of Claim. The Plaintiff argued that limitation date calculations in sexual assault cases are nuanced and are not appropriate for Summary Dismissal.

Mahoney J. held that the Plaintiff's admissions during Questioning demonstrated that she appreciated the causal link between her injuries and the alleged sexual assault decades before she filed her Statement of Claim. The limitation date started to run when she became aware of this causal link. Mahoney J. held that even if he took the latest possible time at which the Plaintiff could have become aware of the causal link, the limitation date would have expired in 1974. Given that the Plaintiff's Action was commenced 25 years later, Mahoney J. held that the Plaintiff's Action was statute barred. As such, the Application for Summary Dismissal was granted.

The Plaintiff further argued that the Defendant had a non-party, his son and Power-of-Attorney, swear an Affidavit in support of his Application, but the Affiant refused to answer questions that were relevant to the Application. Mahoney J. held that the Rules do not provide that only parties can file Affidavits. Rather, the Affiant, in his role as Attorney, was simply putting facts before the Court by attaching excerpts from transcripts of the Questioning of the Defendant. Mahoney J. held that Rule 2.13 provides for such a procedure and, as such, nothing unfair or improper was done in filing the Affidavit.

GATEWAY CHARTERS LTD (SKY SHUTTLE) v EDMONTON (CITY), 2012 ABCA 93 (MCFADYEN AND SLATTER JJA, BERGER JA IN DISSENT)
Rules 3.2 (How to Start an Action) and 3.15 (Originating Application for Judicial Review)

The Respondent, rather than launching an Appeal pursuant to the relevant provision of the *Municipal Government Act*, RSA 2000, c M-26, applied for Judicial Review of a Decision of the Appeal Committee. The Chambers Judge quashed that Decision.

The Majority of the Court of Appeal, citing Supreme Court of Canada authority, indicated that the general rule is that specific adequate remedies must be exhausted before Judicial Review is available, subject to the Court's discretion to grant Judicial Review notwithstanding the alternate remedy. In this case, however, the Majority indicated that the Application for Judicial Review did not undermine the Appeal process for the following reasons: the time limits for each process were respected, the record was the same, the standard of review and available remedies were the same, and the Tribunal (being the Court of Queen's Bench) conducting the Review was the same.

Citing Rule 3.2(6), the Majority determined that to the extent that the Decision was within the jurisdiction of the Appeal Committee, the Application should be treated as having been commenced under Rule 3.2(2), rather than under Rule 3.15(1). The Court pointed out that a portion of the Application was properly in the form of a Judicial Review, since the proper interpretation of the applicable statute did not appear to fall within the jurisdiction of the Appeal Committee.

Berger J.A., in Dissent, did not make reference to the Rules of Court in determining that the Chambers Judge failed to consider the adequacy of the Statutory Appeal before proceeding to Judicial Review.

UNITED FOOD & COMMERCIAL WORKERS CANADA UNION, LOCAL 401 v NORTH COUNTRY CATERING LTD, 2012 ABQB 306 (GOSS J)
Rule 3.22 (Evidence on Judicial Review)

The Applicant requested that the Court quash a decision of the Alberta Labour Relations Board ("Board"). The Respondent included in its authorities materials relating to the procedural history that occurred after the Board rendered its decision. The Court cited *Alberta Liquor Store Assn v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904, for the following propositions:

> (a) the general rule is that Judicial Reviews are conducted based on the return filed by the Tribunal;
>
> (b) additional Affidavits and evidence are admitted in exceptional circumstances;
>
> (c) evidence not before the Tribunal, relating to the merits of the decision, is not permitted on Judicial Review; and,
>
> (d) a Tribunal's decision cannot be rendered unreasonable by referring to matters that were never put before it.

The Respondent did not apply via Rule 3.22 to have the new evidence admitted. Accordingly, the Court declined to consider the material that was not available to the Board at the time of its decision.

NIXON v TIMMS, 2012 ABQB 315 (ACTON J)
Rules 3.26 (Time for Service of Statement of Claim), 3.27 (Extension of Time for Service), 3.28 (Effect of Not Serving a Statement of Claim in Time), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 11.5 (Service on Individuals)

A process server swore an Affidavit of Service stating that he personally served the Statement of Claim on the Defendant. The Plaintiff subsequently obtained Default Judgment. Upon discovering that an enforcement agency was attempting to enforce the Default Judgment, the Defendant retained a lawyer and claimed that he was never served and had no knowledge of the Claim. The Defendant applied for a Declaration that the Statement of Claim had expired, or in the alternative, for an Order setting aside a Default Judgment pursuant to Rule 9.15(3).

After reviewing the *viva voce* evidence of the Defendant, the process server, and a tenant of a property which was the subject matter of the dispute, Acton J. determined that the Defendant was never served with the Statement of Claim. Rather, the Claim was served on a tenant of the subject property.

The Defendant argued that the Statement of Claim had expired, and relied on Rule 11 of the former Rules, which were in force when the Statement of Claim was filed. Rule 11 provided that a Statement of Claim was in force for a period of 12 months after it was issued. The Defendant argued that the Statement of Claim was not served within this 12 month period and, as such, had expired. For all intents and purposes, the Action was "dead" and any steps taken after the expiry of the Statement of Claim were void or ineffective.

The Rules require a commencing document to be served personally (Rules 3.26(a) and 11.5(a)). However, the Plaintiff was operating on the understanding that he had effected personal service on the Defendant. In this context, Acton J. held that the issue was whether a Statement of Claim can become a nullity unbeknownst to a Plaintiff who acts in good faith and proceeds in accordance with the Rules, until a Declaration is made that service is not in order.

Under the former Rules, an expired Statement of Claim was not a nullity and could be revived in a number of circumstances. Former Rule 11 was replaced by Rule 3.27, which provides that the Court may extend the time for service in extraordinary circumstances that exist by virtue of the conduct of a person who is not a party to the Action. Rule 3.27 specifically contemplates the kind of unusual consequence of a false Affidavit upon which an entire case would stand or fall. Rule 3.28 sets out the

effect of a failure to serve a Statement of Claim within the one year time limit, and provides that if a Claim is not served in time, no further proceeding may be taken against the Defendant who was not served in time. In such circumstances, it was more appropriate to describe the Action as suspended rather than struck or dead.

Acton J. held that given the extraordinary circumstances, and pursuant to Rule 3.27, it was reasonable to extend the time for service of the Statement of Claim to the date of her Decision. Acton J. held that such an extension would not prejudice either Party, because the Defendant was able to defend on the merits of the Claim even if the time for service was extended.

HERITAGE STATION v SHARIFZADEH, 2012, ABQB 338 (MANDERSCHEID J)
Rules 3.37 (Application for Judgment Against Defendant Noted in Default), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 9.16 (By Whom Applications Are To Be Decided)

The Defendant Appealed a Default Judgment granted in an *ex-parte* Application pursuant to Rule 3.37. As a preliminary question, Manderscheid J. addressed whether or not the Court had jurisdiction to hear the Appeal. The Court stated that an Appeal of a Master's Decision of an ex parte Application should be directed back to the Master. Manderscheid J. granted the Appeal and set aside the Default Judgment and directed that the matter be returned to Master Mason for a fresh assessment of the damages.

