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

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ERNST v ENCANA CORPORATION, 2013 ABQB 537 (WITTMANN CJ)
Rules 1.2 (Purpose and Intention of These Rules), 3.68 (Court Options to Deal with Significant Deficiencies), 7.3 (Summary Judgment) and 13.6 (Pleadings: General Requirements)

The Plaintiff, Ernst, brought an Action against EnCana Corporation ("EnCana"), the Energy Resources Conservation Board (the "ERCB") and Her Majesty the Queen in Right of Alberta ("Alberta") in respect of alleged damage to the water well and aquifer that supplied fresh water to her home near Rosebud, Alberta. Ernst claimed that the ERCB was negligent in its administration of its statutory regime with respect to EnCana's drilling activity, and that the ERCB owed her a private duty to take reasonable steps to protect her well water from contamination. Ernst further alleged that the ERCB breached s. 2(b) of the *Canadian Charter of Rights and Freedoms* by barring her from communicating with the ERCB through the usual public channels. The claim against Alberta related to Alberta Environment & Sustainable Resource Development ("Alberta Environment"). Ernst claimed that she relied on Alberta Environment to protect underground water supplies and to reasonably respond to complaints. Ernst alleged that Alberta Environment responded to her complaints negligently and in bad faith. Ernst further alleged that Alberta Environment owed her a duty to protect her water well from foreseeable contamination caused by the EnCana drilling.

Ernst filed a Statement of Claim in December 2007, and an Amended Statement of Claim on April 21, 2011. A Second Amended Statement of Claim was filed on February 7, 2012. Applications were made by all of the Defendants to strike certain paragraphs from the Second Amended Statement of Claim. The ERCB also sought Summary Judgment against Ernst. When the Applications were heard in April 2012, the Case Management Judge suggested that Ernst redraft the Second Amended Statement of Claim in a manner that complied with the *Rules of Court*. A fresh Statement of Claim was drafted.

The fresh Statement of Claim was filed on June 25, 2012. The ERCB and Alberta brought Applications in respect of the fresh Claim. The ERCB requested an Order striking certain paragraphs of the Claim or, in the alternative, granting Summary Judgment in favour of the ERCB. In the

further alternative, the ERCB requested better particulars with respect to certain paragraphs in the fresh Claim, Costs of the April 2012 Application, and Costs of the present Application. Alberta sought an Order striking certain paragraphs or portions thereof from the Claim or, in the alternative, for Particulars and Costs.

The paragraphs the ERCB sought to have struck from the fresh Claim related to negligence claims against the ERCB and to the *Charter*. Pursuant to Rule 3.68, a Claim may be struck if it is plain and obvious that the pleading does not disclose a reasonable cause of action. With respect to Ernst's negligence Claims, the ERCB argued that it, as a statutory body, did not owe Ernst a private duty of care. In the absence of a duty of care, there could be no action in negligence. The ERCB also relied on s. 43 of the *Energy Resources Conversation Act (ERCA)*, a statutory immunity clause in favour of the ERCB. Ernst argued that the ERCB owed her a private duty of care, and that the statutory immunity clause in the *ERCA*, properly interpreted, did not provide immunity to the ERCB in respect of her Claim.

Wittmann C.J. held that the duties owed by the ERCB were not private duties, but duties owed to the public at large. None of the paragraphs in the fresh Claim elevated the ERCB's public duties to a private duty owed to Ernst in particular. As such, Wittmann C.J. held that there was no sufficient proximity to ground a private duty of care. Wittmann C.J. held that the allegations of negligence against the ERCB in the fresh Statement of Claim should be struck.

The arguments respecting s. 2(b) of the *Charter* related to a reference Ernst had made about Wiebo Ludwig. The ERCB argued that *Charter* protection of free expression did not extend to situations involving threats or acts of violence. The ERCB argued that the Wiebo Ludwig comment was significant in the context of numerous violent acts of eco-terrorism against oil and gas development in Alberta and, as such, it was required to take such threats seriously. The ERCB further argued that Ernst continued to contact the ERCB after it ceased communications with her and, as such, her Claim related to the ERCB's failure to respond to her communications. The ERCB argued that s. 2(b) of the *Charter* only guarantees a right to free expression, and not a right to be listened to. Ernst alleged that the ERCB used the Wiebo Ludwig comment as an excuse to prohibit her from communicating with the ERCB through the ordinary channels for public communication. Ernst argued that her *Charter* rights were breached in that the ERCB punished her for criticizing the ERCB, and in that she was restrained in her communication with the ERCB. Wittmann C.J. held that a Claim is not doomed to fail simply because it is novel. Wittmann C.J. held that the ERCB led no evidence with respect to the Wiebo Ludwig eco-terrorism Claim, and therefore could not rely on this argument. As such, it could not be said that the *Charter* Claim was doomed to fail or that it did not disclose a cause of action.

