JSS BARRISTERS

RULES

OCTOBER 2012

Jensen Shawa Solomon Duguid Hawkes LLP

Volume 1 Issue 7

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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MCMEEKIN v ALBERTA (ATTORNEY GENERAL), 2012 ABQB 456 (SHELLEY J)
Rules 1.2 (Purpose and Intention of Rules) 1.5 (Rule Contravention, Non-Compliance, and Irregularities), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 3.68 (Court Options to Deal with Significant Deficiencies), 4.7 (Monitoring and Adjusting Dates), 4.16 (Dispute Resolution Processes), 7.3 (Summary Judgment), 8.4 (Trial Date: Scheduled by Court Clerk), 13.7 (Pleadings: Other Requirements) and 13.12 (Pleadings: Denial of Facts)

The Defendants applied to strike the unrepresented Plaintiff's Action and the Plaintiff applied to strike the Statements of Defence. Citing case-law under the new Rules, the Court confirmed that Rule 7.3(1) applies the same criteria and analysis as Section 159(b) under the former Rules. The Court also concluded that there was nothing to support the Plaintiff's allegation of malicious prosecution by some of the Defendants.

The Crown Defendant also asserted that an allegation of defamation by the Plaintiff was not detailed as required by Rule 13.7(f), and that the potential defamatory speech would have occurred at a point in time falling outside the two year limitation period for civil litigation. The Court did not strike this allegation, determining that the Pleading deficiencies could be cured by an amendment to the Statement of Claim, which might reveal a different alleged defamation that could still be a potential subject for litigation.

The Defendants further requested dismissal of the Action based on categorizing the Plaintiff as a vexatious litigant, pursuant to Rule 3.68. Shelley J. indicated that the Court could strike a Claim or dismiss an Action if the Statement of Claim was frivolous, irrelevant, improper, or an abuse of process. Referring to pre and post new-Rules case law, Shelley J. stated that a pleading is frivolous if its substance indicates bad faith or is hopeless factually; a frivolous plea is one so palpably bad that the Court needs no real argument to be convinced of that fact. The Court later referred to the hallmarks of a vexatious litigant specified in *Dykun v Odinshaw*, 2000 ABQB 548.

Her Ladyship pointed out that Canadian Courts generally provide litigants, particularly self-represented litigants, with very significant leeway with respect to Rules 3.68(2)(c-d), since there are both good policy and equity bases for this approach. By way of example, Justice Shelley remarked that it would not be surprising for a self-represented litigant to misunderstand or misapply elements of civil law procedure. The Court indicated that the Rules provide broad authority to address issues that might arise in such circumstances. Shelley J. noted that the Court's response is contextual and that not all unrepresented parties warrant the same treatment.

Shelley J. found that the Plaintiff: (1) followed Court procedure only when it was in his interest to do so; (2) conducted himself in an abusive and hostile way in Court; (3) alleged bias of legal professionals and the judicial system, on a repetitive basis in this and other proceedings; and (4) applied for Summary Judgment – the exact same strategy he had taken in four reported Decisions, all of which failed. Shelley J. noted that the Plaintiff engaged in repeated litigation on the same issue, including Appeals, and that the Plaintiff did not engage in the kinds of mediation or negotiation that indicate a sincere litigant. The Court also indicated that there was no evidence that the Plaintiff conformed to the general litigant obligations in Rule 1.2(3). Justice Shelley struck the Plaintiff's Claim as being vexatious for all of these reasons.

The Plaintiff, on the other hand, had three arguments in support of Summary Judgment against the Defendants. The first assertion was that the Defendants failed to enter into a dispute resolution process pursuant to Rule 4.16. Her Ladyship, referring to Rule 8.4(3)(a), pointed out that a Trial cannot be scheduled unless the parties have engaged in a Rule 4.16(1) dispute resolution process or had that obligation waived via Rule 4.16(2). Shelley J. noted, however, that Rule 4.16 does not set any kind of timeline other than litigants are required to attempt good faith dispute resolution procedures at some point prior to Trial. The Court indicated that the Plaintiff had no right to demand compliance at this point of the Proceeding, and that the Plaintiff had not discharged his own obligation under Rule 4.16 to attempt resolution in good faith.

The Plaintiff's second assertion was that the Statements of Defence did not have a detailed, point by point denial of his allegations. Shelley J. concluded that this point was irrelevant, since both Statements of Defence included categorical denials of any facts not admitted, which satisfies Rule 13.12(2).

Finally, the Plaintiff contended that the Defendants served their Statements of Defence late. The Court rejected this argument because an Affidavit of Service indicated that service occurred within the required period.

SAVOIE v ALBERTA UNION OF PROVINICAL EMPLOYEES, 2012 ABQB 575 (MOREAU J)
Rules 1.2 (Purpose and Intention of these Rules), 1.4 (Procedural Orders), 7.3 (Summary Judgment) and 9.4 (Signing Judgments and Orders)

In 2011, the Appellant filed a Claim alleging, *inter alia*, deceit by the Respondent in notifying the Appellant's wife that grievances related to her employment would be taken to Arbitration by the Respondent. The Appellant's wife granted the Appellant Power of Attorney that included authorization to sue on her behalf. The Respondent applied for Summary Dismissal of the Claim, which was granted on January 31, 2012. The Appeal before Moreau J. was brought on the basis that the Appellant was not aware of the time and place of the Summary Dismissal Application and, thus, could not attend. The Appellant also argued that, pursuant to the *Provincial Court Act*, the Provincial Court did not have jurisdiction to grant Summary Judgment.

Moreau J. held that, pursuant to section 8 of the *Provincial Court Act*, the Provincial Court has jurisdiction to grant a Summary Dismissal Application pursuant to Rule 7.3. Moreau J. further held that the Appellant may not have been aware of the date of the Summary Dismissal Application. While there was evidence of laxity in the Appellant's approach to the proceedings in Provincial Court, the interests of justice required that he be given an opportunity to fully respond to the Summary Dismissal Application.

Moreau J. further held, however, that pursuant to Rule 1.4 (which authorizes the Court to make any Order to advance the purpose and intention of the Rules), and Rule 1.2, returning the matter to Provincial Court for a continuation of the Summary Dismissal Application would be contrary to the intent of the *Provincial Court Act* and the Rules. As such, Moreau J. held that the Appeal should be continued before her as an Application *de novo* for Summary Dismissal.

TORONTO DOMINION BANK v GAUTHIER, 2012 ABQB 569 (MASTER SCHLOSSER)
Rules 1.2 (Purpose and Intention of These Rules) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Defendant applied to set aside a Default Judgment that was granted without the Defendant present. The Defendant did not appear before the Court to contest the Default Judgment Application because he was under the impression that a Settlement Agreement had been reached. The Plaintiff did not believe that a Settlement Agreement had been reached and proceeded with the Application in the absence of the Defendant. After being granted an Order for Default Judgment, the Plaintiff filed a Writ for the entire amount of the Claim, which was approximately $6,000.00 higher than the alleged settlement amount.

The Defendant's Application was made on short notice and

the original counsel for the Plaintiff was unable to attend, so a student lawyer appeared on behalf of the Plaintiff. In considering the Application, Master Schlosser relied on Rule 1.2, which encourages early, informal resolution, and stated:

> In our zeal to move matters forward, it is easy to forget that the Rules are about resolving disputes not taking steps. More haste, less speed.

The Defendant's Application was adjourned until the following week. Master Schlosser ordered that the Writ be discharged, and further directed that the matter be heard in Justice Chambers, due to the conflicts in evidence and the fact that the matter had been before a Justice several times prior.

CAMERON CORPORATION v EDMONTON (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2012 ABCA 243 (SLATTER JA)
Rules 1.5 (Rule Contravention, Non-Compliance and Irregularities) and 530.5 (Transcripts of Oral Testimony)

In this case, the Respondent applied to strike an Affidavit filed by the Applicant in support of an Application to restore an Appeal after it had been struck under Rule 530.5(4) for failure to file the Appeal Digest in time. The Respondent wished to cross-examine the Affiant but was met with limited cooperation on the part of the Appellant. When the Application to restore the Appeal came for argument, counsel for the Respondent applied to have the Affidavit struck on the basis that the Affiant did not attend for cross-examination after several attempts made on the part of the Respondent to accommodate the Affiant.

The issue on this Application became whether the Application should be adjourned to permit cross-examination on the Affidavit, or whether the Affidavit should be struck, which would mean that the Application to restore the Appeal would likely fail. In the end, Slatter J.A. adjourned the Application to permit Questioning for the following reasons:

1. It was desirable to have the Appeal resolved on the merits;

2. Pursuant to Rule 1.5(4), the general rule was that procedural irregularities would be tolerated if there was no prejudice that could not be compensated and, while Rule 1.5 did not strictly apply to Appeals, it reflected the common law principles that have traditionally been applied; and

3. The failure of the Affiant to attend for Questioning was improper, and the explanation was weak; however, this was not a case where the Affiant was refusing to submit to examination, or was deliberately contemptuous of Court processes.

Based on the above, the Application to restore the Appeal was adjourned on conditions.

CHAMPAGNE v SIDORSKY, 2012 ABQB 522 (JONES J)
Rules 2.6 (Representative Actions), 2.16 (Court-Appointed Litigation Representatives in Limited Cases) and 2.21 (Litigation Representative: Termination, Replacement, Terms and Conditions)

One of the three Plaintiffs brought an Application to be appointed as the Litigation Representative for the other two Plaintiffs under Rules 2.16 and 2.21, as well as certification of the three Plaintiffs as a class under the *Class Proceedings Act*, SA 2003, c C-16.5 (*"CPA"*). Jones J. held that a Litigation Representative under the Rules reflects what was formerly referred to as a Next Friend or *Guardian Ad Litem*, under the old Rules. As a result, the jurisprudence regarding the old Rules is binding on the new Rules surrounding Litigation Representatives.

Jones J. relied on *Salmon v Alberta (Minister of Education)*, (1991), 120 AR 298, and *Torrance v Alberta*, 2010 ABCA 88, for the proposition that a lay Next Friend could not act as counsel for a disabled person. Similarly, under the new Rules, except where the Court exercises its discretion to allow representation by non-lawyers or where otherwise provided for in an express exception, representative Plaintiffs must be represented by counsel. In determining

whether or not to use the Court's discretion to allow a non-lawyer to represent the Plaintiffs, Jones J. referred to and relied on *Pacer Enterprises Ltd v Cummings*, 2004 ABCA 28, and held that the circumstances in this case were not appropriate to do so. The Plaintiff's Application to be appointed as Litigation Representative was dismissed.

Lastly, the Court considered Rule 2.6(1) in deciding the lone Plaintiff's Application to have the three Plaintiffs certified as a Class. Jones J. stated that an Action may still be started under Rule 2.6(1), independent of the *CPA*, and that the requirements for a Class Action to be certified under this Rule were outlined in *Korte v Deloitte, Haskins & Sells* (1993), 135 AR 389 (CA). Despite the Plaintiffs meeting this test, Jones J. held that Rule 2.6(1) referred to "numerous" persons, and did not intend for this to include only three individuals. As a result, the Application was dismissed.