HUNKA v DEGNER, 2012 ABQB 207 (GILL J)
Rules 3.62 (Amending Pleading) and 3.65 (Permission of Court to Amend Before or After Close of Pleadings)

The Plaintiffs brought an Application for leave to amend the Statement of Claim to include alleged oppressive acts by the Defendants. Citing *Manson Insulation Products Ltd v Crossroads C and I Distributors*, 2011 ABQB 51, Gill J. held that the test for amending pleadings is the same as that under the former Rules: pleadings may be amended, no matter how careless or late the party seeking to amend is, with four exceptions. First, an amendment will not be allowed where it would cause serious prejudice that is not compensable in costs. Second, an amendment will not be allowed if it is hopeless. Third, an amendment will not be allowed where, unless permitted by statute, it seeks to add a new party or new Cause of Action after the expiry of a limitation period. Fourth, an amendment will not be allowed where there is bad faith associated with the failure to plead the amendment in the first instance. If no exception applies, the pleadings can generally be amended. Gill J. granted the Application to amend the Statement of Claim and held that there was sufficient evidence capable of supporting the Plaintiffs' allegations.

DONOGHUE v JOHNSON, 2012 ABQB 295 (MAHONEY J)
Rules 3.62 (Amending Pleading) and 3.65 (Permission of Court to Amend Before or After Close of Pleadings)

The Plaintiffs applied to have their Statement of Claim amended after the close of pleadings, pursuant to Rules 3.62 and 3.65. Mahoney J. recognized that the Courts have previously held that the test for amending pleadings is the same as it was under former Rule 132. An amendment should be allowed, no matter how careless or late, unless there is prejudice to the other side, and even that is no obstacle if the harm can be repaired.

The Defendant argued that the amendments should not be allowed because they were hopeless. Mahoney J. held that a proposed amendment is not hopeless if it raises a triable issue and there is a modest degree of evidence in support of it. The Application to amend the Statement of Claim was granted.

URBAN LANDMARKS MASTER BUILDER INC v LLOYD'S UNDERWRITERS, 2012 ABQB 224 (GRAESSER J)
Rules 3.68 (Court Options to Deal With Significant Deficiencies) and 3.72 (Consolidation or Separation of Claims and Actions)

This matter consisted of two related Actions that arose out of a fire that destroyed an apartment complex. The Plaintiff owners brought the first claim against the security services provider, its insurer and insurance broker. Two days prior to the expiration of the limitation period, the Plaintiffs

filed a second claim against one of the same Defendants under a new cause of Action. The Plaintiffs did not serve the second claim for nearly a year. Once the second claim was served, the Defendant in the second Action brought an Application to strike the Plaintiffs' claim pursuant to Rule 3.68, and argued that commencing a second Action for a single wrongful act was an abuse of process. The Plaintiffs brought an Application to consolidate the two Actions, pursuant to Rule 3.72.

Graesser J. stated that while the parties were the same, the contract was the same, and the fire loss was the same, the mechanism of the loss was different between the two Actions. As such, it was a reasonable strategic decision to issue a new Action, and it was not an abuse of process. Furthermore, the decision not to serve the second claim for almost a year was arguably an abuse of process, but was something that could be completely addressed by Costs. The Application to strike the claim was dismissed.

The Defendants argued that the Application to consolidate the two Actions should be denied because the Plaintiffs had failed to provide any evidence in support of the Application. Graesser J. held that while an Application to amend a claim required evidence, an Application to consolidate two claims did not. Despite this, the Application to consolidate was also dismissed, and the Court Ordered that the Actions be tried at the same time or one after another, as may be directed by further Order of the Court.

395545 ALBERTA LTD (APPOLLO DRUGS AND HERBS) v TELUS COMMUNICATIONS INC, 2012 ABQB 184 (MASTER BREITKREUZ)
Rule 3.73 (Incorrect Parties Not Fatal to Actions)

The Plaintiff applied to add another party as a Plaintiff under Rule 3.73. The proposed Plaintiff was incorporated a year before the Statement of Claim was issued, but was not included as a Plaintiff when the Claim was filed. The proposed Plaintiff carried on business under the same trade name as the Plaintiff and both companies had the same controlling mind behind them. The issue in the Application was whether or not the *Limitations Act*, RSA 2000, c L-12, barred the addition of the proposed party as a Plaintiff. Master Breitkreuz held that the proposed Plaintiff was a sister company to the Plaintiff and granted the Application.

NETTE v STILES, 2012 ABQB 290 (BELZIL J)
Rule 3.74 (Adding, Removing or Substituting Parties after Close of Pleadings)

A stranger to the Action sought an Order to add its name as a Party to the Action. The Court indicated that Rule 3.74(2)(b) governed the Application, but found that on a plain reading of that Rule, the Application could only be made by an existing Party to the Action. Belzil J. concluded that the non-party was unable to invoke Rule 3.74(2)(b) to add itself as a Party to the Action.

TORONTO DOMINION BANK v LETENDRE, 2012 ABQB 323 (MANDERSCHEID J)
Rule 3.77 (Subsequent Encumbrancers Not Parties in Foreclosure Action)

This was an Appeal of a Master's Decision. The Appellant was the second encumbrancer on the Defendant's property title. The first encumbrancer had already proceeded through a Foreclosure Action and had been paid out for the amounts and related costs under a mortgage. The Appellant brought an Application before the Master, claiming an interest in the remaining funds from the sale of the property, which had been paid into Court. The Defendant did not respond to that Application, but a subsequent encumbrancer on title (the "Respondent") opposed the Application for payout on the basis that the Appellant was statute barred from bringing a Claim pursuant to the *Limitations Act*, RSA 2000, c L-12.

One of the central questions in the Appeal was whether the Respondent, who was not a Defendant in the Foreclosure Proceeding, could invoke the protection afforded in the *Limitations Act*. Rule 3.77 does not permit a subsequent encumbrancer to be a party to an Action unless possession is claimed from the subsequent encumbrancer. Manderscheid J. indicated that, from both a policy and interpretation perspective, it would be counter-productive for Rule 3.77 to prescribe on one hand, that a Plaintiff in a Foreclosure Action must not make any subsequent

encumbrancer a party to the claim (save certain special circumstance) and, in another breath, for the subsequent encumbrancer to turn around and commence a separate Foreclosure Action in respect of the same mortgaged lands as a Plaintiff against the same Defendant debtor in the first Foreclosure Action. For this reason and others, the Respondent's limitation argument failed.

WIENS v DEWALD, 2012 ABQB 172 (VEIT J)
Rules 4.33 (Dismissal for Long Delay) and 4.4 (Standard Case Obligations)

The Defendants appealed the Decision of Master Laycock to not strike the proceedings under the "drop dead" Rule. The "drop dead" date was April 25, 2011, and an Application to impose a Litigation Plan was set for April 21, 2011. The Application was set over to May 18, 2011 and the Parties agreed that this adjournment could not be used to dismiss the Action pursuant to Rule 4.33.

In the May 18, 2011 Application, Master Laycock made an Order implementing a Litigation Plan that set dates, outside of the "drop dead" date, for responses to Undertakings, questions in relation to those responses and the filing of a Form 37.

Veit J. found that Master Laycock erred in finding that a Litigation Plan in a standard case is a required step and thus materially advances the Action, because in a standard case a Litigation Plan is optional. However, Veit J. noted that Master Laycock had continued the analysis to determine if the Action had been significantly advanced, and that the decision of Master Laycock was reasonable.

Veit J. found that the Action was significantly advanced by setting dates by which Questioning on answers to Undertakings would be completed and a Form 37 would be filed. Veit J. noted that a specific exception in Rule 4.33 is when the delay is provided for in a Litigation Plan.