The ERCB also made a limitations argument with respect to Ernst's *Charter* Claim. The ERCB argued that Summary Judgment could be granted if a Claim was filed outside the limitation period. While there was no Affidavit evidence in support of this Application, the ERCB argued that the fresh Claim itself demonstrated that the *Charter* Claim was brought out of time. The ERCB further argued that the Summary Judgment Rule provides that Judgment may be given at any time in an Action when admissions of fact are made in a pleading. Further, while Rule 7.3(2) provides that an Application for Summary Judgment must be supported by Affidavit evidence, the Rule also provides that an Application for Summary Judgment may be supported by other evidence to the effect that the grounds have been met. The other evidence referenced in Rule 7.3(2) included admissions of fact in the pleadings. Ernst argued that the ERCB had not proven the test for demonstrating that a limitation period had expired, on the facts, as provided under the *Limitations Act*. Wittmann C.J. agreed, and held that there was insufficient proof upon which to ground Summary Judgment.

The ERCB further argued that the statutory immunity clause in s. 43 of the *ERCA* was an absolute bar to the Ernst Claims against it. Ernst argued that s. 43 could not bar her Claim on the basis that it did not cover omissions. Wittmann C.J. held that s. 43 bars any actions or proceedings against the ERCB both in terms of its decisions to act and its decisions not to act. As such, even if it was

found that the ERCB owed a private duty of care to Ernst sufficient to establish a tort claim, that claim would have been barred by s. 43 of the *ERCA*. With respect to Ernst's constitutional arguments, Wittmann C.J. held that the statutory immunity clause applied to claims for personal remedies pursuant to the *Charter*. As such, s. 43 of the *ERCA* was an absolute bar to Ernst's claims against the ERCB, and the claims were struck or, in the alternative, dismissed.

With respect to Costs, the ERCB argued that it was a successful Party at the Application returnable April 2012. The Case Management Judge expressed negative views regarding the Second Amended Statement of Claim and ultimately directed that a new Statement of Claim be filed. Wittmann C.J. held that, at the April 2012 Application, the Case Management Judge found that she had the authority to order amendments pursuant to Rule 3.68, and it was on that basis that she recommended that the Statement of Claim be redrafted. Wittmann C.J. declined to award any Costs for the April 2012 Applications on the basis that the issues determined that day were initiated by the Case Management Judge on her own motion and were approved of by all Counsel.

Alberta sought an Order striking certain paragraphs of the fresh Claim or, in the alternative, Particulars and Costs. Alberta argued that a number of paragraphs in the fresh Statement of Claim were frivolous, irrelevant or improper. Rules 13.6(1)(a) and 13.6(2)(a) require that only relevant matters of fact upon which a Party relies, but not the evidence to prove those facts, should be pleaded. Further, a pleading must be succinct. Rule 13.6(3) requires a Party to state any matter relied upon which may take another Party by surprise. Pursuant to Rule 3.68, the Court may strike out all or any part of a Claim on the ground that a commencement document is frivolous, irrelevant, or improper. Alberta argued that pleadings are not intended to be prolix and must not go beyond a summary of the facts or be argumentative. Ernst argued that the essence of a properly drawn pleading is clarity and disclosure, and that the burden with respect to striking out pleadings is extremely onerous and high. It must be plain and obvious that the facts as pleaded, which must be assumed to be true, do not disclose a reasonable cause of action. Wittmann C.J. held that while some of the impugned words or phrases ought to be excised or substituted, that was not the function of the Case Management Judge. Tinkering with the pleadings by the Court would not be useful to the advancement of the Action, and therefore would be contradictory to the Foundational Rules. As such, Alberta's Application was dismissed.

PRECISION DRILLING CANADA LTD v YANGARRA RESOURCES LTD, 2013 ABQB 492 (TILLEMAN J)
Rules 1.2 (Purpose and Intention of These Rules), 5.17 (People Who May be Questioned), 6.8 (Questioning Witness Before Hearing), 6.20 (Form of Questioning and Transcript) and 7.3 (Summary Judgment)

This was an Appeal from a Master within the context of a Summary Judgment Application. Yangarra Resources Ltd. ("Yangarra") contracted with Precision Drilling Canada Limited Partnership ("Precision") to drill wells. Precision employees allegedly used inappropriate drilling chemicals, resulting in a well and some equipment being lost. Precision sued for payment of its services on the basis that the contract required that it be paid regardless of errors. Precision applied for Summary Judgment on this basis. Yangarra argued that it was not obligated to pay since the original well was lost due to Precision's negligence.