TOMPKINS v ALBERTA (APPEALS COMMISSION FOR ALBERTA WORKERS' COMPENSATION), 2012 ABQB 418 (GATES J)
Rule 3.2 (How to Start an Action)

The Applicant, Bruce Tompkins, was struck and injured by equipment while working on an oil drilling rig in 1975. At that time, he claimed workers' compensation and was paid total temporary disability benefits for nine days and subsequently returned to work. In the early 2000s, he requested that the Workers Compensation Board ("WCB") reopen his claim. When his request was denied, the Applicant applied for review by the Decision Review Body ("DRB"). The DRB denied the appeal and the Applicant then appealed to the Appeals Commission ("AC"). When this appeal was also denied, the Applicant requested reconsideration by the AC of its decision. The AC denied the request for reconsideration and the Applicant applied for Judicial Review of the AC's decision by way of Originating Notice, dated November 26, 2006.

A preliminary issue brought before the Court was whether the Action was properly brought in the context of a Judicial Review. Gates J. noted that the Applicant complained in the Originating Notice that the AC did not properly apply the law to the facts of the case. These complaints were characterized as questions of mixed fact and law, which could be considered by the Court in the context of a Judicial Review.

Gates J. briefly discussed the jurisdiction of the Court to cure technical defaults in order to continue proceedings. Referring to *Buckley v Entz Estate*, 2007 ABCA 7 (a WCB case) Gates J. noted the possibility of "recasting" the proceedings under former Rule 753.16 (now Rule 3.2(6)) to allow the Court to convert pleadings where the parties chose the wrong type of proceeding. Gates J. also referred to *Patrus v Alberta (Workers' Compensation Board, Appeals Commission)*, 2011 ABQB 523, and noted that Rule 3.2(6) could be used in certain circumstances to avoid denial of a remedy on the basis of a technical defect.

Gates J. did not accept the WCB's contention that the issues raised by the Applicant were not properly before the Court. The Applicant sought relief from the Court on the basis of alleged errors on the part of the AC in dismissing his claim and Gates J. stated that even assuming that the application for Judicial Review erroneously characterized some of the questions as issues of law, the Court still had jurisdiction to hear the matter.

GENSTAR DEVELOPMENT COMPANY v PLAINS MIDSTREAM CANADA ULC, 2012 ABQB 457 (MASTER PROWSE)
Rule 3.2 (How to Start an Action)

The Applicants (collectively "Genstar") brought an Originating Application to have a utility right of way removed from title to land. Plains Midstream Canada ULC applied to have the Action converted into a Statement of Claim. Rule 3.2 requires Actions to be brought by Statement of Claim unless one of the enumerated grounds listed in the Rule is met. Genstar argued that two exceptions were met:

1. An enactment provided for a remedy – that enactment being the *Land Titles Act*, RSA 2000, c L-4, specifically section 141 (application to discharge caveat) and section 146 (order re caveat). The Court

held that these sections were inapplicable as they dealt with caveats and not rights of way.

2. There was no substantial factual dispute. The Court held that there may not be facts in dispute, but there may be unknown facts which might affect the legal answer.

The Application to convert the Action to a Statement of Claim was granted. The Court held that even if it was permissible to commence the Action by Originating Notice, the Action should proceed by Statement of Claim because of the unsettled and complex legal issues.

LAASCH v TURENNE, 2012 ABQB 566 (GRAESSER J) Rules 3.2 (How to Start an Action), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings), 4.33 (Dismissal for Long Delay), 6.1 (What This Division Applies To), 6.3 (Applications Generally), 9.12 (Correcting Mistakes or Errors), 9.13 (Re-Opening a Case), 9.14 (Further or Other Order After Judgment or Order Entered), 9.15 (Setting Aside, Varying and Discharging Judgments and Orders) and 9.16 (By Whom Applications are to be Decided)

In April, 2008, the Plaintiffs filed an Originating Notice which sought to register the Plaintiffs' Montana Judgment in Alberta, pursuant to the *Reciprocal Enforcement of Judgments Act*. In July, 2008, the Plaintiffs issued a Statement of Claim in relation to the debt created by the Montana Judgment. The registration Application was heard and dismissed in 2009. The Plaintiffs then pursued the debt Action, but Summary Judgment was granted in favour of the Defendants on the basis that it was brought outside the relevant limitation period.

The Plaintiffs applied to amend the 2008 Originating Notice to add the debt claim as an alternative to the registration remedy that was initially pursued. In the alternative, the Plaintiffs sought a Procedural Order under Rule 3.2(6), directing that the amendment be set out in a Statement of Claim filed in this Action. The Plaintiffs argued that, pursuant to section 6 of the *Limitations Act*, if a claim is added to an already commenced Proceeding, the Defendant is not entitled to immunity from liability, provided the added Claim is related to the conduct, transaction or events described in the original Pleading. The Plaintiffs further argued that their Application was permitted under Rule 6.3, which provides that, unless the Court otherwise permits, an Application may be filed during an Action or after Judgment is entered.

The Defendants argued that section 6 of the *Limitations Act* requires an existing Proceeding or Claim to which an amendment may be made. The Originating Notice proceeding was concluded in 2009. The Originating Notice merged into the Formal Judgment, and the Court became *functus*. Further, the Defendants argued that Division 3 of Part 9 of the Rules sets out the only circumstances under which an amendment after Judgment can be sought (i.e. under Rule 3.6), but that Division 3 of Part 9 had no relevance to the Plaintiffs' circumstances.

Graesser J. held that Rule 6.3 was of no assistance to the Plaintiffs because Rule 6.1 provides that Division 1 of Part 6 does not generally apply to Originating Applications. Further, Graesser J. held that Plaintiffs were not required to bring themselves within Division 3 of Part 9. Rather, the Plaintiffs were required to meet the requirements of Rule 3.65, which relates specifically to amending Pleadings.

Graesser J. held that an Action can end in a number of ways. An Action can lie dormant for up to the period governed by Rule 4.33, after which it is effectively at an end. The present Action was not dormant for long enough to be treated as dead merely by the passage of time.

Graesser J. held that the Plaintiffs could have pursued the debt claim as an alternative remedy in 2009. In the Originating Notice, the Plaintiffs sought the registration of the Montana Judgment, Interest and Costs, and the general and often pled remedy of "such further and other Relief as Counsel may advise and this Honourable Court deems just". The only issue adjudicated in 2009 was the registration of the Judgment. There was no adjudication relating to the findings of fact or the Judgment itself, and there was no pursuit of any other relief as sought in the Originating Notice. Graesser J. held that having regard to the actual

wording in the Originating Notice, it could not be said that everything contemplated by the Originating Notice had been litigated. There was no technical reason under the Rules which would bar the Plaintiffs from pursuing further relief, subject to *res judicata*, issue estoppel, action estoppel and Rule 4.33.

Graesser J. held that prejudice is relevant to the Court's determination as to whether to allow an amendment under Rule 3.65. Prejudice relates to the ability to answer a Claim, and turns on factors such as availability, health and memory of key witnesses and destruction of relevant records. Prejudice does not refer to the loss of a limitations defence or other technical arguments. Graesser J. held that the Defendants would not be prejudiced by the amendment, and that the Plaintiffs had met the requirements for an amendment under Rule 3.65. Graesser J. allowed the Application, and permitted the Plaintiffs to amend the Originating Notice to add the alternate relief related to the debt Action.

LAASCH v TURENNE, 2012 ABCA 32 (SLATTER, BIELBY JJA AND READ (AD HOC))
Rule 3.2 (How to Start an Action)

In 2006, Default Judgment was awarded in favour of the Appellant Plaintiffs against the Respondent Physician in a medical malpractice Action in Montana. In 2008, the Appellants filed an Originating Notice to have the Montana Judgment registered in Alberta. That Action was dismissed in 2009. In 2008, before the registration Application was heard, but more than two years after the date of the Montana Judgment, the Appellants commenced a debt Action to enforce the Montana Judgment. In 2010, a Master of the Court of Queen's Bench of Alberta granted Summary Judgment in favour of the Appellants, concluding that the two year limitation period did not begin to run until the date the registration Application was dismissed. On Appeal, the Chambers Judge concluded that the Action was barred by the *Limitations Act*.

The Court of Appeal held that the Chambers Judge made no error of law and dismissed the Appeal. The Respondent was immune from liability with respect to the debt Action because it was commenced more than two years after the limitation period began to run. However, the Court further held that its Decision did not preclude an Application by the Appellants under Rule 3.2(6) to add the debt Action to the Originating Notice by which the Appellants unsuccessfully sought registration of the Montana Judgment.

SEARS CANADA INC v C & S INTERIOR DESIGNS LTD, 2012 ABQB 573 (KENT J)
Rules 3.3 (Determining the Appropriate Judicial Centre) and 3.5 (Transfer of Action)

Sears Canada Inc. ("Sears") sought to overturn a Master's Decision staying the Alberta Action. The Master had held that Ontario was the most appropriate jurisdiction.

Sears cited Rules 3.3 and 3.5 and argued that the Alberta Rules of Court suggested that Alberta was the most appropriate jurisdiction. The Court held that Rules 3.3 and 3.5 address the issue of the appropriate judicial centre with respect to initiating a claim, and have nothing to do with determining the appropriate forum in the face of competing jurisdictions. The Appeal was dismissed.

UNLAND v NATURAL RESOURCES CONSERVATION BOARD, 2012 ABQB 501 (HALL J)
Rule 3.15 (Originating Application for Judicial Review)

An Application was brought for Judicial Review of a Decision made by the Natural Resources Conservation Board ("NRBC"). The Decision regarded the licensing status of a cattle ranch located on property adjacent to the Applicant. Both the NRBC and the cattle ranch (Rocky Butte Ranches) were Respondents to the Application.

The NRBC provided an initial Decision to the Applicant on October 15, 2007. The Applicant was not satisfied with the Decision. The Applicant then provided further evidence to the NRBC and called upon the NRBC to review its earlier Decision. The NRBC continued to collect evidence, investigate and correspond with both the Applicant and Rocky Butte Ranches. On August 11, 2008, a second Decision was provided to the Applicant, which confirmed

the original Decision. The Applicant subsequently filed their Originating Notice for Judicial Review on February 10, 2009.

Rule 3.15(2) states that an Originating Application for Judicial Review to set aside a Decision of a person or body must be made within six months of the Decision. The Respondent NRBC argued that because the initial Decision was provided on October 15, 2007, and that the subsequent decision of August 11, 2008 was merely a review of the original Decision, that the six month time period had lapsed. Hall J. rejected this argument, stating:

> I disagree. The initial decision of October 15, 2007 was almost immediately reviewed and reconsidered by the Board and its Inspector, at the urging of the Applicants. Had no further steps been taken by the Board to review that decision, this application would have to be made within six months of the decision. However, as the Board continued to gather evidence to inform itself in respect of the issue and to communicate with the Applicants, the matter clearly was not considered complete by the Board or its Inspector Mr. Jespersen. The Inspector continued to conduct his investigation, to the knowledge of the Respondent Rocky Butte, and to the knowledge of the Applicants. The decision did not become final until communicated on August 11, 2008. The Application was brought within six months thereof. Accordingly, the limitations argument put forth by the Respondents fails.