WETHERFORD CANADA PARTNERSHIP v ADDIE, 2012 ABQB 215 (SHELLEY J)
Rules 5.2 (When something is Relevant and Material), 5.6 (Form and Contents of Affidavit of Records) and 5.10 (Subsequent Disclosure of Records)

The Applicants sought production of certain records that the Respondent refused to produce. Specifically, the Applicants sought an Order directing the Respondent to produce un-redacted versions of certain records and to produce any further relevant and material records in its possession.

Shelley J. held that relevance and materiality are tied to the scope of the pleadings, because the pleadings define the issues between the parties. However, Shelley J. further held that Courts should not be overly strict in assessing relevance and materiality in interlocutory proceedings. It will be sufficient if counsel can disclose a rational strategy in which the disputed document has a role.

Parties to an Action have an obligation to produce all relevant and material records. A party's obligation to produce records is not contingent upon the opposing party identifying what records it thinks are in the possession of the other. Further, inconvenience and expenditure of effort are not acceptable reasons for delaying or refusing production. Moreover, disclosure does not bar further disclosure, and records that are relevant and material cannot be held back on the basis that they contain similar information to records already produced. Shelley J. found that the records sought by the Applicants were relevant and material to the litigation and ordered disclosure.

MEDICINE SHOPPE CANADA INC v DEVCHAND, 2012 ABQB 375 (TOPOLNISKI J)
Rules 5.3 (Modification or Waiver of This Part), 5.25 (Appropriate Questions and Objections), 6.31 (Timing of Application and Service), 6.32 (Notice to Media) and 6.34 (Application to Seal or Unseal Court Files)

The Defendants sought an Order to compel the corporate representative of the Plaintiff to provide answers to questions arising from the Cross-Examination on an

Affidavit. The Plaintiff brought an Application seeking a temporary Sealing Order in relation to certain Records.

In relation to the Defendants' Application, the Affidavit had been filed by the Plaintiff in support of its Application Staying the Counterclaim pending Arbitration. The Plaintiff refused to answer questions that went to the merits of the Counterclaim. Section 7 (1) of the *Arbitration Act*, RSA 2000, c A-43 mandates that the Court shall grant a Stay of proceedings if the parties have contracted to have their disputes Arbitrated. Section 7(2) outlines exceptions to section 7(1) whereby the Court may refuse to grant a Stay. One of the exceptions found in section 7(2) is if the matter in dispute is appropriate for Summary Judgment (the "Summary Judgment Exemption"). The Defendants argued that a Stay Application brought the Summary Judgment Exemption into play. The Defendants further argued that since a Stay is analogous to a Summary Dismissal, all of the issues raised in the Affidavit and Counterclaim were relevant and subject to Questioning.

The Court held that in order for the Defendants to rely on the Summary Judgment Exemption, the Defendants were required to actually bring a Summary Judgment Application, including supporting Affidavit evidence. Without such an Application before the Court, the Defendants could not rely on the Summary Judgment Exemption. As well, the Court held that a Stay Application is not analogous to a Summary Dismissal, but is akin to an Application regarding *forums conveniens*. The Defendants' Application to compel answers was denied.

In regard to the Plaintiff's Application, the Court held that the Records were confidential, contained trade secrets, and the release of the Records would cause serious harm to the Plaintiff. Additionally, the salutary effects of temporarily sealing the documents outweighed any deleterious effects. Compliance with Part 6, Division 4 of the Rules was not addressed by the Plaintiff at the hearing of the Application. Thus, the Court held the temporary Sealing Order would expire in 7 days if the Plaintiff had not complied with the Rules, and if the Plaintiff had complied with the Rules the Sealing Order would remain in effect pending the outcome of the Stay Application and, if successful, the Arbitration.

CHAN v CALGARY REMAND CENTRE, 2012 ABQB 325 (MASTER SCHLOSSER)
Rules 5.6 (Form and Contents of Affidavit of Records) and 15.4 (Dismissal for Long Delay: Bridging Provision)

The Applicants brought three Applications to dismiss three separate Actions for long delay.

The Respondent argued that the delay occurred because it was too dangerous to proceed to Questioning, as the police had advised that a criminal gang intended to murder the Plaintiff and anyone in the vicinity of the Plaintiff was in danger. The Court held that this did not constitute a Standstill Agreement. Additionally the Court held that other steps could have been taken or precautions could have been implemented to allow Questioning to take place. Two of the Actions were dismissed.

In the third Action, there was not a 5 year gap. The Plaintiff served an Affidavit of Records during the 5 year period. The Respondent argued that the Affidavit of Records was a blank record (there were no records listed), and thus it was not a completed step.

The Court held that the Rules specifically allow for this situation (Rule 5.6 (3)), and the Application was dismissed. The Court also Ordered that the Plaintiff would have to obtain leave of the Court before filing a further and better Affidavit of Records.

CHEVALIER v SUNSHINE VILLAGE CORPORATION, 2011 ABQB 557 (STREKAF J)
Rules 5.33 (Confidentiality and Use of Information)

This was an Application, by consent of the parties, for a restricted Court access Order to seal an Affidavit. The Affidavit had been prepared by the Plaintiff in response to an Application brought by the Defendant. The documents attached to that Affidavit had been listed in the Defendant's Affidavit of Records and made available to the Plaintiff. The Defendant expressed concerns that that documents attached to the Affidavit could affect the reputation of the Defendant if obtained by the public. The Defendant pointed out that these documents had been made available

to the Plaintiff pursuant to Rule 5.33, as a requirement of the litigation process and subject to the confidentiality protection of Rule 5.33.

The Court indicated that Rule 5.33 codifies the common law implied undertaking that prohibits the use of Discovery evidence except for the purposes for which it was produced. Strekaf J. highlighted, however, that once documents are filed on the Court record, they are, absent any restricted Court access Order, available to the public. In other words, the filing of an Affidavit outside the scope of Rule 5.33 may remove the confidentiality that otherwise attached to the contents of that Affidavit.

Because Rule 5.33 does not protect documents outside the scope of Rule 5.33, a separate legal test known as the *Dagenais/Mentuk test (Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835; *R v Mentuck*, 2001 SCC 76) had to be satisfied before Strekaf J. would grant the confidentiality Order. That test is the following:

A confidentiality order … should only be granted when:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the contest of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this contest includes the public interest in open and accessible court proceedings.

The *Dagenais/Mentuk* test was not satisfied in this case, and the Application was rejected.

BAKER v BAKER, 2012 ABQB 296 (LEE J)
Rules 6.3 (Applications Generally) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

On April 5, 2012, an Application was brought in Family Chambers at which the Respondent failed to appear. An Order was granted reflecting that the Respondent had failed to appear, although properly served, and the Applicant received a $5,000 credit towards his Maintenance Enforcement Program obligations, representing the apparent overpayment of certain Section 7 expenses.

Three weeks later, counsel for the Respondent advised the Court that his client received a copy of the Order, but was never properly served with the Application. The Respondent argued that the Applicant was acting on his own behalf and had sent the Respondent unfiled documents related to the Hearing. Because such documents could be changed, altered or revised before they were filed and became a part of the Court record, counsel for the Respondent argued that he was justified in not responding on behalf of the Respondent. The Applicant argued that he served the Respondent by delivering a Notice and sworn Affidavit, which he received back from the Clerk of the Court, to the office of the Respondent's counsel more than three weeks prior to the Application return date.

Lee J. held that the Applicant failed to adequately address the allegations made by the Respondent, particularly whether filed copies of documents were served. If unfiled documents were served, the Applicant did not comply with Rule 6.3(3).