Yangarra sought to inquire into whether Precision field personnel communicated the drilling mistake to offsite Precision personnel prior to the well being lost. Yangarra wanted to issue Notices of Appointment for Questioning to four offsite personnel, pursuant to Rule 6.8. Transcripts of the Questioning would then be put into evidence in the Summary Judgment Application. Master Prowse held that, while Yangarra was entitled to question the witnesses under Rule 6.8, it would be limited to examinations in chief, as opposed to cross-examination. The key issue on Appeal was whether Rule 6.8 permitted Yangarra to cross-examine the employees of Precision or whether, consistent with former Rule 266, the examination was to be done only in chief. A related secondary issue was whether Precision's employees were adverse in interest to Yangarra, such that they could be cross-examined.

Rule 6.8 relates to the Questioning of witnesses with respect to Applications. Rule 6.20 is incorporated into Rule 6.8 and addresses Questioning on Affidavits and Questioning a witness. Tilleman J. held that Rule 6.8, on its face, does not provide that a witness may be cross-examined. However, the wording of Rule 6.8 differs from former Rule 266, including the addition of Questioning in the nature of cross-examination as contemplated by Rule 6.20. Tilleman J. held that the intent of the changes to the Rules was to streamline proceedings and promote efficiency. The Foundational Rules, such as Rule 1.2, also supported a streamlined and efficient process. In the circumstances, Tilleman J. held that he was required to interpret Rule 6.8 in a manner that best promoted the fair, timely and efficient resolution of disputes.

With these interpretive principles in mind, Tilleman J. held that Rule 6.8 was broad enough to permit cross-examination of a witness. Moreover, Tilleman J. held that such a cross-examination did not require an intervening declaration of hostility. If it were not so, a party seeking to cross-examine a witness in such circumstances would have to apply to a Master for permission to call the witness and then make a separate Application to a Justice for a declaration that the witness was hostile. Such an approach would be antithetical to the efficiency sought to be promoted by the Rules.

Further, the new Rules permit broader access to cross-examination. While the former Rules drew a distinction between an Examination on an Affidavit and an Examination of a person called as a witness, Rule 6.20 does not draw such a distinction in terms of the form of Examination. As such, Rule 6.8 permits cross-examination of a witness by a party who has called the witness, and Yangarra was entitled to cross-examine the four Precision employees.

Tilleman J. further held that the four Precision employees were adverse in interest to Yangarra. Although the employees were not named Parties, they were not neutral. The principles underlying the new Rules required a nuanced approach with respect to considering a witness adverse in interest. The new Rules allow for a broader scope of Questioning, not only of an adverse party, but also of a witness directly linked to an adverse party. Adversity in interest is a determination of fact which requires an examination of the particular circumstances. Tilleman J. held that Courts must not be blind to the reality of the relationship between parties and witnesses and should be cautious in taking a categorization approach. Tilleman J. held that, for predictably unfriendly witnesses, there was no need to seek a declaration of hostility with additional Applications before allowing a cross-examination.

Tilleman J. also noted that a broad interpretation of Rule 6.8, which allowed for cross-examination of a presumably unfriendly witness with sufficient commonality with the adverse party, enhanced the information-gathering function of that Rule.

Yangarra's Appeal was allowed.

ATTILA DOGAN CONSTRUCTION v AMEC AMERICAS LIMITED, 2013 ABQB 525 (WITTMANN CJ)
Rules 1.2 (Purpose and Intention of These Rules) and 3.65 (Permission of Court to Amendment Before or After Close of Pleadings)

The Plaintiff and Defendant became joint venture participants in an agreement to build a large magnesium oxide plant with Jordan Magnesia Company Limited (JorMag). The Parties entered into an amending agreement in order to resolve cash flow issues but the project continued to encounter delays which resulted in the termination of the entire project. The Parties and JorMag submitted to arbitration, and the Plaintiff and Defendant subsequently entered into a claims agreement which had the effect of suspending the claims as between the Plaintiff and Defendant. The joint venture participants settled with JorMag and the Plaintiff commenced this Action against the Defendant, claiming damages for the failure of the project. The Plaintiff subsequently sought to amend its Amended Statement of Claim and its Statement of Defence to Counterclaim pursuant to Rules 1.2 and 3.65. The Plaintiff argued that the proposed amendments required no supportive evidence.