VANDEN BRINK v RUSSELL, 2012 ABQB 523 (MASTER PROWSE)
Rules 3.27 (Extension of Time for Service) and 9.15 (Setting Aside, Varying and Discharging Judgments and Orders)

The Defendant applied to set aside a Default Judgment obtained by the Plaintiff. The Defendant argued that he was entitled to set aside the Default Judgment as of right because he was never served with the Statement of Claim. He further argued that the Court should exercise its discretion to set aside the Default Judgment pursuant to Rule 9.15(3).

Master Prowse rejected the Defendant's Application to set aside the Default Judgment as of right, because the Plaintiff had proffered sufficient evidence to prove Service, and because the Defendant's evidence denying Service was not credible. Although the Plaintiff bears the burden of proving Service, in the absence of filed evidence that puts Service in doubt, the Plaintiff's burden is satisfied by filing an Affidavit of Service. Where conflicting Affidavits result in a deadlock, *viva voce* evidence should be heard by a Justice in Chambers to resolve the matter based on findings of credibility. Only if the matter remains deadlocked after a *viva voce* hearing should a Default Judgment be set aside on the basis of the Plaintiff's failure to meet their onus.

Master Prowse held that this approach avoids a scenario whereby a Plaintiff obtaining a Default Judgment faces the prospect of it later being set aside based on a bare denial of Service by the Defendant. The consequence of setting aside the Judgment may be that the time for Service of the Statement of Claim will have elapsed, and the Cause of Action lost due to limitations issues. While Rule 3.27(1)(b) allows the time for Service of a Statement of Claim to be extended where an Order for Substitutional Service is later set aside, there is no provision to extend the time where proof of Service upon which a Default Judgment has been issued is later rejected.

Master Prowse noted that the Court considers three factors in an Application pursuant to Rule 9.15: (1) the Court will consider the reason the Defendant failed to file a Statement of Defence within the time provided by the Rules; (2) the Court will consider whether the Defendant delayed in applying to set aside Default Judgment once he became aware of it; and (3) the Court will consider whether the Defendant has an arguable defence. Master Prowse held that the Defendant had no adequate reason for not filing a Statement of Defence within the time afforded by the Rules, and further that the Defendant delayed in pursuing his Application to set aside the Default Judgment. However, Master Prowse held that the Defendant had an arguable Defence on the merits. As such, and given an absence of

prejudice to the Plaintiff, the Default Judgment was set aside.

SOLER & PALAU v MEYER'S SHEET METAL LTD, 2012 ABQB 496 (MASTER HANEBURY)
Rules 3.58 (Status of Counterclaim) and 7.3 (Summary Judgment)

The Plaintiff sued the Defendant for outstanding invoices (the "Old Invoices"). Before litigation commenced, the Plaintiff and Defendant agreed that all new orders made by the Defendant would be subject to an additional fee that would be applied to the Old Invoices. When the Plaintiff eventually sued for the Old Invoices, the Defendant claimed that the two year limitation period had expired for all but one of the Old Invoices. The Defendant also filed a Counterclaim alleging that the Plaintiff breached an exclusive dealership agreement by marketing its products to the Defendant's competitors. The Plaintiff argued that the monies owing under the Old Invoices were due and that Summary Judgment should be granted.

One issue before the Court was whether the partial payments extended the limitation period for all of the outstanding invoices, or only the one against which the payments were applied (the Defendant maintained that this was the earliest of the Old Invoices). The issue relating to the Rules was whether Summary Judgment should be granted in light of the nature of the Counterclaim.

Master Hanebury cited *Manufacturers Life Insurance Co v Executive Center at Manulife Place Inc*, 2011 ABQB 189, stating that in order to grant Summary Judgment, the Court must be satisfied that there is no genuine issue for Trial, which in this case would be that there were no triable issues in relation to the limitations defences raised by the Defendant. After a detailed interpretation of the *Limitations Act*, RSA 2000, c L-12, the Court granted Summary Judgment only for the earliest of the Old Invoices, stating that there was a genuine issue for Trial as to whether there was a single claim or several claims.

Addressing the second issue of whether the Counterclaim barred an Order for Summary Judgment, Master Hanebury stated:

> Rule 3.58 provides that a counterclaim is an independent action. It will not, in and of itself, prevent a plaintiff from obtaining summary judgment, unless the counterclaim constitutes a defence. A legal or equitable setoff, as defences, may prevent summary judgment. Procedural setoff does not.

The Court noted that legal set-off applies between Liquidated Claims, which was not the situation in this case. Equitable set-off requires a Counterclaim to be so clearly connected with the Plaintiff's demand that it would be manifestly unjust to allow the Plaintiff to enforce payment without taking the Counterclaim into account.

The Defendant filed no evidence supporting the allegations set out in the Counterclaim. Further, the Counterclaim did not indicate that there was an agreement for an exclusive distributorship or that there was a breach of the alleged agreement. For these reasons, the Court found that the Defendant's Counterclaim did not preclude Summary Judgment as granted.

OMEGA DEVELOPMENTS INC v CANADA SAFEWAY LIMITED, 2012 ABQB 564 (MASTER PROWSE)
Rules 3.58 (Status of a Counterclaim), 4.33 (Dismissal for Long Delay) and 15.4 (Dismissal for Long Delay: Bridging Provision)

Omega owned a building in Calgary. The adjacent land was acquired by Canada Safeway, who hired Ledcor to construct a building. In February 2001, Omega brought an Action for damages against Safeway and Ledcor, claiming that they had trespassed on Omega's lands and damaged its building. Omega eventually discontinued the Action against Safeway, leaving Ledcor as the only Defendant. Ledcor sought an Order dismissing the Action pursuant to Rule 15.4, on the basis that five years had elapsed since the last thing done by Omega to significantly advance the Action.

Ledcor argued that the five year period during which nothing was done to significantly advance the Action was May 14, 2007 to May 14, 2012. However, Master Prowse

noted that in June 2007, Omega filed a Defence to the Counterclaim filed by Safeway. Although Rule 3.58 provides that a Counterclaim is an independent Action, in practice a Claim and a Counterclaim are tied together more closely than two separate Actions. Where there is a Claim and a Counterclaim, Parties hold concurrent Questioning, and set the matter for Trial concurrently. Master Prowse further held that the Court generally applies a functional approach to dismissal for delay, and considers how an Action was advancing as a whole, and not just against a particular Defendant. The former Rules of Court specifically directed the Court to take Counterclaims into consideration in an Order Striking an Action for Delay. The current Rules simply state that an Action must be dismissed where there is a five year delay. However, under the functional approach, a Claim and Counterclaim should be considered together. This avoids one five year time period running under an Action and a different five year time period running under a Counterclaim.

In any event, Master Prowse held that it was not necessary to decide whether filing of the Defence to the Counterclaim materially advanced the Action. Master Prowse held that Omega materially advanced the Action against Ledcor when it discontinued against Safeway in July, 2010. Moreover, in June 2011, Omega amended its Claim against Ledcor, which also significantly advanced the Action. These steps occurred during the relevant five year period, and as such, Master Prowse declined to dismiss the Action pursuant to Rule 15.4.

KENT v POSTMEDIA NETWORK INC, 2012 ABQB 559 (TILLEMAN J)
Rule 3.62 (Amending Pleading)

The Plaintiff applied to amend his Statement of Claim to include allegations of misappropriation of personality, and breach of duties of confidentiality and fiduciary trust. Tilleman J. confirmed that as long as there was some foundation for the amendment and unless there was a significant prejudice or injustice, an Order to allow amendments should be freely given. It was noted that factors such as bad faith, unreasonable delay, or questionable motive should always be considered, as they could prove fatal to a request to make amendments, but none of those factors were argued by the Defendants in this case. Further, Tilleman J. confirmed that amendments cannot be hollow, futile, or hopeless, and further defined futile as meaning that "it would make little sense to grant an amendment that is barren of all evidence and is otherwise so starved of a triable issue that it faced a perfect (100%) chance of success on a motion to strike or a motion for summary judgment". In this case, Tilleman J. held that the allegations were worthy of argument and it was preferable to err in sending a matter to Trial on its merits, rather than take it away on the Pleadings. Tilleman J. concluded by noting that while the evidence could be stronger, Pleadings were not evidence and in this case there was a "modest degree of evidence". The Application to amend was allowed.

CASTLEDOWNS LAW OFFICE MANAGEMENT LTD v FASTTRACK TECHNOLOGIES INC, 2012 ABCA 219 (RITTER, MCDONALD AND BIELBY JJA)
Rules 3.65 (Permission of Court to Amendment Before or After Close of Pleadings) and 3.74 (Adding, Removing or Substituting Parties After the Close of Pleadings)

The Plaintiff (Respondent) and the Defendant (Appellant) were embroiled in a dispute over the ownership of an office building. After a Trial and an Appeal, the Defendant requested that the matter be case-managed. They sought to amend their Claim for damages and to add parties to the Action. The case-management judge had dismissed the Application to Amend and the Defendant appealed. The Court of Appeal considered Rules 3.65 and 3.74 in analyzing the legal test for amending pleadings and adding parties. The Court, relying on prior case law, emphasized that considerable discretion is given to allow amendments after pleadings have closed but that there are exceptions to this presumption of discretion. The exceptions include: circumstances where the proposed addition or amendment would cause serious prejudice to the opposing party, or where a limitations period has expired. The party resisting the amendment or addition bears the burden of showing that, if the amendment were allowed, they would suffer prejudice that would not be compensable by Costs. Additionally, Rule 3.74 expressly provides that

an Order adding parties should not be allowed if doing so would cause prejudice that could not be remedied by Costs, Adjournment or the Imposition of Terms. The Court, affirming the Case Management Judge's Decision, found that the Plaintiff would suffer serious prejudice if parties were added or amendments to the Claim were made. The Appeal was dismissed.

ENGLER v ENGLER, 2012 ABQB 442 (VEIT J)
Rule 3.68 (Court Options to Deal with Significant Deficiencies)

Ms. Engler sought an Order striking portions of Mr. Engler's Affidavits on the grounds that they contained allegations not supported by independent evidence, were too long and contained opinion. The Court held that Mr. Engler's Affidavits were prolix, repetitive, argumentative and sometimes irrelevant. The Court cited *Chevron Canada Resources v Canada (Executive Director of Indian Oil and Gas Canada)*, 1998 ABQB 910, for the proposition that although the Court could review the parties Affidavits and strike out material which is frivolous, irrelevant or improper, the wiser course of action is to ignore the material. The Court then cited *Elkow v Sana*, 2006 ABQB 851, for the exception to the general rule, that if the material is interwoven with the acceptable evidence, then the only solution may be to strike the complete Affidavit. The Court struck one paragraph from one of the Affidavits as it was both irrelevant and gratuitously offensive.