Lee J. further held that Rule 9.15(1) provides that the Court may set aside, vary or discharge a Judgment or Order where it was made without Notice to one or more Parties. Lee J. held that it was clearly the Respondent's intention to challenge the Application and, as such, the non-appearance by the Respondent's counsel at the April Hearing was an accident or mistake as contemplated in Rule 9.15(1)(b). Lee J. concluded that the Respondent should have the opportunity to respond to and challenge the Application, notwithstanding the accident or mistake that occurred. As such, Lee J. vacated his Order and remitted the matter to Family Law Chambers.

MURPHY v CAHILL, 2012 ABQB 220 (LEE J)
Rule 6.7 (Questioning on Affidavit in Support, Response and Reply to Application)

The Applicants sought an Interim Receivership Order. The Respondents requested an Adjournment to allow for Questioning in relation to the Affidavits that were submitted in support of the Application. The Court held that case law from old Rule 314 (1) was applicable in determining the application of Rule 6.7. The Court canvassed past case law and cited the following exceptions for not allowing Cross-Examination on an Affidavit:

(a) the examination would be frivolous;

(b) the examination is only to forestall the proceedings; or,

(c) the delay caused by the adjournment would put property at risk.

The Court allowed the Adjournment holding that none of the exceptions were met.

VAN CAMP v CHROME HORSE MOTORCYCLE INC, 2012 ABQB 175 (BURROWS J)
Rule 6.14 (Appeal from Master's Judgment or Order)

The Court disagreed with other decisions that have interpreted Rule 6.14, including *Janvier v 834474 Alberta Ltd*, 2010 ABQB 800 (*"Janvier"*).

Justice Burrows considered the "constitutional foundations of the respective jurisdictions of a Judge and a Master". The Court indicated its agreement with Stevenson & Côté's *Alberta Civil Procedure Handbook* (the "ACPH") 2011 (at p 6-44) wherein the authors indicate that the new Rule is substantially the same to the old Rule. The Court agreed with what is said in the ACPH, namely, that an Appeal from a Master is *de novo* and Justices of the Court of Queen's Bench can use their discretion afresh and substitute their view for the Master's view. According to the ACPH, "[t]he test is whether the Master was correct. There is (in a sense) no standard of review."

BAHCHELI v YORKTON SECURITIES INC, 2012 ABCA 166 (CÔTÉ and HUNT JJA, STREKAF J (AD HOC)
Rule 6.14 (Appeal from Master's Judgment or Order)

This Appeal addressed the Standard of Review on an Appeal of a Master's Decision.

The Court noted that, pursuant to Rule 6.14(3), an Appeal from a Master's Decision is on the record and, absent new evidence, a Justice has to consider the evidence that the Master heard. However, Côté J.A. pointed out that the new Rules do not say that an Appeal from a Master is always on the record; Rule 6.14(3) makes an exception when the Justice determines it is proper to admit new evidence. The exception to Rule 6.14(3) is quite wide, making the Rule that the Appeal must be "on the record" rather narrow. Any proposed new evidence need only be "relevant and material" in the opinion of the Justice hearing the Appeal.

Côté J.A. noted that, according to *Gudzinski Estate v Allianz Global Risks US Insurance Co*, 2012 ABCA 5, it is now settled law that there is no deference to a Master's findings of fact or discretion when the Justice hears new evidence in the Appeal from a Master's Decision. His Lordship pointed out that if the Standard of Review were *deferential* when the evidence before the Justice was the same as that before the Master, this could tempt lawyers to file additional peripheral or scarcely different affidavits on Appeal in order to engineer a different Standard of Review. Côté J.A. also noted another distinction that explains why Decisions from a Justice are assessed on a *deferential* standard: Justices, unlike Masters, hear conflicting evidence and (where the evidence is oral) routinely decide based on weight or credibility. According to the Court, some of the logical puzzles or possible distinctions which would arise from an Appeal on the record on conflicting evidence rarely apply to an Appeal from a Master.

The Court concluded that the Standard of Review on Appeal from a Master to a Judge is still, on *all* issues, *correctness*.

VERBEEK v STEWART, 2012 ABQB 415 (GRAESSER J)
Rule 6.14 (Appeal from Master's Judgement or Order)

A Master approved an offer to purchase two quarter sections of land, and the decision was Appealed. The Appellant obtained a copy of the transcript from the Master's decision, but a copy was not forwarded to opposing counsel or put before the Court.

The Court held that Rule 6.14(4) requires that the record for the Appeal include a transcript of the proceedings before the Master, and the Master's Judgment, unless the parties agree or the Justice hearing the Appeal rules that it is not necessary.

The Court was advised that there were no detailed reasons provided by the Master, so that deficiency was not fatal to the hearing of the Appeal. The Court held that although it would have been preferable to have the full proceedings before the Court, this was not a procedural deficiency that would bar the hearing of the Appeal.

ROYAL BANK OF CANADA v LEE, 2012 ABQB 320 (MASTER WACOWICH)
Rules 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

The Plaintiff filed a claim against the Defendant mortgagor seeking foreclosure on a mortgage between the two parties. The Defendant's Statement of Defence and Third Party Notice alleged that Third Parties, including a bank employee, had fraudulently induced him to execute the mortgage.

The Plaintiff filed an Application for Summary Judgment. The Court referred to and relied on prior mortgage fraud cases that found that where there is possible involvement of or misrepresentation by the Plaintiff bank in the fraud, by a bank employee or agent, Summary Judgment may be denied. Further, the Court may refuse Summary Judgment if the Plaintiff bank does not provide any evidence in reply to an allegation that its employees or agents had knowledge of and participated in the fraud.

In the circumstances of this Action, the Plaintiff bank offered no denial to allegations from the Defendant that its employee helped to perpetrate the mortgage fraud. As a result, the Court dismissed the Summary Judgment Application because it was not clear that there were no genuine issues for trial.

CRAIK v ALBERTA TREASURY BRANCHES, 2012 ABQB 373 (STREKAF J)
Rules 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

The Plaintiff applied for Summary Judgment and the Defendants (collectively referred to as "ATB") applied for Summary Dismissal of the Action. The Plaintiff claimed that he was wrongfully charged service fees on his bank account, that he was improperly accused of having made lewd and vulgar comments, and that ATB's conduct was contrary to various provisions of the *Fair Trading Act*, RSA 2000, c F-2, the *Alberta Treasury Branches Act*, RSA 2000 c A-37, the *Financial Consumers Act*, RSA 2000, c F-13, and the *Criminal Code*, RSC 1985, c C-46.

The Plaintiff brought his Application for Summary Judgment pursuant to Rule 7.2 and ATB's Application was brought pursuant to Rule 7.3. Strekaf J. noted that the substantive tests applied by the Court on Applications for Summary Judgment or Summary Dismissal under Rules 7.2 and 7.3 are the same; the Applicant must demonstrate that it is plain and obvious that there is no genuine issue for Trial. Strekaf J. quoted *Murphy Oil Co v Predator Corp*, 2006 ABCA 69, which set out that Summary Judgment will only be granted where there is no genuine issue for Trial and it must be "plain and obvious" that the Action cannot succeed. Further, the moving party must meet a burden that includes the "beyond doubt" standard. *Murphy Oil* also set out a two stage analysis for a Summary Judgment Application:

> [T]he moving party must adduce evidence to show that there is no genuine issue for trial. Once the moving party has met that burden, the responding party may adduce evidence to persuade the court that there remains a genuine issue to

> be tried. It may choose to adduce no evidence, but then bears the risk that the judge will decide that the evidence adduced by the moving party has established that there is no genuine issue to be tried.