Wittmann C.J. outlined Rule 3.65 and noted the test for

amending pleadings. Chief Justice Wittmann confirmed that the evidentiary threshold for allowing amendments is "generally low"; however, substantive amendments do require supportive evidence. Certain amendments to allegations (for example: fraud, breach of trust, wilful default or undue influence) require a greater evidentiary standard. Chief Justice Wittmann held that the proposed amendments required evidence. Further, it was appropriate to consider the prior evidence brought in support of the Application to decide if the amendments should be allowed. Based on a detailed consideration of the proposed amendments and the available evidence, Wittmann C.J. allowed some specific amendments to the Pleadings and denied other amendments.

FORT MCKAY FIRST NATION v ALBERTA ENERGY REGULATOR, 2013 ABCA 396 (SLATTER JA)
Rules 1.2 (Purpose and Intention of These Rules), 530.1 (Transcripts, Generally) and 530.5 (Transcripts of Oral Testimony)

The Respondent in the Appeal, Applicant in the instant Application, Brion Energy Corporation ("Brion"), applied for advice and direction with respect to the prosecution of the Appeal of a Decision of the Alberta Energy Regulator. Brion argued that the Appeal could risk the approval of a multimillion dollar project and, as such, it would be prejudiced if the Appeal was not prosecuted diligently. The Appellant, Fort McKay First Nation, argued that, because the Appeal raised important issues, it should have sufficient time to develop the necessary record and arguments.

Slatter J.A. held that it was an underlying objective of the Rules of Court to ensure that all Appeals are dealt with diligently. The Appellant argued that it should be allowed the maximum amount of time permitted by the Rules to complete each step of the Appeal process. For example, the Appellant argued that Rule 530.5(4)(b) gives 15 weeks from the filing of the Notice of Appeal to file the Appeal Digest. However, Slatter J.A. held that such a period was the outside time limit, at which point the Appeal would be struck by the Registrar. Rule 530.1(1)(b) requires that the preparation of the Appeal Digest must commence within 10 days, and Rule 530.5(4)(a) mandates that the Appeal Digest be prepared promptly and filed and served forthwith. Slatter J.A. held that, in this context, the Appellant was not entitled to take 15 weeks to prepare the Appeal Record. While the Appellant was entitled to a reasonable amount of time to prepare, the Respondent in the Appeal was entitled to expect that the Appellant would proceed diligently. Slatter J.A. held that, when Leave to Appeal is granted, it is granted on the implicit condition that the Appellant will proceed as expeditiously as the circumstances permit.

UNIVERSITY OF CALGARY v JR, 2013 ABQB 652 (JONES J)
Rule 3.2 (How to Start an Action) and Part 5 (Disclosure of Information)

A former employee of the University of Calgary (the "University") sued for constructive dismissal and requested some documents pursuant to the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 ("FOIPP"). The University claimed solicitor-client privilege over some of the records requested and the Information and Privacy Commissioner of Alberta (the "Commissioner"), after exhausting other attempts to satisfy himself that the claim of privilege was properly made, issued a Notice to Produce the records in order to determine if the privilege was properly claimed.

The University brought an Application for Judicial Review of whether the Adjudicator had authority to issue the Notice to Produce under FOIPP. Justice Jones held that the Adjudicator had authority to issue the Notice to Produce under FOIPP. Justice Jones also noted that recourse to compel disclosure would not be available through the Courts. Justice Jones noted that Part 5 of the Rules only applied to disclosure of information in the context of a Court Action, not FOIPP requests independent of the Courts. Further, an Application under Rule 3.2 was only available if an enactment so authorized, but FOIPP did not authorize any Application except for review of the Commissioner's Decision post-inquiry.

COLD LAKE FIRST NATIONS v ALBERTA (TOURISM, PARKS AND RECREATION), 2013 ABCA 443 (CÔTÉ, ROWBOTHAM and O'FERRALL JJA)
Rule 3.12 (Application of Statement of Claim Rules to Originating Applications)

Alberta Tourism, Parks and Recreations ("Parks") sought to redevelop and expand a campground on lands adjacent to the Cold Lake First Nations ("First Nations"). The Alberta Government appealed the Order of Madam Justice Browne (the "Review Judge"), who held that Parks failed to fulfill its duty to consult and accommodate the First Nations with respect to the campground redevelopment and expansion (the "Project"). The Order set aside the decision by Parks to end the consultation and to commence construction.