STONEY TRIBAL COUNCIL v IMPERIAL OIL RESOURCES LIMITED, 2012 ABQB 557 (MASTER HANEBURY)
Rules 3.68 (Court Options to Deal with Significant Deficiencies) and 7.3 (Summary Judgment)

Imperial applied to have a royalty payments claim struck. Master Hanebury stated that a Claim will be struck under Rule 3.68 if it is plain and obvious or beyond doubt that the Action cannot succeed; however, if it can be shown that "there is a chance" that the Action will be successful, the Claim should not be struck. Next, Master Hanebury noted that a claim may be dismissed summarily under Rule 7.3, but an Application for Summary Dismissal should not be granted if there is a genuine issue for Trial. Master Hanebury also confirmed that when the facts were not in dispute, as was the case in this matter, the question to be determined by the Court was whether the issue could be fairly decided on the filed record. After considering each issue in turn, Master Hanebury determined that there was no genuine issue for Trial and the Stoney Tribal Council had no standing to continue their claim against Imperial.

MEADS v MEADS, 2012 ABQB 571 (ROOKE J)
Rules 3.68 (Court Options to Deal with Significant Deficiencies), 4.22 (Considerations for Security for Costs Order), 10.29 (General Rule for Payment of Litigation Costs) and 10.49 (Penalty for Contravening Rules)

Crystal Lynne Meads (the "Appellant") requested a Case Management Hearing to help resolve issues she faced dealing with her husband, Dennis Larry Meads (the "Respondent") in relation to ongoing spousal and child support payments. At the Case Management Hearing, the Respondent proclaimed that, as a "child of God", he was not subject to the Rule of Law and therefore not obligated to provide further support payments. The litany of fallacious arguments submitted by the Respondent at the Case Management represented a group Justice Rooke labeled as Organized Pseudolegal Commercial Argument Litigants ("OPCALs"); individuals who employ techniques to disrupt Court operations and to attempt to frustrate the legal rights of governments, corporations, and individuals.

Justice Rooke's Reasons for Decision served to assist the Appellant in dealing with the Respondent as she moves through the litigation process. However, Justice Rooke's ultimate goal in this decision was to address and rebut the controversial arguments and concepts adopted by the OPCAL community and "set the record straight" for Canadian Courts to end the OPCAL community's abuse of the litigation process.

Rooke J. cited Rule 3.68(2)(c) which allows Courts to strike Claims or dismiss an Action where a Justice concludes that a commencement document or pleading is frivolous, irrelevant, or improper. Justice Rooke referenced numerous nonsensical documents submitted to the Court by the Respondent and suggested that Rule 3.68(2)(c) could

be applied in the circumstances of this case. Moreover, the Court added that a proceeding may be struck where a Defendant is "left both embarrassed and unable to defend itself": *Kisikawpimootein v Canada*, 2004 FC 1426.

With regard to elevated Costs, Rooke J noted a potential exception to the rule that a successful litigant is entitled to a costs award against the unsuccessful party (Rule 10.29(1)), and that is where there is a novel issue before the Court: *Grant v Grant*, 2010 ABQB 735. However, the Court maintained that the opposite occurs with OPCALs and cited numerous cases that support ordering elevated costs against OPCALs.

With regard to an Order for Security for Costs, Justice Rooke stated that litigation, a defence, or an Application that flows from a known OPCAL strategy might favour an Order for Security for Costs against an OPCAL. Since OPCALs usually maintain that they stand outside the Court's authority, that alone should be a strong factor that may favour a Security of Costs Order under Rule 4.22(e).

Further, His Lordship observed that Rule 10.49(1) authorizes a Justice to order a person to pay the Court Clerk a penalty where the person fails to comply with the Rules and interferes with the proper or efficient administration of justice. The Rule provides a "very helpful mechanism to address OPCAL misconduct". Justice Rooke added that any fine issued under this Rule does not affect the substance of a dispute, thus respecting the legal rights and issues that an OPCAL may have.

LOZINIK v SUTHERLAND, 2012 ABQB 583 (JONES J)
Rules 4.16 (Dispute Resolution Processes), 4.29 (Costs Consequences of Formal Offer to Settle), 7.3 (Summary Judgment), 10.29 (General Rule for Payment of Litigation Costs), 10.31 (Court-Ordered Costs Award) and 10.33 (Court Considerations in Making Costs Award)

The Plaintiff brought a series of Applications including Applications for Summary Judgment, Double Costs, and dismissing the requirement for Judicial Dispute Resolution. The Defendants cross-applied to have the Plaintiff's claim summarily dismissed and for Costs under column 5 of Schedule C of the Rules. Jones J. dismissed the Plaintiff's Actions against the Defendant, Sutherland, in their entirety and as against the remaining two Defendants in their entirety except for an Action that may be founded on breach of covenant. All of the Plaintiff's Applications were denied.

Jones J. denied the Plaintiff's request for Costs because he was entirely unsuccessful in his Application for Summary Judgment, and because Rules 10.29 and 10.31 provide the Court with discretion in awarding a Costs award and in considering the factors outlined in Rule 10.33. Further, Jones J. considered the factors outlined under Rule 10.33(2) and found that the Plaintiff improperly sought:

(a) To set a Trial date prior to disclosure of information between parties;

(b) Case management after the date had been set for his Special Chambers Application relating to his Summary Judgment Application; and

(c) To compel the Defendants to complete a Request for Disclosure which the Plaintiff prepared in a manner not in compliance with the Rules.

Jones J. stated that there was no basis for awarding the Plaintiff any Costs, and granted the Defendants' request for Costs pursuant to Column 5 of Schedule C of the Rules.

SUCKER CREEK FIRST NATION v CANADA (ATTORNEY GENERAL), 2012 ABQB 460 (MASTER SMART)
Rules 4.33 (Dismissal for Long Delay) and 15.4 (Dismissal for Long Delay: Bridging Provision)

The Defendants applied for an Order dismissing the Plaintiffs' Action, pursuant to Rule 15.4(1), on the basis that the Plaintiffs did nothing to significantly advance the Action for five years prior to the date the Application was filed. In deciding this Application, Master Smart relied on *Bahcheli v Yorkton Securities Inc*, 2010 ABQB 824, for the proposition that the jurisprudence under former Rule 244.1(1) continues to be applicable to Rule 15.4 and that there is no difference between the term "significantly" advanced under the new Rule and "materially" advanced

under the old Rule.

Master Smart stated that the question to be decided was whether or not there was an express agreement between the Plaintiff and Defendant for a standstill agreement that added time onto the five year period contemplated under Rule 15.4. In determining whether there was an express agreement, Master Smart relied on *Bugg v Beau Canada Exploration Ltd*, 2006 ABCA 201, where the Court stated that a standstill agreement can be written, oral, or partly written and partly oral, as long as it is express and not based on intent or inference. Further, not all agreements that remove the need to take an immediate step automatically add time to the period contemplated in Rule 15.4. Master Smart concluded that the interpretation of an alleged standstill agreement should be based on the words used or there must be a reasonable implication or inference that adds time onto the five year period contemplated by the Rule. Master Smart also held that the Court must consider whether or not the facts and circumstances support an inference of a standstill agreement.

The Court found that an extension of time was requested by the Defendants, and was granted by the Plaintiffs, but only in order to provide the Plaintiffs with an opportunity to correct a material defect in their Statement of Claim. Master Smart stated that the Court was unable "to clearly (or at all) find by inference or implication a standstill agreement by time tacking or otherwise". The Application of the Defendants was granted and the Action was dismissed.

BARRETT v ALBERTA (PUBLIC TRUSTEE), 2012 ABCA 212 (CONRAD, BERGER AND MARTIN JJA)
Rules 4.33 (Dismissal for Long Delay) and 15.4 (Dismissal for Long Delay: Bridging Provision)

Barrett appealed a Decision dismissing his Action against the Public Trustee. The Action was dismissed pursuant to former Rule 244.1, because five years had elapsed since the last thing was done to significantly advance the Action.

Barrett had filed a Claim against the Public Trustee alleging that the Public Trustee had failed to protect Barrett's rights as a minor and failed to notify him of his inheritance from his grandfather. Nothing was done to advance the Action, and the Public Trustee filed a Motion to dismiss the Claim.

Prior to the Action against the Public Trustee, Barrett commenced a Claim against the Estate of his grandfather, relating to alleged mishandling of the Estate (the "Estate Action"). The Estate Action was dismissed for want of prosecution, and that Decision was upheld on Appeal. Barrett argued that his Appeal in the Estate Action was a "thing" that materially advanced the Public Trustee Action.

The Court dismissed Barrett's Appeal for various reasons, including:

(a) The Public Trustee Action could have continued while the Estate Action was proceeding;

(b) The Public Trustee Action and the Estate Action were not inextricably linked - the result in the Estate Action would not have been legally or factually determinative of the Public Trustee Action;

(c) The Estate Action did not materially advance the Public Trustee Action; and

The Decision in the Estate Action would not have been a legal bar to a Decision in the Public Trustee Action.

NEWEL POST DEVELOPMENTS LTD v 1402801 ALBERTA LTD, 2012 ABQB 422 (WITTMANN CJ)
Rule 4.36 (Discontinuance of Claim)

This Action involved the sale and subsequent resale of a Calgary property known as "The Barron Building". The property was sold by the Plaintiff in 2007 with certain conditions, and because of unfulfilled obligations of the purchaser, the Plaintiff registered an Unpaid Vendor's Lien against the title of the property. In 2008, the Defendant acquired the property and filed an Action to have the Unpaid Vendor's Lien removed from the title. The Plaintiff and Defendant purported to settle that Action by way of a settlement agreement. The Plaintiff, in turn, brought this Action to enforce specific performance of the settlement agreement.

Just prior to the Trial of the Action of this matter, the Plaintiff applied for an Order, pursuant to Rule 4.36, to authorize it to discontinue the Action, without costs to the Defendant. The Application was heard and the Court adjourned the Trial *sine die* pending the decision of the Application and requested written briefs from the parties.

In deciding the Application, the Court found that there was no material difference between the new Rules and the "old" Rules governing the obligation of a party to obtain leave of the Court to discontinue an Action or Claim. Furthermore, the Court relied on *De Shazo v Nations Energy Co*, 2006 ABCA 400 (CA), for the following principle:

> [A]fter the proceedings have reached a certain stage, the Plaintiff, who has brought his adversary into Court, shall not be able to escape by a side door and avoid the contest. He is then, to be no longer *dominus litis*, and it is for the judge to say whether the action shall be discontinued or not and upon what terms.