After assessing the relevant facts and evidence submitted by the parties, Strekaf J. held that Plaintiff's Application for Summary Judgment had to be dismissed on the basis that the evidence did not establish that it was plain and obvious that his Claim would succeed. Strekaf J. also considered ATB's Application for Summary Dismissal and was satisfied that there was no evidence that raised a triable issue. The ATB had demonstrated that it was plain and obvious that no part of the Plaintiff's Action would succeed; therefore, the Defendants' Application for Summary Dismissal was granted and the Action was dismissed in its entirety.

SCOTT & ASSOCIATES ENGINEERING LTD v FINAVERA RENEWABLES INC, 2012 ABCA 181 (O'BRIEN, ROWBOTHAM, O'FERRALL JJA))
Rules 7.2 (Application for Judgment) and 7.3 (Summary Judgment)

This was an Appeal of an Order by Sullivan J. dismissing an Application for Summary Judgment on the basis that there were material evidentiary issues to be determined at Trial.

The Plaintiff negotiated with Penn West for the purchase of a wind generating project. The Plaintiff required funding for the purchase and approached the Defendant for financing. The Plaintiff forwarded confidential information about the project to the Defendant, and the parties subsequently signed a Confidentiality Agreement. The Plaintiff sent a second offer to Penn West. The Defendant then negotiated a deal directly with Penn West at the same price as the Plaintiff's offer. The Plaintiff sued for breach of confidentiality and unjust enrichment.

The Defendant brought a Summary Judgment Application pursuant to Rule 7.2, which permits the Court to give Judgment where admissions of fact are made in a pleading or otherwise, or the only evidence consists of records and an Affidavit is sufficient to prove authenticity of the records in which the evidence is contained. The Defendant submitted that Summary Judgment should have been ordered under Rule 7.3 because there was insufficient documentary evidence to support the claim. The Chambers Justice dismissed the Application, stating that there was evidence produced by both parties that identified issues of material fact that could only be determined at Trial.

The Court of Appeal affirmed the Chambers Justice's Decision to dismiss the Application stating that "as the chambers judge noted, the issue of whether there was an understanding between the parties and whether it fell within the rubric of the Confidentiality Agreement were triable issues".

BLOOD TRIBE v CANADA (ATTORNEY GENERAL), 2012 ABCA 206 (CONRAD, O'BRIEN, O'FERRALL JJA)
Rule 7.2 (Application for Judgment)

The Respondents ("Blood Tribe") planned to purchase an oil refinery and convert it to reserve land with the view that the refinery's production would be exempt from federal tax. The Crown did not provide Blood Tribe an assurance that the refinery's production would be tax exempt, and Blood Tribe accordingly sued the Crown for breach of fiduciary duty and unjust enrichment.

The Crown applied for Summary Judgment on the basis that there was no merit to any of Blood Tribe's claims. The Chambers Judge dismissed the Application and the Crown appealed. The Court of Appeal cited *Guarantee Co of North America v Gordon Capital Corp*, [1999] 3 SCR 423 in laying out the test for Summary Judgment:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court.

The Court of Appeal added that the test for Summary Judgement is a "high hurdle", but if the Defendant meets the standard, Summary Judgment should not be withheld.

The Court concluded that the Chambers Judge failed to distinguish between fiduciary obligations arising in the creation of reserve additions and the public law function of Canada in the collection and enforcement of its tax laws. There was also no evidence to suggest that the Crown had been unjustly enriched. For these reasons, the Court concluded that the Crown met the standard for Summary Judgment and allowed the Appeal.

ROYAL BANK OF CANADA v LEVY, 2011 ABQB 700 (ROMAINE J)
Rule 7.3 (Summary Judgment)

A Defendant in a mortgage fraud Action applied for Summary Judgment against the Plaintiff on the basis of the defence of *ex turpi causa non oritur action* (the Court may deny recovery on the basis of participation in an immoral or illegal scheme). The Defendant argued that the *ex turpi* defence applied because an employee of the Plaintiff was the primary organizing participant in the alleged fraud. The Plaintiff argued that the *ex turpi* defence was not available on the facts, because the acts of a rogue employee acting outside the scope of his employment and without the Plaintiff's knowledge could not be attributed to the Plaintiff.

Romaine J. held that a Court may give Summary Judgment where it is satisfied that there is no genuine issue for Trial. However, where there are triable issues of fact or law, the matter is not suitable for Summary Judgment.

Romaine J. held that the *ex turpi* defence only applies where it is appropriate to deny recovery to a Plaintiff. To do otherwise would undermine the integrity of the justice system, either by permitting a Plaintiff to profit from an illegal act or to evade criminal penalty. However, in the present circumstances, the Plaintiff did not profit from the actions of the rogue employee who allegedly participated in the fraud. Romaine J. further held that the ex turpi defence may apply where one wrongdoer claims against another for financial loss arising from a joint illegal venture. However, that was not the case on the facts before the Court, and the Defendant failed to adduce evidence to demonstrate that the employee's actions were authorized by the Plaintiff.

Romaine J. further held that in an Application for Summary Judgment, the Defendant had the burden of proving that the *ex turpi* defence applied. However, the Defendant failed to discharge this burden. There was no evidence that the Plaintiff was compliant in the employee's alleged fraudulent activities. As such, there was insufficient evidence to warrant Summary Judgment on the basis of the *ex turpi* defence.

FIRST NATIONAL FINANCIAL GP CORP v KULAGA, 2012 ABQB 8 (MASTER HANEBURY)
Rule 7.3 (Summary Judgment)

The Plaintiff sought Summary Judgment against one of the Defendants, Kulaga, for the amount outstanding on an insured mortgage. Kulaga alleged that the subject property was flipped to inflate the price just before it was transferred to him, and that the Plaintiff knew or ought to have known that the transaction was fraudulent.

Kulaga learned of an investment in which he would hold a mortgage on a house for two to four months until the buyer could acquire the property. He would be paid a fee for providing the financing during that period. Kulaga claimed that he was advised by an alleged Mortgage Specialist from the Royal Bank of Canada and a Mortgage Broker that the transaction was legal.

Kulaga argued that Summary Judgment could not be granted as the mortgage contract was tainted by illegality by way of participation in the fraud by the Lender. Indeed, two other Real Estate Purchase Contracts had been forwarded to the Lender in respect of the same property. In this context, Kulaga claimed that the Plaintiff knew or ought to have known of the fraud and chose to lend the funds regardless. Kulaga further argued that the lawyer, as agent for the Plaintiff, failed to disclose the true transaction to him and thereby committed a misrepresentation upon which he relied.

Master Hanebury held that Summary Judgment may only be granted if there is no genuine issue for Trial. The evidentiary burden is initially on the Applicant to prove its cause of action on a balance of probabilities. The evidentiary burden

then shifts to the Respondent to show that there is no genuine issue for Trial.

Master Hanebury held that participants in a fraudulent or illegal scheme cannot ask the Court to refuse to enforce the contract they signed on the basis of its illegality. However, Master Hanebury further held that this legal principle cuts both ways. If the lender was involved in the fraud, it too may have difficulty enforcing the contract due to its illegality.