The Majority of the Court allowed the Appeal, holding that Parks adequately discharged its duty and the decision to end consultation was reasonable. O'Ferrall J.A. dissented, emphasizing that the standard of review was reasonableness and deference was to be afforded to the Review Judge's findings with respect to the adequacy of Parks' discharge of its duty to consult.

In particular, O'Ferrall J.A. disagreed with the Majority's decision that the record was sufficient to make an assessment of the impact of the Project for the purposes of determining the adequacy of consultation. The Review Judge held that a traditional land use and occupancy study, submitted by the First Nations, was inadmissible because it had been prepared after the consultation had closed and was not part of the record being reviewed. O'Ferrall J.A. opined that the dispute was best characterized as one between two parties over whether the party owing a duty had in fact discharged that duty. Thus, the decision to exclude the study "may have been a misapplication of administrative law principles to what … was a *lis inter partes*".

While the First Nations expressly sought judicial review of Parks' decision in its Originating Application, O'Ferrall J.A. noted that judicial review is discretionary. Rule 3.12 permits the Court to direct an Action by Statement of Claim, even when an Action is commenced by way of an Originating Application. In such a case, it would have been appropriate for the First Nations to adduce evidence as to the strength of the rights asserted and the seriousness of potentially adverse effects of the Project.

Regardless of the proper characterization of the dispute, O'Ferrall J.A. held that the record was unduly one-sided in favour of Parks and, as such, the Court could not assess the impact of the Project on the First Nations' rights. O'Ferrall J.A. would have sent the matter back to the Trial Court to assess the adequacy of consultation based on the evidence which the Parties wished to adduce.

MAMMOET 13220-33 STREET NE LIMITED v EDMONTON (CITY), 2013 ABQB 663 (MICHALYSHYN J)
Rules 3.15 (Originating Application for Judicial Review) and 7.3 (Summary Judgment)

At issue on Summary Judgment was whether an Edmonton City Bylaw complied in substance with its empowering legislation, the *Municipal Government Act*, RSA 2000 c M-26 (*"MGA"*) and the *Principles and Criteria for Off-Site Levies Regulation*, AR 48/2004 (*"Regulation"*).

The Applicants, including the City of Edmonton, did not deny that arguably the Bylaw failed to comply with the *Regulation*; however, they argued that any claims that the Bylaw was invalid were irrelevant because the Respondents missed a limitation period. The Applicants argued that a challenge to the validity of a Bylaw under s. 536 of the *MGA* was barred if not brought within six months of its enactment, pursuant to the six month limitation period in Rule 3.15(2). In this case, the Bylaw was enacted on October 1, 2006. The Applicants argued that any challenge to the Bylaw's validity had to be made by April 1, 2007. The Respondents highlighted that they acquired lands subject to the Bylaw on March 14, 2007, but were not informed by the Applicants that they were subject to a levy under the Bylaw until April 25, 2012. The Respondents argued that they did not know, and could not have anticipated, that levies would be imposed on them prior to the suggested April 1, 2007 limitation expiry. They had an awareness of the Bylaw within the limitation period; however, they did not in abstract scrutinize the Bylaw, nor

should they have reasonably been expected to.

The Parties agreed that the test for Summary Judgment, specifically in the context of a limitation period, was that there had to be no genuine issue for Trial, and it had to be plain and obvious that the claim could not succeed; therefore, where a claim was barred by a limitation period, there was no genuine issue for Trial.

Michalyshyn J. noted that, in *Okotoks (Town) v Foothills (Municipal District No 31)*, 2013 ABCA 22 (*"Okotoks"*), the Court of Appeal characterized the issue as solely being the application of Rule 3.15(2) to an Application under s. 536 of the *MGA*. One noted difference between the case at bar and *Okotoks* was highlighted in the Court of Appeal's statement that, "Okotoks had been involved throughout [in] the process leading to the bylaw". Michalyshyn J. noted that the Court of Appeal in *Okotoks*, without mentioning *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City of)*, 2002 ABCA 131 (*"United Taxi"*), held that a municipal Bylaw was in fact "a decision or act" subject to the Rule 3.15(2) limitation period. In *Okotoks*, the Court of Appeal stated that "the Legislature knew full well in 2010 when it enacted the *Rules* that the judicial review rules, including Rule 3.15(2), were being applied to challenges of bylaws as well as to the traditional judicial review remedies". The Applicants relied on this statement to conclude that the *Okotoks* Decision erased any distinction between void and voidable Bylaws for the purpose of Judicial Review proceedings seeking declaratory relief.