The Court recognized that there was no resistance by the Defendant to the Discontinuance of the Action. Rather, there was only resistance to the Discontinuance of the Action on a without costs basis. In deciding whether or not Costs should be awarded, the Court stated that if the evidence established that the Defendant had "engineered" the situation so as to render the continuation of the Action to a successful Judgment an exercise in futility, it would have granted leave to Discontinue the Action on a without costs basis. In the circumstances, the Court found that the continuation of the Action to Judgment had not been proven to be demonstrably futile, and therefore, Leave to Discontinue the Action with Costs to the Defendant was granted.

KENT v MARTIN, 2012 ABQB 467 (TILLEMAN J)
Rules 5.4 (Appointment of Corporate Representatives), 5.30 (Undertakings) and 10.52 (Declaration of Civil Contempt)

At the heart of this Contempt Application was the assertion by the Plaintiff that the corporate representative of the Defendant (the "Representative") appeared unprepared at his Questioning. In summary, the Plaintiff's argument was that the Representative did not review the material in advance, notwithstanding a previous Order of the Court that all parties were to conduct Questioning, and complete Questioning, in a very tight time frame. Tilleman J. also noted that Clarkson J., who issued the Order in respect of Questioning, had emphasized the importance that the Representative be prepared.

The Defendant in this case argued that due to the operation of Rule 5.30, the remedy for a corporate representative appearing unprepared at Questioning is not contempt; it is for the corporate representative to undertake to inform himself. Tilleman J. rejected this idea, stating that it is possible for a corporate representative to be found in contempt of Court for not complying with Rule 5.4(2) (which requires a corporate representative to inform himself of relevant and material records and information before being Questioned). Although Tilleman J. ultimately decided that this case did not amount to contempt, His Lordship stated the following regarding what would be required to establish such a claim:

> In my mind, when new Rules 10.52, 5.4(2) and 5.30 are read together, the Applicant in a contempt proceeding may succeed by showing a lack of diligence and commitment to fulfilling a court order, but to do so, the breach should be: (1) significant, meaning a substantial noncompliance; (2) the failure to comply was not redressed forthwith and responsibly; (3) the failure to comply was clear; and (4) the Court Order was direct and unequivocal.

The Court also spoke to increased obligations of corporate representatives under Rule 5.4(2) relative to the former Rules. Tilleman J. stated:

> I also agree with the Plaintiffs that under Rule 5.4(2), the expectation with the history of this case is that the corporate representative will really be informed. A higher obligation than under the old rules is consistent with the foundational rules which speaks to more efficiency. [Emphasis in original]

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

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

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

THUNBERG v ZADWORNY, 2012 ABQB 576 (LEE J)
Rule 6.14 (Appeal from Master's Judgment or Order)

The Defendant brought an Application for a Declaration that the Plaintiffs' Claim did not survive the Defendant's discharge from bankruptcy. The Master dismissed the Application and allowed the Plaintiffs to amend their Statement of Claim to include fraud, embezzlement, misappropriation and defalcation. The Defendant appealed the Master's Decision.

Lee J. heard the Appeal of the Master's Decision and stated that the standard of review was correctness for questions of law and reasonableness for questions of fact. Lee J. went on to state that the matter could not be dealt with summarily because the Plaintiffs had not yet obtained full disclosure of relevant information, and there was a genuine issue to be tried as to whether the Defendant induced the Plaintiffs to invest based on false pretenses or fraudulent misrepresentations. These issues needed to be determined by the Court once the Plaintiffs amended their Statement of Claim. Lee J. held that the Master did not err in dismissing the Application, and that it was not appropriate under the circumstances for the Court to substitute its discretion for that of the Master.

SAVEVA v FLIGHT CENTRE, 2012 ABQB 477 (MASTER SCHLOSSER)
Rules 6.17 (Payment of Allowance) and 11.25 (Real and Substantial Connection)

This Action arose from an accident that occurred while the Plaintiff was vacationing at a hotel in the Dominican Republic. Upon the Plaintiff's return to Edmonton, she filed a claim against the resort in the Dominican Republic as well as the tour operators that carry on business in Alberta. The resort Defendants claimed that the Dominican Republic is the proper forum and filed an Application to have the proper forum determined pursuant to Rule 11.25. Prior to the Court hearing the Application to determine the proper forum, the resort Defendants applied to have the Plaintiff provide conduct money, pursuant to Rule 6.17, to pay for the expense of Questioning its witnesses.

In deciding the resort Defendants' Application for conduct money, the Court reviewed Rule 11.25 and found that two of the presumptive connective factors provided in Rule 11.25 applied to the Action. The Court relied on the case of *Van Breda v Village Resorts Ltd*, 2012 SCC 17, for the proposition that when there are presumptive factors arising from Rule 11.25 that apply, the Applicant will have the onus of rebutting the presumption. Therefore, in the Application to determine the proper forum, the resort Defendants would have the onus to prove that Alberta was not the proper forum. The Court dismissed the resort Defendants' Application for conduct money and provided the following reasons for its Decision:

(i) The resort Defendants were the Applicants in determining the proper forum;

(ii) Providing conduct money would likely create a hardship for the Plaintiff;

(iii) The resort Defendants did not demonstrate that the witnesses, for which they were requesting conduct money, were the only ones that could provide the evidence in question; and

(iv) The resort Defendants could speak to Costs if they

were successful in their Application to determine the proper forum.

OLYMPIA TRUST COMPANY v TOTTEN, 2012 ABQB 488 (HALL J)
Rule 6.25 (Preserving or Protecting Property or Its Value)

The Plaintiff loaned money to the Defendants, his son and daughter-in-law, for the purchase of a house. The house was purchased and two mortgages were obtained. The mortgages on the house went into default, and the property was sold in foreclosure. The son and daughter-in-law separated soon thereafter. An issue arose as to whether the payments made by the Plaintiff to the Defendants were a loan or a gift. Both the Plaintiff and his son (the "Applicant") claimed the payments were a loan. The daughter-in-law (the "Respondent") claimed the payments were a gift.

The Applicant sought an injunction, relying in part upon the *Matrimonial Property Act*, to prevent the proceeds of the foreclosure sale from being distributed until the issue had been resolved. Hall J. commented on the proper Rule under which to bring such an Application, and what would be required for such an Application to be successful:

> [The Applicant] seeks a freezing order which he says is brought under the *Matrimonial Property Act*. That Act makes no specific provisions for a freezing order. The Court's jurisdiction to freeze matrimonial assets arises under the *Judicature Act* 1980 c. J-1, s. 13(2). Rule 6.25(1) of the *Rules of Court*.
>
> In order for the court to grant such an order [the Applicant] must show a strong *prima facie* case and a real and substantial risk that [the Respondent] is dissipating or disposing of assets other than in the normal course to provide for herself and her children.

His Lordship determined that there was not sufficient evidence to grant such an order. Justice Hall stated that no *prima facie* case has been made out and there was no evidence that the Respondent had been dissipating or would dissipate the funds. The Application was denied.

EDMONTON FLYING CLUB v EDMONTON REGIONAL AIRPORTS AUTHORITY, 2012 ABQB 563 (VEIT J)
Rule 7.1 (Application to Resolve Particular Questions or Issues)

The Edmonton Flying Club ("EFC") had a lease to operate out of the Edmonton City Centre Airport ("ECCA") until 2028. In 2009 the City of Edmonton announced its decision to commence a phased closure of the ECCA. In response, EFC launched legal proceedings. In this Application, EFC sought a severance Order to allow a Trial to determine whether it was entitled to a Permanent Injunction prior to determining Damages.

The Court outlined the general principles applicable to Rule 7.1, as outlined in *Gallant v Farries*, 2012 ABCA 98:

(a) The clear aims identified in Rule 7.1 cannot be superceded by Rule 1.2;

(b) There must be a good probability that a second Trial will not be necessary;

(c) The first Trial must be much shorter than the second would be; and

(d) Any significant overlap in evidence between the issue to be severed and the remainder of the Action will essentially doom the severance Application.

In applying the general principles, the Court held that, amongst other things:

(a) There was no material overlap between a determination of EFC's entitlement to an Injunction and EFC's claim for Damages;

(b) There was a good chance that the determination of whether EFC was entitled to injunctive relief would end the Action;

(c) The Trial regarding injunctive relief would be much shorter than the Trial regarding Damages;

(d) Severance would provide an opportunity to minimize litigation expenses and even the imbalance of litigation funding ability between the parties; and

(e) There was no prejudice to any of the parties.

The Order for severance was granted.

LKD v JB, 2012 ABCA 72 (PICARD, SLATTER AND O'FERRALL JJA)
Rules 7.1 (Application to Resolve Particular Questions or Issues) and 12.3 (Application of Other Parts)

After a 30 day Trial, the Provincial Court gave guardianship of a child to the Respondents. Subsequently, an Appeal to the Court of Queen's Bench was filed and a Case Management Judge was appointed. This particular Decision arose from an Appeal of two of the Orders of the Case Management Judge.

Slatter J.A., writing for the Court, stated that absent an error on an extricable question of law, discretionary Decisions of Case Management Judges are entitled to deference and are not to be overruled unless they reflect an error of principle or are clearly unreasonable. After considering the reasoning behind the first Order of the Case Management Judge, the Court held that the Order was not unreasonable, nor was there a reviewable error.

Regarding the second Order, the Case Management Judge refused to sever some of the issues on Appeal and have them argued and decided ahead of time, deciding that the legal issues overlapped and the facts might be important to deciding them. The Trial Judge expressed reservations as to whether Rule 7.1 applied to family law Appeals but the Court of Appeal stated that the intention of Rule 12.3 was that the general Rules applied to family law proceedings with the necessary modifications. Based on this, in the right case, issues on Appeal could be severed and decided separately. Slatter J.A. also noted that Case Management Judges acquire special knowledge about the issues that are going to arise in a proceeding, and their assessment of when and how the issues should be decided, and on this basis, such decisions should not be lightly disturbed.

Regarding the second Order, the Court of Appeal also held that the conclusion of the Case Management Judge was not unreasonable and did not disclose a reviewable error. The Appeal was dismissed.

YAWORSKI v GOWLING LAFLEUR HENDERSON LLP, 2012 ABQB 424 (MAHONEY J)
Rule 7.3 (Summary Judgment)

The Plaintiff, a lawyer and an income partner in the Defendant law firm, sought compensation from the Defendant for services provided. The Defendant sought an Order to Stay the Action because the disputed matter was subject to a mandatory arbitration clause in a letter agreement between the Defendant and the Plaintiff's Professional Corporation. The Plaintiff argued that the Court should refuse the Stay of the Action as the matter was a proper one for Summary Judgment.

Justice Mahoney considered Rule 7.3 in deciding if the matter was a proper one for Summary Judgment. His Lordship confirmed that the test for Summary Judgment is well established by prior case law. There must be no genuine issue for Trial and a Trial is normally ordered when relevant facts are contested. His Lordship held that Mr. Yaworski had not met his burden of showing that there was no genuine issue to be tried; consequently, Summary Judgment was not appropriate. Summary Judgment was not granted and the Action was stayed.