Master Hanebury held that the Plaintiff provided no response to Kulaga's claims that it knew or ought to have known of the fraud. Further, the Plaintiff did not deny that it received notice of the back-to-back offers showing a significant increase in the value of the property in a short period of time. Although Kulaga was not an innocent party, it was not obvious that the Plaintiff came to Court with clean hands. As such, Master Hanebury held that Summary Judgment was not a remedy available on the facts as presented, and dismissed the Application.

MRAICHE INVESTMENT CORPORATION v McLENNAN ROSS LLP, 2012 ABCA 95 (RITTER, MARTIN and WATSON JJA)
Rule 7.3 (Summary Judgment)

A solicitor took instructions from a client to transfer properties of a client. The Statement of Claim alleged that the solicitor was liable for "the tort of conspiracy to defraud a creditor of the client…". It was alleged that the conveyance was a fraudulent diversion of assets.

The Plaintiff appealed the Summary Dismissal of its Claim. The Court of Appeal upheld the Chamber Justice's Decision, who had found that the claim against the Defendant had no merit, was purely speculative and had no chance of success. The Court of Appeal concluded that to defeat the Summary Dismissal Application, the Plaintiff needed to show there was triable case with respect to all of the required elements of the tort of conspiracy. It was not enough if the only thing shown was "some evidence of some parts of the tort 'if there was' no evidence of any one or more essential ingredients".

BALM v AIKINS MACAULEY & THORVALDSON LLP, 2012 ABCA 96 (FRASER CJA, WATSON JA and O'FERRALL JA)
Rule 7.3 (Summary Judgment)

The Appellants appealed the Decision of Macleod J. refusing Summary Judgment to dismiss the Action against them. On Appeal the Court upheld the decision of Macleod J. holding,

> [W]e are not persuaded that there is palpable and overriding error in his assessment, or that his conclusion falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

In respect of Rule 7.3, the Court held:

> A decision on a summary judgment motion involves an exercise of discretion and to some extent a weighing of evidence.
>
> We do not need to address whether the legal test for summary judgment under the current applicable Rule 7.3 differs from its predecessor rules. Under Rule 7.3, the chambers judge would have had to be satisfied that Balm's claim lacked "merit" on the topic of discoverability and that the suit was barred by the s. 3(1) limitation period.

Moreover, the Court held that it did not need to address whether current Rule 7.3 differs from its predecessor under the old Rules. The Court held that in order for the Appellants to have succeeded, they were required to satisfy the Chambers Justice that the Plaintiff's claim lacked "merit" as to the issue of discoverability and that the Action was barred by the limitation period and Section 3.1 of the *Limitations Act* RSA 2000, c L-12.

GAYTON v RINHOLM, 2012 ABQB 232 (BROOKER J)
Rule 7.3 (Summary Judgment)

The Defendant, an emergency room physician, sought Summary Judgment dismissing the Plaintiff's claim against him. The Applicant filed an Expert Report which stated

that he had met the standard of care of an emergency room doctor practicing in Alberta. The Plaintiff also filed an Expert Report, which stated that the Applicant breached the relevant standard of care.

Citing *Sima v Hui*, 2008 ABQB 104, Brooker J. held that Summary Judgment is appropriate where it is plain and obvious that an Action cannot succeed. Brooker J. further held that the initial onus is on the Applicant to demonstrate that there is no genuine issue for Trial. Once this threshold has been met, the onus shifts to the Respondent to establish that the claim has a real chance of success. The Respondent cannot merely rely on allegations in the pleadings or on the possibility that more evidence may be available at Trial. If the Respondent fails to come forward with evidence to prove a meritorious case, Summary Judgment will be granted. In the context of medical malpractice cases, Brooker J. held that there may be an onus on a Respondent to provide expert evidence to support the claim in a Summary Judgment Application.

Brooker J. held that liability could be established against the Applicant if the Respondent could prove on a balance of probabilities that his conduct fell below the appropriate standard of care, which was that of a reasonably competent emergency room physician practicing in Alberta. Brooker J. held that expert opinion proffered on behalf of the Plaintiff, that the Applicant breached the standard of care, was of no weight because the expert had no expertise as to the appropriate standard of care in Alberta. As such, the Respondent had no proper evidence before the Court to support her allegation that the Applicant's conduct fell below the standard of care. In the face of expert evidence that the Applicant's conduct met the relevant standard of care, the Respondent's claim against the Applicant was bound to fail. As such, the Application was allowed and Summary Judgment was granted.

MORRONE ESTATE v CAPUTO, 2012 ABQB 370 (MASTER HANEBURY)
Rule 7.3 (Summary Judgment)

In a dispute over the ownership of property, the Plaintiff estate commenced an Action for money paid to the Defendants and for conversion. The Defendants Counterclaimed for money owing on the property. An Application for Summary Judgment was brought and granted, but the Judgment went unpaid. While the litigation continued the property went into foreclosure and an Order for Sale was granted. An Application for Summary Judgment against the Defendant was brought before Master Hanebury.

The Master considered Rule 7.3 which provides that a party may apply for Summary Judgment on the ground that there is no merit to a claim or part of it. The Court considered and applied cases interpreting the former Rules on Summary Judgment. The Master pointed out that the bar that must be met on a motion for Summary Judgment is high; that the obligation to prove each fact required to make out a cause of action rests with the Applicant, if they are also the Plaintiff; that the onus of showing that there is no genuine issue for Trial is also on the Applicant; the assessment of the weight and quality of the evidence is properly for a Trial Judge; and, the Court must be satisfied that there is no genuine issue for Trial – it should be "plain and obvious" or "beyond doubt". The Master added that Summary Judgment should not be granted where opposing Affidavits do not disclose the same relevant facts.

The Master held that the Application was not capable of being resolved summarily because the information provided to the Court was insufficient. The evidence provided did not establish whether the property was paid for in full; this resulted in uncertainty in the assessment of damages owing to the parties. As well, it was unclear as to when the title to the property was to pass or whether rent was payable. The Application for Summary Judgment was dismissed with costs in the cause.

CIBC MORTGAGES INC v LUCAS, 2012 ABQB 402 (MASTER MASON)
Rule 7.3 (Summary Judgment)

The Plaintiff, CIBC Mortgages Inc ("CIBC"), applied for Summary Judgment on the basis that there was no genuine issue for Trial.

The Defendant became involved in a "straw buyer" mortgage fraud scenario where she would assume a high interest mortgage on another's behalf in exchange for $5,000.00. The mortgage eventually went into default and CIBC commenced foreclosure proceedings against the Defendant. The Defendant claimed that she was not responsible for the mortgage deficiency because she was a victim of fraud perpetrated by CIBC's agents. CIBC asserted that there was no evidence that its agents were involved in a fraud, and therefore there was no genuine issue to be raised at Trial.

Master Mason cited *Canada (Attorney General) v Lameman*, 2008 SCC 14 and *Murphy Oil Co v Predator Corp*, 2006 ABCA 69, in stating that the bar on a Motion for Summary Judgment is high, and that the party bringing a Motion for Summary Judgment bears the onus of showing no genuine issue for Trial.

Master Mason noted evidence of prior meetings amongst CIBC's agents, representations from those agents, and falsified documents in her decision to dismiss the Application for Summary Judgment. There was evidence to support the fact that CIBC's agents may have been involved in fraudulent activity, and this evidence raised several questions that needed to be determined at Trial.