While Michalyshyn J. agreed with the Applicants that *Okotoks* conflicted with *United Taxi* on its face, and appeared to reverse it, his Lordship noted that the Court of Appeal did not specifically state such an intent. Michalyshyn J. noted that both *United Taxi* and *Wiswell v Winnipeg*, [1965] SCR 512 appeared to stand for the proposition that a challenge to an arguably invalid Bylaw would not fail due to an expired limitation period. The Applicants argued that *Okotoks* changed the law by expanding the definition of "decision or act" to include arguably invalid Bylaws, and by limiting the rule of law by way of the Rule 3.15(2) limitation period. The Respondents attempted to distinguish *Okotoks* and *Wiswell* on the basis of the nature of the limitation period, being statutory in the *MGA* versus general in the *Rules*; however, Michalyshyn J. agreed that *Okotoks* could not be distinguished from *Wiswell* on that basis. Further, Michalyshyn J. noted that the Parties agreed that, but for *Okotoks*, the prevailing authorities would allow the Applicants to seek declaratory relief, notwithstanding Rule 3.15(2).

The Court then considered the Respondents' argument that, if the Court was unable to distinguish *Wiswell* from *Okotoks*, then the Court was faced with conflicting authorities from the Supreme Court of Canada and the Alberta Court of Appeal, but was bound by the former. Michalyshyn J. felt that the issue was not whether the Court was bound by either *Okotoks* or *Wiswell*, but rather whether *Okotoks* or *United Taxi* was binding. The Court noted that *United Taxi* unequivocally followed the established authority in *Wiswell*; however, *Okotoks* mentioned *United Taxi*, but said nothing about *Wiswell*. Further, the Court of Appeal in *Okotoks* referred to *United Taxi*, but preferred other cases where administrative decisions, rather than legislative enactments, were at issue. *Okotoks* conflicted with *United Taxi*, but did so with no apparent explanation. Based primarily on the fact that there was no definitive statement in *Okotoks* setting out that *United Taxi* was no longer the law in Alberta, the Court was persuaded to follow *United Taxi*.

In the further alternative, the Respondents argued that if the Court was not obligated to follow *United Taxi*, then *Okotoks* was distinguishable on the basis that, unlike the Town of Okotoks, the Respondents in this case had no involvement or reasonable opportunity before the limitation period expired to change the impugned Bylaw. Michalyshyn J. agreed that the Applicants had an arguable case that the Decision in *Okotoks* was distinguishable on that basis.

Finally, the Respondents argued that, assuming Rule 3.15(2) was a bar to their Originating Application, the Rule itself was *ultra vires* Alberta, as limiting the powers of the Court. The Respondents argued that, to the extent Rule 3.15(2) precluded Court review of arguably invalid Bylaws, it was unconstitutional for interfering with the powers of a Court appointed under the *Constitution Act* 1967, 30 &

31 Victoria, c 3 (U.K.), and as recognized in the *Judicature Act*, RSA 2000, c J-2. After considering the Applicants' response to this argument, the Court was not persuaded that the Applicants should be denied the chance to advance this argument at the hearing of this matter.

Based on all of the above, the Applications for Summary Judgment were dismissed.

CRYSTAL RIDGE FUELS LIMITED v MCINTOSH, 2013 ABQB 618 (JONES J)
Rules 3.32 (Additional Options for Defendant), 3.56 (Right to Counterclaim), 3.57 (Contents of Counterclaim), 3.58 (Status of Counterclaim), 3.60 (Application of Rules to Counterclaims), 3.62 (Amending Pleading), 3.65 (Permission of Court to Amendment Before or After Close of Pleadings) and 3.74 (Adding, Removing or Substituting Parties After Close of Pleadings)

The Defendant, Reese McIntosh ("McIntosh"), sought an Order:

(a) Permitting him to file a Counterclaim against the Plaintiffs, Gregory Binks, Sally Binks and Crystal Ridge Fuels Limited ("Crystal Ridge"); and

(b) Compelling answers to Undertakings from Crystal Ridge.