ALBERTA (ADMINISTRATOR, MOTOR VEHICLE ACCIDENT CLAIM ACT) v RIENDEAU, 2012 ABQB 434 (THOMAS J)
Rule 7.3 (Summary Judgment)

This Action involved a motor vehicle accident which took place in September 1992. The injured parties, Zawaski and McNamara, commenced an Action for damages against Riendeau. Riendeau did not defend and was noted in default in the "Personal Injury Action". The Administrator of the *Motor Vehicles Accident Claims Act* stepped in to defend the claims against Riendeau and consented to Judgments being entered against Riendeau. The Administrator commenced Actions to renew both the Zawaski Judgment and the McNamara Judgment in October

2006 and June 2007 respectively ("Judgment Renewal Actions"). Riendeau then filed Counterclaims in both of those Actions. Subsequently, the Administrator applied for Summary Judgment pursuant to Rule 7.3, on the basis that Riendeau had no defence to the Judgment Renewal Actions, nor any basis for making the Counterclaim.

Thomas J. first determined that the Administrator had taken the proper steps of issuing new Statements of Claim and filing the Zawaski Judgment Renewal Action and the McNamara Judgment Renewal Action. Next, Thomas J. considered whether Summary Judgment should be granted in both Judgment Renewal Actions. The Application was brought under Rule 7.3 which sets out that the Application must be supported by an Affidavit swearing positively that one or more of the grounds set out in 7.3(1) have been met. Thomas J. noted that *Murphy Oil Company Ltd v Predator Corporation Ltd*, 2004 ABQB 688, at paragraph 17, set out the well-established and relevant principles regarding an Application for Summary Judgment:

1) A party bringing a Motion for Summary Judgment bears the legal onus of showing that there is no genuine issue for Trial.

2) There is no onus on the responding party to prove a genuine issue for Trial.

3) If the Applicant for Summary Judgment discharges his/her onus on the material filed, a Respondent who does not resist the Application through admissible evidence risks Judgment against him/her. This is an evidentiary burden.

4) There is no obligation on the Respondent to file material. He/she can accept the risk described above. If the Applicant fails to discharge his/her legal onus, the Application will fail.

5) More commonly a Respondent will provide admissible evidence opposing the Motion. The Court will then consider all the evidence to determine whether the Application has shown that there is no genuine issue for Trial.

Rule 7.3 was held to operate in the same manner and follow the same legal principles as was set out in former Rule 159. Thomas J. stated that Applications for Summary Judgment place an obligation on the Court to conduct a careful review to determine whether there are undisputed facts sufficient to resolve the matter. Where there is no factual dispute, there is no purpose to a Trial, as the parties can effectively advance their legal arguments in a Special Chambers Application.

In this case, Thomas J. saw only three issues that required determination: (1) whether there was a Judgment entered against Riendeau in the Personal Injury Action; (2) whether that Judgment had been satisfied; and (3) if that Judgment had not been satisfied, the outstanding amount of the Judgment. Riendeau raised several defences to the Judgment Renewal Actions; however, as the majority of these defences dealt with the original Personal Injury Action, the only allegation that related to issues raised in the Judgment Renewal Actions was whether the Zawaski and McNamara Judgments were properly assigned to the Administrator. Thomas J. was satisfied that this allegation did not raise a genuine issue for Trial and Summary Judgment was granted for both Judgment Renewal Actions.

LOZINIK v SUTHERLAND, 2012 ABQB 440 (JONES J)
Rule 7.3 (Summary Judgment)

This Action arose from a failed attempt on Lozinik's part to elicit financial commitment from the Defendants in the development and introduction of technology which Lozinik claimed to have developed. Lozinik brought a Special Chambers Application seeking, amongst other things, a Summary Judgment and the Defendants filed a Cross-Application seeking, amongst other things, a Summary Dismissal.

Jones J. first considered the objectives of Rule 7.3 and referenced several excerpts from volume 1 of the Stevenson & Côté *Alberta Civil Procedure Handbook*, 2011, (Edmonton: Juriliber, 2011) to clarify factors the Court should consider with respect to an Application for Summary Judgment or Summary Dismissal:

- Summary Judgment cannot be given if there are difficult or intricate legal issues, or if the evidence conflicts.

- The Affidavit for the Motion must make out a *prima facie* case with no holes in it, though the Chambers Judge can draw reasonable inferences.

- The entire basis for Summary Judgment cannot be inadmissible hearsay.

- If the opposing Affidavits clash on relevant facts, the Master or Chambers Judge can rarely prefer one over the other. One must look at the facts deposed to by the Party opposing Summary Judgment, and see if the law permits Summary Judgment on those facts.

- The Defence (or the Cause of Action, if the Defendant moves for Summary Judgment) need only be arguable to resist Summary Judgment. The Defence (or Claim, if the Defendant moves) need not be certain, and need not even have a 50% chance of success. A reasonable doubt on a legally relevant point is enough to prevent Summary Judgment…Where the Defendant moves for Summary Judgment, he or she has an initial evidentiary burden, but then the Plaintiff must show that his suit has a real chance of success. The test of "plain and obvious" is the proper test for Summary Judgment in favour of a Defendant.

- Summary Judgment cannot be given if there is an opposing Affidavit which disagrees on a necessary factual question.

- Material factual issues cannot be decided on a Motion for Summary Judgment or Dismissal.

Jones J. stated that the test for Summary Judgment under Rule 7.3 is the same as under the former Rules. In assessing Lozinik's request for Summary Judgment, Jones J. had to assume that the facts deposed to by the Defendants were correct and then, in accordance with Rule 7.3(1)(a), determine if there was a defence to Lozinik's claim or to any part of it.

The opposite was held to apply for an Application for Summary Dismissal. Jones J. had to assume that facts deposed to by Lozinik were correct and based on that assumption, determine whether there was merit to Lozinik's claim or any part of it, in accordance with Rule 7.3(1)(b).

After individually considering each possible Cause of Action Lozinik brought against the Defendants, Jones J. held that, assuming the assertions set out in the Defendants' Affidavits were true, there would be a defence to each of the asserted Causes of Actions. Based on this, the request for Summary Judgment was dismissed.

Next the Applications for Summary Dismissal were considered in turn, and Jones J. found in each case that even if Lozinik's evidence was accepted, a triable issue or a Cause of Action could not be identified for all but those founded on breach of covenant as against one of the Defendants. Substantially all of Lozinik's actions against the Defendants were dismissed and Jones J. advised Lozinik not to infer from the fact that not all of the actions were dismissed, that the Court believed he had a reasonable chance of success.

SCOTIA MORTGAGE CORPORATION v AAB, 2012 ABQB 464 (MASTER MASON)
Rules 7.3 (Summary Judgment) and 13.18 (Types of Affidavit)

In a mortgage fraud scheme, the Defendants were paid an amount of money to apply to the Plaintiff, Scotia Mortgage Corporation, for mortgage financing. The mortgages went unpaid and Foreclosure Proceedings were commenced. The Plaintiff applied for a Deficiency Judgment against each of the Defendants. In order to determine the issue of whether the Plaintiff had sufficient evidence to support the Application for Deficiency Judgments, Master Mason indicated that, pursuant to Rule 13.18(3), it was sufficient that the Deponent have access to records and be informed of the requisite elements of the relief claimed – it was not a requirement that the Deponent have a role in the granting or approval of the mortgages. Master Mason briefly

outlined the test for Summary Judgment under Rule 7.3. Citing prior leading cases, Master Mason stated that the bar on a Motion for Summary Judgment is high, and that the Party bringing the Motion for Summary Judgment bears the burden of showing that there is no genuine issue for Trial. Master Mason found that there were genuine issues for Trial with respect to the knowledge and participation of the Plaintiff's agents and employees. On that basis, the Plaintiff's Application for Summary Judgment was denied.

DINGWALL v FOSTER, 2012 ABQB 476 (BURROWS J)
Rule 7.3 (Summary Judgment)

The Plaintiffs sought Summary Judgment in their Action to enforce a Nevada Judgment. Burrows J. indicated that the bar on an Application for Summary Judgment is high, and that it must be plain and obvious that a defence or Action cannot succeed, is bound to fail, or has no prospect of success.

With respect to one of the Respondents' defences, being that the Nevada Judgment had been obtained by fraud, the Respondents had invited the Court to speculate on evidence that might be adduced if the matter were to go to Trial. In response to this, Burrows J. referred to a Supreme Court of Canada decision, *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2008 SCC 14:

> In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale for the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. …

Burrows J. pointed out that, according to *Papaschase*, each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried.

The Court determined that the Nevada Judgment was final, for a fixed amount, and had no penal or quasi-criminal character, such factors being the prerequisites for the enforcement of a foreign Judgment in Alberta. His Lordship concluded that it was plain and obvious that none of the Respondents' defences (relating to natural justice, fraud, and public policy) would succeed.

BOSSIO v ANDREANA, 2012 ABQB 492 (MASTER SMART)
Rule 7.3 (Summary Judgment)

The Defendants applied for Summary Dismissal of the Plaintiff's claims.

The Court indicated that Rule 7.3 has not amended the test in Alberta jurisprudence for Summary Judgment under "old" Rule 159. The Court cited *Manufacturers Life Insurance Co v Executive Centre at Manulife Place Inc*, 2011 ABQB 189, and Tottrup v Clearwater (Municipal District No 99), 2006 ABCA 380 as authority for the applicable test under Rule 7.3.

Master Smart also referred to a Supreme Court of Canada decision, *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2008 SCC 14 for the proposition that each side in a Summary Dismissal application must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried. *Papaschase* highlighted that a Summary Judgment Motion cannot be defeated by vague references to what may be adduced into evidence in the future, but rather it must be judged on the basis of the pleadings and materials actually before the Court, not on suppositions about what might be pleaded or proved in the future.

The Court concluded that the Defendants failed to establish that there was no genuine issue of material fact requiring Trial.

KINDRACHUK v BELSECK, 2012 ABQB 515 (MASTER PROWSE)
Rule 7.3 (Summary Judgment)

The Plaintiff sued various parties, including Royal Bank of Canada ("RBC"), seeking damages for deceit and negligence. RBC sought Summary Dismissal of the claim against it on the basis that the Plaintiff was a participant in a fraudulent transaction, and was barred from suing RBC pursuant to the doctrine of *ex turpi causa non oritur actio* (out of fraud, no action arises). Master Prowse noted that Courts have declined to provide summary relief in actions involving complicated and subtle issues of law. Master Prowse also stated that the application of the *ex turpi causa* and *in pari delicto* doctrines to situations where there was evidence that an employee or agent of the lender was involved in the fraud was a complicated and nuanced matter that should not be decided summarily.

PL v ALBERTA, 2012 ABQB 485 (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)

An Application was brought to settle the terms of an Order arising out of another Decision of Graesser J. in the same matter. That Application was heard in conjunction with an Application in *JO (et al) v Her Majesty the Queen in Right of Alberta (et al)*.