EVANS v THE SPORTS CORPORATION, 2011 ABQB 478 (GRAESSER J)
Rules 9.12 (Correcting Mistakes or Errors), 9.13 (Re-opening Case) and 9.14 (Further or Other Order After Judgment or Order Entered)

The Application was to settle terms of the previous Trial Judgment: *Evans v The Sports Corporation*, 2011 ABQB 244. In the Trial Judgment, the Court reserved the right to correct any mathematical or calculation errors in the damage assessment. However, the Court made changes other than just the correction of mathematical or calculation errors. The Court held that it had previously interpreted the contract incorrectly, the damages assessment was overly simplistic and the damages should have been confined to a two year period. The Court held that the new Rules significantly expanded the Court's authority to amend Judgments and Orders, and Rule 9.13 gives the Court an extremely broad authority to do what is correct in the circumstances. The Court amended its damages analysis accordingly.

JR v UNIVERSITY OF CALGARY, 2012 ABQB 342 (READ J)
Rule 9.12 (Correcting Mistakes or Errors)

At Trial, Read J. held that the Defendant did not negligently or intentionally cause the Plaintiff mental suffering either through its behaviour or in the manner of the Plaintiff's dismissal from employment. Further, it was not reasonably foreseeable to the Defendant that its actions in dismissing the Plaintiff would cause the Plaintiff mental distress.

At paragraph 200 of the written Judgment, Read J. considered the question of whether the social worker who diagnosed the Plaintiff as suffering from PTSD was properly qualified to give opinion evidence of that diagnosis. After finding that the social worker was only qualified as an expert in social work with clinical experience in the treatment and trauma of PTSD, the Plaintiff argued that the scope of the social worker's qualification could be expanded by use of the "slip rule" found in the Rules. It was argued that failure to qualify the social worker as an expert in the diagnosis of PTSD was an accidental omission that could be cured by the Rules; however, Counsel was unable to cite the exact Rule number relied on. Read J. noted that the only Rule that fit the definition of a "slip rule" is Rule 9.12; however, this Rule only applies to Judgments and Orders, not procedural steps at Trial. Based on this, Read J. held that the "slip rule" did not assist the Plaintiff's argument to expand the social worker's qualification.

MILNER v SOSTAR, 2012 ABCA 128 (BERGER AND O'BRIEN JJA, STREKAF J (AD HOC))
Rule 9.13 (Re-opening Case)

The Defendant appealed a Decision of the Chambers Justice that registered caveats were to be struck out. That Decision was based in part on a conclusion that Notice to a Party had not been delivered. After the Decision had been rendered, but before the Order (upon which the Decision was based) was entered, counsel produced a letter showing

that Notice had in fact been given. The Chambers Justice refused to consider the letter. At that time, Counsel did not refer the Chambers Justice to Rule 9.13.

In allowing the Appeal, the Court of Appeal indicated it was satisfied that the Chambers Justice was proceeding on the basis that the Court was *functus*. The Court of Appeal remitted the matter back to the Chambers Justice to reconsider whether the letter in question should be admitted into evidence pursuant to Rule 9.13.

BANK OF MONTREAL v MAZA INVESTMENT GROUP LTD, 2012 ABCA 112 (MCFADYEN JA)
Rule 9.15(3) (Setting Aside, Varying and Discharging Judgments and Orders)

The Defendant Appellant sought leave to Appeal a Case Management Judge's Order that imposed terms for setting aside a Noting in Default. Those terms related to the payment of thrown away Costs and the posting of Security for Costs by the Defendant.

McFadyen J.A. indicated that the Judge is given a broad discretion to impose terms that the Judge considers appropriate when issuing an Order setting aside a Noting in Default or a Default Judgment. The Court rejected the Appellant's suggestion that when a Defendant alleges lack of sufficient funds, the Judge setting aside a Noting in Default or Default Judgment is precluded from imposing any monetary terms relating to Costs. McFadyen J.A. concluded that the Judge's Decision was reasonable in the circumstances and dismissed the Application for leave to Appeal.

BROWN v BROWN, 2012 ABQB 214 (GRAESSER J)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Applicant sought an Order to set aside a previous Order that gave her ex-spouse (the Respondent) leave to make an Application to vary the existing spousal support Order. The need for leave existed because of a prior Order that indicated, "[n]either party is entitled to bring any further applications before the Court without leave." The Order granting leave was granted in the absence of the Applicant.

There was also an existing Order that allowed for Notice of an Application to be served on the respective parties' residences by registered mail. The Applicant was served in the manner mandated. However, the Applicant maintained that Notice of the Application was not properly served on her. The Applicant swore an Affidavit indicating that the Respondent knew she was away and took advantage of this absence.

The Court noted that pursuant to Rule 9.15 it "clearly had jurisdiction to revisit an order granted in the absence of the other party." It was determined that Ms. Brown did not have sufficient notice of the Application, despite having been served Notice of the Application pursuant to the previous Order. Given the history of the matter, it was found that had the Applicant been aware of the Application, she would have attended in opposition.

The Court indicated that the purpose of the Order mandating that leave be sought before bringing an Application was intended to allow the Court to act as a gatekeeper, to prevent unnecessary and frivolous Applications.

In this case, the Court saw no reason to treat a leave Application any different than an Application for leave to Appeal under the Rules of Court. It was then noted that "a reasonably arguable case" is required when requesting leave to the Court of Appeal. The Court then analysed whether or not the Respondent's Spousal Support Review Application was reasonably arguable. Ultimately, the Order granting the Respondent leave was stayed. It was stayed pending the delivery of specified disclosure that would help determine whether or not the Respondent's request for leave was reasonably arguable.

BANK OF MONTREAL v COCHRANE, 2012 ABQB 297 (HAWCO J)
Rule 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Plaintiff brought a Claim against a number of

Defendants, alleging that they were involved in obtaining over 60 fraudulent mortgages on which the Plaintiff suffered losses in excess of $8.7 million. The Plaintiff took a number of steps to attach some of the Defendants' properties in Lebanon, which had allegedly been purchased with the fraudulent mortgage funds. The Plaintiff succeeded in obtaining a "Precautionary Attachment" against nine properties in Lebanon. Those Defendants hired Lebanese counsel to challenge the Precautionary Attachment, but the challenge was not successful.

The Defendants were served with the Statement of Claim by way of Substitutional Service. The Defendants failed to file a Statement of Defence and Default Judgment was entered. The Defendants subsequently brought an Application to have Default Judgment set aside, arguing that they were not aware of the Plaintiff's Claim until after Default Judgment had been entered.

Hawco J. held that in an Application to set aside a Default Judgment pursuant to Rule 9.15(3), the Court considers whether there was an adequate explanation as to why the Statement of Defence was not delivered, whether there was any delay in applying to set aside the Default Judgment, whether there was a satisfactory explanation for any delay, and whether the material disclosed a meritorious defence or triable issue. However, Hawco J. held that these requirements should not be applied rigidly, but with an eye to fairness.

Hawco J. held that documents filed by the parties, including by the Defendants, suggested that the Defendants were aware of the Statement of Claim and the specific allegations against them earlier than they suggested. The Defendants were aware of the Statement of Claim shortly after it was filed, and delayed taking any steps for five months without a satisfactory explanation. Moreover, the Defendants took no steps to set aside the Default Judgment for a month after it was obtained. In this context, Hawco J. held that the Defendants did not meet any of the criteria that must be proven to set aside a Default Judgment pursuant to Rule 9.15(3).