McIntosh and Janice Pearce ("Pearce") (McIntosh's common-law spouse) were former employees of Crystal Ridge. After their resignation, the Plaintiffs alleged, *inter alia*, that:

(a) McIntosh and Pearce had unlawfully and fraudulently misappropriated and converted to their own use funds belonging to Crystal Ridge;

(b) McIntosh used funds belonging to Crystal Ridge to form Big Rock Petroleum Ltd. ("BRP") with the intention of competing with Crystal Ridge;

(c) McIntosh caused BRP to appropriate Crystal Ridge's client base, revenue and good will;

(d) McIntosh falsely claimed to own Crystal Ridge and improperly pledged its credit;

(e) McIntosh breached his fiduciary duty to Crystal Ridge; and

(f) BRP was unjustly enriched to the detriment of Crystal Ridge as a result of McIntosh's breach of fiduciary duty.

The Action was commenced in 2004. The claims of Gregory Binks and Sally Binks had been previously struck. McIntosh now sought permission to file a counterclaim alleging, *inter alia*, that the Plaintiffs deliberately misrepresented his 2003 tax withheld in respect of his 2003 income.

The Court held that more than 2 years had passed since McIntosh knew of the injury. Therefore, for the Counterclaim to be allowed, one of the exceptions in the *Limitations Act*, RSA 2000, c L-12 (*"Limitations Act"*), would have to apply.

S. 6(2) of the *Limitations Act* allows for claims to be brought by a defendant in the proceeding against a claimant in the proceeding, and thus applied to the claim against Crystal Ridge. However, the Court held that s. 6(2) did not apply in relation to Gregory Binks or Sally Binks, as although part of the Action, they were no longer *claimants* as their claims had been struck.

However, the Court held that s. 6(4) of the *Limitations Act* applied. The Counterclaim related to events in the original claim, and Gregory Binks and Sally Binks:

(a) Would be added as Defendants;

(b) Received sufficient knowledge of the added claim within the applicable limitation period plus time for service (3 years in total); and

(c) Would not be prejudiced in maintaining a defence to the counterclaim.

The Application to allow the filing of the Counterclaim was granted.

McIntosh also sought an Order requiring Crystal Ridge to provide answers to what he alleged were deficient responses to Undertakings. The Court dismissed this Application, and held that the appropriate remedy was for McIntosh to Question further on the Undertakings if he believed that the answers were inadequate. However, the Court awarded costs to McIntosh, holding that the Application would have been unnecessary if counsel for Crystal Ridge had replied to a letter from counsel for McIntosh that detailed the alleged deficiencies in the Undertakings.

RODRIGUES v RODRIGUES, 2013 ABQB 718 (NIXON J) Rules 3.37 (Application for Judgment Against Defendant Noted in Default) and 11.25 (Real and Substantial Connection)

The Plaintiff sued the Defendant for defamation for statements made about the Plaintiff between the Fall of 2010 and May 2011. At the time of the incident, both the Plaintiff and the Defendant were residing in Calgary, Alberta. Since then, the Defendant had moved back to India, while the Plaintiff continued to reside in Alberta.

The Defendant was Noted in Default and the matter was set for an assessment of damages pursuant to Rule 3.37. As the Defendant was Noted in Default, the facts in the Statement of Claim were deemed to be admitted (*TLA Food Services Ltd v 1144707 Alberta Ltd*, 2011 ABQB 550). In 2004, the Defendant had made similar statements in India. These earlier statements were admitted to prove that the Defendant was the author of the statements at issue in this Action.

Before assessing damages, Nixon J. considered whether the Court could hear the case against a foreign defendant who had not attorned to the jurisdiction. The Court found that all relevant documents were served on the Defendant. Nixon J., after reviewing the circumstances under Rule 11.25(3), also found that a real and substantial connection to Alberta existed, as all publications were sent, and the internet and blog postings were accessed, by individuals in Alberta.

Upon determining that the Defendant had published defamatory statements in Alberta about the Plaintiff, the Court turned to damages. The Court awarded $75,000 in general damages and $50,000 in aggravated damages. Punitive damages were not awarded. The Court also awarded injunctive relief. The Court did not direct an apology or retraction as the Defendant was neither a newspaper nor a broadcaster. Costs were awarded on a solicitor-client basis.