Graesser J. held that during the course of argument in the *JO* matter, it became clear that a number of errors were made in several rulings in *PL v Alberta*, 2012 ABQB 383. Graesser J. held that the Order in the present matter had not been entered and, pursuant to Rule 9.13(a), Justice Graesser had jurisdiction to correct any errors therein.

Graesser J. determined that the area to be corrected related to proposed Amendments to the Statement of Claim. In the previous Decision, Graesser J. disallowed the addition of certain paragraphs on the basis that public perception of a situation is irrelevant to a Claim. However, in this Decision, Graesser J. held that in the context of the Supreme Court of Canada's decision in *KLB v British Columbia*, 2003 SCC 51, those paragraphs of the Statement of Claim should not have been struck. Rather, Graesser J. held that those paragraphs could remain in the Statement of Claim as relevant to the issue of vicarious liability.

LUZIA v BAPTISTA, 2012 ABQB 491 (MASTER SCHLOSSER)
Rule 10.31 (Court-Ordered Costs Award) and Schedule C

Plaintiffs' counsel proposed a Litigation Plan in a standard case in February 2012 and received no response from Defence counsel. After two attempts in May and June, 2012 to elicit a response, the Plaintiffs prepared an Affidavit and filed an Application, returnable in July 2012. Defence counsel then consented to the Litigation Plan but when Plaintiffs' counsel asked the other side for Costs of their abandoned Application, they received no response. Plaintiffs' counsel then told Defence counsel that they would be appearing on the date of their abandoned Application to ask for Costs and no objection was raised.

Master Schlosser considered the commentary regarding abandoned Motions in the Alberta Law Reform Institute's Consultation Memorandum No. 12.17. The Committee's position in the Memorandum was that some Costs should be made available to the Party who was forced to commence an Application in order to get the opposite Party to move forward. Master Schlosser felt that Costs of an abandoned Application appeared to be captured in Rule 10.31(1)(a), the section that speaks to the Costs to "file" an Application, but stated that such Costs were more explicitly captured in Schedule C, Item 7(c). In the result, the Court awarded the Applicant 50% of Schedule C, Item 6(1) for an uncontested Application.

DOVE HOMES (1999) LTD v FOUNTAIN CREEK ESTATES LTD, 2012 ABQB 497 (SHELLEY J)
Rule 10.33 (Court Considerations in Making Costs Award)

On the eve of Trial, the Plaintiffs discontinued against one of the Defendants, Umer Choudhry ("Choudhry"), and agreed to pay Costs of $9,000.00 to Choudhry. After completion of the Trial, the Plaintiffs applied for Costs on a full indemnity basis. The Plaintiffs also sought an Order

that the unsuccessful Defendants pay the Costs owed to Choudhry.

The Plaintiffs based their claim for full indemnity Costs on the Defendant's credibility issues, misstatements of facts and delay. The Court held that although there were issues with the conduct of the Defendants, it did not meet the high bar for solicitor-and-client Costs, but did give rise to an increase in the taxable Costs.

The Court held that it may make Orders requiring an unsuccessful Defendant to pay Costs directly to a successful Defendant, or directing a Plaintiff to pay the successful Defendant's Costs and allowing a Plaintiff to add those Costs to its Costs. The Court cited *Gladue v Alberta (Attorney General)*, 2011 ABQB 535, for the following tripartite test:

(a) Was it reasonable to add the successful Defendant to the litigation?

(b) Was it reasonable to keep the successful Defendant in the litigation?

(c) Is it fair and just to require the unsuccessful Defendant(s) to pay the Costs of the successful Defendant?

The Court held that:

(a) Because of the uncertainty about potential liabilities at the commencement of the Action it was reasonable and advisable to name Choudhry;

(b) It was reasonable to keep Choudhry in the litigation; and

(c) Had the other Defendants not failed to admit certain facts, Choudhry could have been discontinued against earlier.

The Court ordered the unsuccessful Defendants to pay the $9,000.00 in Costs directly to Choudhry.

ANDERSON ESTATE, 2012 ABQB 517 (CLARK J)
Rules 10.33 (Court Considerations in Making Costs Award) and 13.6 (Pleadings: General Requirements)

In 2011, Justice Clark ordered compensation to the Applicants in the amount of $810,000 for their services as Executors of the Anderson Estate ("Estate") (2011 ABQB 806) (the "Compensation Decision"). The Parties in this Application sought a Decision in respect of the Costs incurred in the Compensation Decision. The Applicants maintained that they should be fully indemnified for their legal costs out of the Estate or from the Respondents.

The Court considered the factors set out in Rule 10.33(1) in making its Decision on Costs. With regard to Rule 10.33(a), the Applicants argued that they were "substantially successful" because they were awarded $810,000 in the Compensation Decision when the Respondents claimed that they should have been awarded no compensation. Justice Clark was not convinced that the Applicants were "substantially successful" because: (a) the Applicants originally requested $2,900,000 for compensation from the estate, an amount significantly disproportionate to the actual amount awarded; and (b) the Compensation Decision took into account the Applicants' failure to properly manage the Estate.

With regard to Rule 10.33(2)(a), the Applicants claimed that they should have received full indemnity for their legal costs because the Respondents made "scurrilous allegations of misconduct" throughout the proceedings, and that responding to these allegations unnecessarily lengthened the proceedings. Justice Clark stated that because the Applicants improperly managed the Estate, the Respondents' allegations were justified.

The Court gave serious consideration to refusing to allow the Applicants any reimbursement of their legal fees because of them: (a) mishandling the Estate; and (b) commencing litigation in an attempt to secure an unrealistic amount of compensation for their services as Executors. However, Justice Clark decided that it would be "too harsh a stance" to deny any Costs for the Applicants since litigation could have been commenced even if the Applicants requested a

sum less than $2,900,000 for compensation. The Court considered it reasonable to reimburse the Applicants $50,000.00 for their legal costs, which was to be paid from the Estate.

With regard to Rule 10.33(2)(g) the Court awarded the Respondents Solicitor-Client Costs due to the Applicants' mismanagement of the Estate and disregard for the interests of the residuary beneficiary by requesting a grossly inflated amount for compensation from the Estate.

The Respondents were disentitled from claiming prejudgment interest under Rule 13.6(2) which states that a Pleading must state any interest claimed, including the basis for the interest, and the method of calculating interest. The Respondents' Notice of Objection made no mention of prejudgement interest. Accordingly, Justice Clark concluded that an award of prejudgment interest was not appropriate in the circumstances.

LAKHOO v LAKHOO, 2012 ABQB 574 (KENT J)
Rule 10.50 (Costs Imposed on Lawyer)

The wife in this case sought Costs on a full indemnity basis from the solicitor who previously acted for the husband. Kent J. denied an Application by that lawyer for permission to continue to act for the husband, notwithstanding that a lawyer in his office had been consulted by the wife prior to the wife commencing the Action for divorce. The wife's counsel stated that she notified the solicitor immediately of the conflict, but the solicitor continued to pursue Motions with respect to disclosure, payment of spousal support and related relief. Counsel for the solicitor argued that the solicitor did not act egregiously and the Costs that the wife should be entitled to would be the usual party/party Costs.

Kent J. noted that Rule 10.50 permitted the Court to order a lawyer to pay Costs personally if the lawyer "engages in serious misconduct" and these Costs have been awarded where a lawyer has promoted excessive motions, put forward irrelevant material and generally acted in bad faith. Further, awarding such Costs required a finding of positive misconduct. In this case, Kent J. held that the lawyer did not act inappropriately when he sought a ruling about his ability to act and because he lost, the wife would receive party/party Costs. The only conduct that Kent J. considered as questionable was that the solicitor waited approximately three months to bring the Motion; however, this conduct did not rise to the level of ordering Costs personally against the solicitor.

Even though Costs were not personally awarded against the solicitor, Kent J. did find that the delay in bringing the Motion was inexcusable and during that period, work was done on the file by both sides that became irrelevant. Based on this, Kent J. ordered Costs of $5,000 to the wife.

SCHMIDT v WOOD, 2012 ABCA 235 (CÔTÉ JA)
Rule 10.52 (Declaration of Civil Contempt)

The Appellants sought to overturn the striking of their Pleadings and the Judgment granted thereafter. The Pleadings were struck because of repeated convictions for Contempt of Court. The Respondents moved to Stay the Appeal because of unpurged Contempts of Court by the Appellants.

The Court noted that some of the matters not purged were failures to pay fines, and given the words "other than an order to pay money" in Rule 10.52(3)(a)(i) this may not give rise to Contempt. However, there were other Contempts not purged relating to disobeying Orders to provide information.

The Court held that the general rule is that a party still in Contempt should not be able to invoke the Court's processes to seek positive relief. The Court also held that it is especially dangerous to allow someone in Contempt to invoke the Court's aid when the Contempt relates in some way to the same litigation. If this were not so, a litigant could pick and choose which parts of civil procedure or Court Orders to follow. The Application was stayed until the Appellants could prove to a Justice of the Court of Appeal that they were no longer in Contempt and, additionally, Security for Costs had to be paid.

METCALF ESTATE v YAMAHA MOTOR POWERED PRODUCTS CO LTD, 2012 ABCA 240 (HUNT, MCDONALD AND BIELBY JJA)
Rules 11.26 (Methods of Service Outside Alberta) and 11.27 (Validating Service)

The Respondent Plaintiff, who was injured in an all-terrain vehicle accident, obtained an Order for Service *Ex Juris* for the Japanese parent company of the Defendant manufacturer. Service was effected by sending the Statement of Claim to a Japanese lawyer who then served the Defendant by Registered Mail. At Trial, this was deemed effective and Service was validated through Rule 11.27. The Appellant Defendants appealed.

Mr. Justice McDonald, (Bielby and Hunt JJA concurring), stated that Rule 11.27 permits validation when the manner of Service is not specified in the Rules, and it potentially applies to any of the Rules in Part 11, Divisions 1 through 5. However, Rule 11.26 is to be differentiated from the other Rules on Service: it requires considerations beyond whether the document was brought, or was likely to be brought, to the attention of the foreign Defendant. Rule 11.26(1)(b) adopts and employs the *Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters* which requires attention to international obligations. Justice McDonald concluded that Rule 11.27 could not be used to validate service when the Respondents had failed to comply with the Order granted pursuant to Rule 11.26(1)(b). The Appeal was allowed and the Order Validating Service was set aside.

GL and SL v NAH, 2012 ABCA 247 (WATSON J)
RULE 12.71 (Appeal from Decision of Court of Queen's Bench Sitting as Appeal Court)

The Applicant was the grandmother of a child ("JF") who had been apprehended from his mother by the Director of Child, Youth and Family Enhancement. The child had been apprehended due to the mother's continued drug use.