Hawco J. further held that the conduct of the Defendants did not suggest an effort to act in good faith. Rather, the Defendants appeared to have ignored what had occurred in Alberta and attempted to seek protection through the judicial system in Lebanon. When they failed, they redirected their efforts to Alberta. Hawco J. held that if the Defendants could demonstrate good faith by proffering an irrevocable letter of credit in the amount of $700,000.00 within one month of the date of his Decision, the Default Judgments would be set aside and the Defendants would have leave to file a Statement of Defence. However, if the Defendants failed to do so, their Application would be dismissed without further notice.

CAPLINK MORTGAGE INVESTORS CORPORATION v KRETSCHMER, 2012 ABQB 396 (MASTER SMART)
Rules 9.35 (Checking Calculations: Assessment of Costs and Corrections), 10.37 (Appointment for Assessment), 10.41 (Assessment Officer's Decision) and 10.43 (Certification of Costs Payable)

The Plaintiff applied for a review of a reduction in a Foreclosure Bill of Costs, as proposed by the Assessment Officer pursuant to Rules 9.35(1) and 10.41.

The Master refused to modify the Assessment Officer's determination, for two reasons. First, Rule 9.35(4) requires that attendance in front of a Master take place before a Foreclosure Order has been entered. Here, out of necessity, the Order had already been entered to facilitate the closing of a sale to a third party purchaser. Master Smart indicated that this situation was one of the practical difficulties arising from the new Rules.

Second, the Bill of Costs had been presented to the Assessment Officer on a without notice basis. The Master applied Rule 10.37, pointing out that notice of the Assessment had to be given unless there had been consent to the Bill of Costs.

The Court also noted that the practice of the Assessment Officer had not been to issue a Certificate for an Assessment, but rather to return the Bill of Costs with a cover sheet setting out what she would be prepared to allow. Master Smart determined that, although not technically

correct, the substance of the Assessment Officer's practice conformed with Rule 10.43.

BA CAPITAL INC v FOCUSED MONEY SOLUTIONS INC, 2012 ABQB 379 (MASTER LAYCOCK)
Rule 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges)

The Plaintiffs applied to request leave to review their solicitor's accounts after the passage of the 6 month period prescribed by Rule 10.10(2) had passed. The Plaintiffs applied on the grounds that they had been "overcharged, misled on legal strategy" and indicated that the case had been ongoing and they did not want to jeopardize it. One of the Plaintiffs filed an Affidavit in support of the Application. The law firm did not file an Affidavit but opposed the Application for an extension of time to review their legal accounts.

Master Laycock first considered whether or not the Plaintiffs had a reasonable excuse for failing to bring the disputed accounts before a Review Officer within six months of the bill being delivered. The Plaintiffs provided no evidence in their Affidavit to explain the 16 month delay in bringing the Application, nor when they became concerned about the size of the account or the performance of the law firm. An explanation was provided during argument, but Master Laycock stated that this was not evidence and was therefore irrelevant.

Master Laycock also noted that if a reasonable explanation for the delay had been provided to the Court, then the Court was required to consider whether or not there was any evidence of prejudice to the law firm in bringing the matter forward. In this case, there was no evidence of prejudice; however, this did not matter because there was no explanation given for the delay in bringing the accounts before the Review Officer.

Finally, Master Laycock cited *Twinn v Saw Ridge Band*, 2012 ABQB 44, where Browne J. referred to the decision in *P & S, Barristers & Solicitors v Legal Aid Society*, [1994] 164 AR 208 (QB), stating the following about client-initiated reviews:

> The six month time limit for client-initiated reviews makes sense for many reasons. Clients will almost always be aware of any concerns they may have about lawyer's fees within six months of receiving the final account. Client-initiated reviews put lawyers on notice that a client has concerns. The time limit encourages clients to voice concerns close to the date they arise. This makes it easier for all parties (including the Review Officer) to resolve the disputes. This also allows lawyers to anticipate uncollectible receivables within a reasonable period of time.

In conclusion, there was no adequate evidence explaining the delay and as such the Application for leave to have the accounts reviewed was dismissed.

BOTAN (BOTAN LAW OFFICE) v ST. AMAND, 2012 ABQB 260 (MICHALYSHYN J)
Rules 10.22 (Action For Payment of Lawyer's Charges), 10.42 (Actions Within Provincial Court Jurisdiction) and 10.50 (Costs Imposed on Lawyer)

The Defendant sought Costs against the Plaintiff law firm, after the Plaintiff had advanced a claim for $106,250.00, but only received a Judgment of $5,250.00, and after the Defendant had previously made an informal offer of $10,000.00.

The Court awarded Costs to the Defendant, and made the following findings in *obiter*:

> (a) should the Plaintiff have received Costs, those Costs would have been reduced by 25% as the amount of the Judgment fell within the limit of the Civil Division of the Provincial Court of Alberta: Rule 10.42;
>
> (b) Rule 10.22 ensures "that no lawyer will take a legal judgment for fees against a client without a frank and clear review of that judgment by the Courts"; and,
>
> (c) Rule 10.50, which allows Costs to be awarded

> against a lawyer, can be punitive, whether intentional or not.

DAHMER v DAHMER, 2012 ABCA 120 (BERGER JA)
Rules 14.1 (Application) and 515.1 (General Appeal List)

The Applicants sought to restore an Appeal to the general list, after the Appeal had been struck by the Deputy Registrar for non-compliance with filing deadlines. Rule 515.1 was referred to, as the former Rules continue to apply to Appeals to the Court of Appeal (Rule 14.1).

The conditions precedent to restoring an Appeal that had been struck were set out in *Koerner v Capital Health Authority*, 2011 ABCA 131, citing *707739 Alberta Ltd. v Phillips*, 2001 ABCA 219. The principles from those cases provide:

> (a) the restoration of an Appeal struck via Rule 515.1(7) is discretionary;
>
> (b) all relevant matters must be considered;
>
> (c) counsel inadvertence will generally not prevent restoration;
>
> (d) restoration may be denied where the Appeal lacks merit;
>
> (e) restoration may be denied where the Appellant shows no intention of proceeding with the Appeal;
>
> (f) restoration may be denied where there is prejudice to the Respondent; and,
>
> (g) restoration may be denied where there is not a reasonable explanation for a lengthy delay.

The Court allowed the Appeal, holding that there was no appreciable delay in bringing the Motion to restore, and the Applicant provided a reasonable excuse attributable to inadvertence for the failure to file the materials.

KINDYLIDES v KOROL, 2012 ABCA 195 (PICARD JA)
Rule 505 (When Appeals Available)

This case was an Application for a Leave to Appeal the Order of Picard J.A. where Costs were ordered against the Plaintiff (Applicant). The Applicant's Statement of Claim was struck by a Master and a Justice of the Court of Queen's Bench on the basis that it did not show a cause of action. The Applicant alleged a conspiracy among several organizations and individuals who, it was claimed, were subjecting the Applicant to "crazy-making" techniques that amounted to torture. The Applicant sought an Appeal on the grounds that most of the material was not considered at the Court of Queen's Bench and that the Order for Costs violated a United Nations Convention against Torture.

Madam Justice Picard cited *DataNet Information Systems, Inc v Belzil*, 2011 ABCA 40 and the test arising from that case which governs Applications pursuant to Rule 505(6).

> The applicable rule for this form of relief, Rule 505(6), has been interpreted to state that a justice should grant leave to appeal if the issues engage a serious question of general importance, or, absent such a question, if there is a possible error of law, a discretion has been unreasonably exercised, or the initial decision was based on a misapprehension of important facts…

Justice Picard was entirely unconvinced that the Action had any chance of success. Leave to Appeal was dismissed.