The Director placed JF with the Respondents ("GL and SL") under a Director's Temporary Guardianship Order. This later became a Permanent Guardianship. Following a Trial in Provincial Court, guardianship was granted to GL and SL. The Applicant appealed that Decision to the Court of Queen's Bench.

Manderscheid J. dismissed the Appeal and affirmed the Decision of the Provincial Court. The Applicant then sought leave to appeal the Decision of Manderscheid J. under Rule 12.71. Although Rule 12.71 does not set out the test for leave to appeal, Watson J. described the test as follows:

> The test for leave to appeal under Rule 12.71 is that the applicant must show that there is an important question of law or of precedent, that there is a reasonable chance of success on appeal, and that the delay will not unduly hinder the progress of the action or cause undue prejudice …

BRIGGS BROS STUDENT TRANSPORTATION LTD v ALBERTA (ATTORNEY GENERAL), 2012 ABQB 455 (LEE J)
Rule 15.4 (Dismissal for Long Delay: Bridging Provision)

The Applicant ("Alberta") filed a Notice of Motion pursuant to old Rule 244.1, now Rule 15.4, for an Order dismissing the Respondent's ("Briggs") Action on the basis that five years had passed without a "thing" having been done that materially advanced the Action.

In 1998, Briggs applied for a tax rebate pursuant to s. 4(3) of the *Fuel Tax Act* ("Act"). This provision allowed consumers to obtain a fuel tax rebate for fuel consumed in certain vehicles (in this case, school buses) while they were being used for commercial purposes. Briggs was entitled to a rebate under the Act and received a cheque accordingly.

In 2001, Alberta disallowed the 1998 rebate because it was not satisfied that Briggs established the fuel consumption rate for idling yellow school buses. Briggs' Notice of Objection was denied, and a Notice of Appeal was filed with the Court of Queen's Bench in 2003 (the "Appeal"). Throughout these proceedings, Briggs continued to apply for fuel tax rebates under the Act which were also denied on the basis that Briggs failed to establish the fuel consumption rate of idling yellow school buses. Briggs filed

Notices of Objections to these denials ("Other Objections").

Briggs provided Alberta with fuel consumption surveys to show the average fuel consumption for yellow school buses was 4.83 litres per hour (Alberta originally applied a rate of 2.0 litres per hour). In 2009 and early 2010, Alberta accepted Briggs' fuel consumption surveys and resolved the Other Objections by applying a fuel consumption rate of 5.17 litres per hour (4.83 plus 7% margin of error).

In 2010, Alberta applied to dismiss Briggs' Appeal for long delay pursuant to Rule 15.4, claiming that five years had elapsed since the last thing done to significantly advance the Action. The sole issue before the Court was this:

> Is the determination by the government of the applicable fuel consumption rate for idling yellow school buses in October 2009 to February 2010 of 5.17 litres per hour a "thing done to significantly advance" this Appeal within the meaning of Rule 15.4(1)?

Justice Lee stated that while the wording of the current Rule has been altered slightly from the old Rule 244.1, the change from "materially advance the action" in the old Rules to "significantly advance the action" in the current Rules carried no difference in meaning. To determine what constituted a "thing" done to significantly advance the Action, the Court referred to the following authorities:

> *Alberta v Morasch*, 200 ABCA 24 – A "thing" is not required to be a procedural step, but may be anything that moves the Action closer to Trial.
>
> *Calgary (City of) v Chisan*, 2000 ABCA – A "thing" does not have to be done in the within Action, but may be done in a closely related Action, when the proceedings are "inextricably linked".

The Court considered four non-exhaustive factors from *Haekel v Canada*, 2008 ABQB 701, in determining whether the Other Objections were "inextricably linked" to the Appeal:

1. Are the two Actions inextricably linked in the sense that the result in the related Action would be "legally or factually determinative" of the issues in the primary Action?

2. Will the issue determined in the related Action be "relevant and binding" in the primary Action?

3. Does the related Action materially advance the primary Action?

4. Could the Decision in the related Action be a "barrier in law" to the Court's adjudicating the primary Action?

Justice Lee found that Alberta's decision in 2009 and 2010, when it accepted Briggs' rate of idle fuel consumption, was factually determinative of the primary issue in the Appeal:

> By determining the idling rate in the Other Applications, the government has therefore also determined the rate for this Appeal, and so was "materially advancing" this Appeal by resolving one of the matters in issue.

Accordingly, Alberta's Motion to Dismiss the Appeal for long delay was denied.

HOGARTH v SIMONSON, 2012 ABCA 101 (O'FERRALL JA)
Rule 508 (Stay of Enforcement)

This was an Application for a Stay of Enforcement pending Appeal. The Applicant was Principal and Chief Operating Officer of Rocky Mountain Slate Inc., and was found liable for negligent misrepresentations with respect to the Respondents, who were former Investors with the company. Judgment was awarded against the Applicant in an amount equal to the Respondents' investments, and was likely to exceed $1.5 million.

O'Ferrall J.A. dismissed the Application for a Stay pending Appeal, and held that the general presumption is that successful litigants are entitled to the benefits of the

litigation. Stays of money Judgments should only be granted reluctantly. While there may be serious questions to be determined on Appeal, no irreparable harm would be done to the Applicant if execution was allowed to proceed. Further, O'Ferrall J.A. held that the balance of convenience favoured the Respondents. The Respondents indicated that they would hold any funds collected as a result of execution in trust pending the outcome of the Appeal. O'Ferrall J.A. ordered that a written Undertaking to that effect be filed with the Court.

EQUITABLE TRUST COMPANY v LOUGHEED BLOCK INC, 2012 ABCA 171 (PAPERNY, McDONALD AND O'FERRALL JJA)
Rule 518 (Powers of Court)

After the Court of Appeal issued a Memorandum of Judgment, one of the Respondents at the Appeal brought an Application seeking the Court's leave to re-argue the Appeal. The Court was provided with written argument from both counsel and received the transcript of the oral argument from the Appeal Hearing.

The Court of Appeal confirmed that the test for leave to re-argue requires exceptional, special or unusual circumstances and is generally to be discouraged. Further, when it is alleged that a Court overlooked or misapprehended evidence, the Applicant is required to show that the overlooked or misapprehended evidence would have affected the outcome. The Applicant must provide support for the allegation that the Court misled itself or was misled, having regard to the Record or the issues raised. The Court also specified that disagreement by the Appellant with findings did not warrant leave to re-argue.

In this case, the Respondent (Applicant on the Motion to re-argue) satisfied the Court of Appeal that the case fell within the narrow exception, as evidence might have been misapprehended with respect to knowledge of both parties; therefore, leave was granted to fully re-argue the Appeal.

CAMERON CORPORATION v EDMONTON (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2012 ABCA 229 (CÔTÉ JA)
Rule 530.5 (Transcripts of Oral Testimony)

Cameron Corporation ("Cameron") applied to restore an Appeal which had been struck for Cameron's failure to file the Transcript and Appeal Digest. The Appeal related to a Subdivision and Development Appeal Board Decision granting a Development Permit to the Respondent. The relevant Bylaws created a Stay of the Permit until the conclusion of the last stage of the Appeal process. Côté J.A. held that Cameron could effectively prevent the development and tie up the land in question simply by filing an Appeal, which is the opposite of the usual rule regarding Stays of Execution.

Côté J.A. noted that one criterion for restoring an Appeal is a reasonable explanation for the delay. Cameron claimed that the delay was due to a miscommunication between them and their counsel. Côté J.A. held that this was not an adequate explanation for the delay. It is improper to file an Appeal and then do nothing with it, and a solicitor cannot properly accept instructions to take such a course of action. Further, there was evidence before the Court that a similar Appeal had been struck for non-prosecution.

Côté J.A. found that there was evidence of prejudice to the Respondent if the Appeal was restored. Further, Côté J.A. held that with diligence the Appeal may have already been argued on the merits and decided. On such facts, Côté J.A. held that it was tempting to deny the Motion and leave the Appeal struck.

Finally, Côté J.A. held that Cameron would be granted a final chance to restore the Appeal, but that they would not be compelled to do anything. If the Appellants wished to have the Appeal restored, they would have to comply with all of the conditions set by Côté J.A. by 3:00 p.m. on the fourth business day following the date of the Reasons for Decision. Such conditions included: filing the Appeal Record, Factum and Extracts of Evidence; providing $18,000 to be held as Security for Damages and Costs; and filing a Notice of Motion returnable before Côté J.A. to fix a

timetable for the Appeal. If any of the conditions were not met within the time fixed, then the Appeal would remain struck.

CAMERON CORPORATION v EDMONTON (SUBDIVISION AND DEVELOPMENT APPEAL BOARD), 2012 ABCA 256 (SLATTER JA)
Rule 530.5 (Transcripts of Oral Testimony)

Cameron Corporation ("Cameron") appealed a Decision of the Subdivision and Development Appeal Board (the "DAB") approving the installation of a billboard sign. The Notice of Appeal was filed, but was never served on the DAB. The Appeal Digest was not filed within 15 weeks, and the Appeal was struck by the Registrar under Rule 530.5(4). Cameron applied to restore the Appeal.

Justice Slatter stated that in deciding whether to restore an Appeal that has been struck, the Court must consider all relevant factors, including:

(a) Whether there was a continuing intention to prosecute the Appeal, notwithstanding the inactivity;

(b) The length of and reason for the delay;

(c) Whether the Applicant moved diligently to restore the Appeal;

(d) The merits of the Appeal; and

(e) Any prejudice to the other parties, and whether the prejudice could be ameliorated by costs or otherwise.

The Court found that Cameron's explanations for inactivity were inadequate. Additionally, a parallel Appeal addressing the same issue relating to the installation of a billboard sign was struck under Rule 530.5(4) two months prior to the striking of Cameron's current Appeal. Justice Slatter commented that the first striking was ample warning to the Appellant that this Appeal must be perfected in accordance with the Rules. Further, the Court concluded that restoring the Appeal would prejudice the DAB because an Appeal from the Subdivision and Development Appeal Board would operate as a stay of the installation permit which would result in revenue loss. The Application was dismissed.

VACCARO v TWIN CITIES POWER-CANADA ULC, 2012 ABCA 193 (CÔTÉ, O'BRIEN AND O'FERRALL JJA)
Schedule C (Framework of Tariff of Recoverable Fees)

The successful Defendant sought increased Costs beyond the Tariff of Recoverable Fees. The Court stated that there is no mandatory Rule of Court or mandatory principle of law on point, but there are a number of well-settled grounds for going above the usual level of costs, including:

1. The successful party's award exceeded the amount of the Offer to Settle (even an informal Calderbank offer), which occurred in this case.

2. The losing party raised entirely different grounds on Appeal than were raised at the Court of Queen's Bench. That occurred in these proceedings.

3. The losing party made representations of fact to the Chambers Judge not properly in evidence. The Court found that such representations occurred here.

4. The losing party made allegations of misconduct without adequate foundation. In this case, fraudulent conveyances or concealment of assets were repeatedly asserted without proper evidence.

The Court exercised its discretion to award increased Costs.