LAFARGE CANADA INC v EDMONTON (CITY), 2013 ABCA 376 (CÔTÉ and WATSON JJA, SULYMA J (AD HOC)) Rule 3.68 (Court Options to Deal with Significant Deficiencies)

In May 2007, Lafarge Canada Inc. ("Lafarge") contracted with the City of Edmonton ("Edmonton") to provide cement pipe for a light rail transit project. Edmonton alleged that Lafarge did not comply with specific delivery times set out in the contract. In July 2007, Edmonton served Lafarge with notice that delay costs were being tracked and would be charged back to Lafarge under the contract. Lafarge disputed Edmonton's contractual entitlement to withhold delay costs. The contract between the Parties provided that disputes would be submitted to Arbitration. In May 2009, the Parties entered into a Standstill Agreement, by which the Parties agreed not to assert a limitations defence in any proceedings commenced by either Party. The Standstill Agreement also provided that, upon termination, the Parties had three months to commence proceedings to preclude a limitation defence. Lafarge terminated the Standstill Agreement by written notice on February 2, 2011. On February 11, 2011, Lafarge commenced an Action by Statement of Claim to recover the balance of the contract price. The Statement of Claim was silent with respect to Arbitration. In its Statement of Defence, Edmonton pleaded, *inter alia*, that the Parties had agreed to submit any disputes under the contract to Arbitration. Lafarge served its Affidavit of Records in July 2011, at which time Edmonton asserted that Arbitration proceedings had not been commenced within three months of the termination of the Standstill Agreement, and therefore were not commenced in in time, pursuant to s. 51 of the *Arbitration Act*, RSA 2000, c A-43. In June 2012, Edmonton applied to strike the Statement of Claim pursuant to Rule 3.68 or, alternatively, to stay the Action pursuant to s. 7 of the

Arbitration Act, and for a declaration that the Arbitration of the dispute was statute barred.

The Chambers Judge held that the Statement of Claim served as sufficient notice of, or as a commencing document with respect to, Lafarge's intention to arbitrate the dispute under the contract. Alternatively, the Chambers Judge held that the Statement of Claim complied with the Standstill Agreement and prevented Edmonton from raising a limitations defence to the commencement of Arbitration proceedings. The Chambers Judge held that the Arbitration survived and remained outstanding, but did not decide whether the Statement of Claim should be stayed pursuant to s. 7 of the *Arbitration Act*. Edmonton appealed the dismissal of its Application to strike or stay proceedings, and the Chambers Judge's refusal to issue a Declaration that Arbitration proceedings were statute barred.

The Court of Appeal allowed Edmonton's Appeal. The Court held that the Statement of Claim did not serve as a commencing document for Arbitration, and further, that it was not sufficient notice of an intention to arbitrate. Further, given that Lafarge's Statement of Claim did not refer to arbitration, and sought to recover monies owed under contract, the Statement of Claim could not be said to have expressed a clear and unequivocal intention to arbitrate or to commence arbitration proceedings. The Court further questioned the premise that a Statement of Claim could suffice to either commence an arbitration, or serve as notice of an intention to arbitrate, given that arbitration and litigation are distinct processes. In this context, the Court held that the Statement of Claim did not constitute a notice of Arbitration and therefore the Appeal must be allowed.

The Court held that the Chambers Judge did not err in concluding that, if Lafarge was entitled to pursue an Action for its claim, the Statement of Claim was filed in time. As such, the Court held that there could be some merit in Lafarge's submission that the Statement of Claim was not defunct, and that there was an active proceeding in the Court of Queen's Bench until the Court ruled otherwise. However, the Court further held that it should not address the issue of whether Edmonton, by its conduct, waived its rights to insist on arbitration, or attorned to the jurisdiction of the Court. The Chambers Judge did not decide these issues and, as such, the Court of Appeal held that the record before it was inadequate to resolve those questions. While the Court allowed the Appeal on the basis that the Statement of Claim did not constitute notice of arbitration, the issues of attornment and delay were returned to the Court of Queen's Bench for consideration.

DUECKMAN v DUECKMAN, 2013 ABCA 306 (O'BRIEN, MCDONALD and O'FERRALL JJA)
Rule 4.19 (Documents Resulting from Judicial Dispute Resolution)

The Appellant appealed an Order entered following a Judicial Dispute Resolution ("JDR"). The Appellant and Respondent married in 1986 and divorced in 2007. They had three children; one was under the age of 18. In January 2013, the Appellant filed an Application seeking to vary custody and support; the Respondent filed a cross-motion seeking to vary access and further relief. The Case Management Judge ordered that all outstanding matters be dealt with in a special one-day Chambers Hearing, after attempting Alternative Dispute Resolution. The Parties attended the JDR meeting. The self-represented Appellant refused to sign a form of Binding Judicial Dispute Resolution Agreement tendered by the Respondent, so the JDR was non-binding.

The Court stated that the Judge may facilitate discussion, and if the Parties reached an agreement, the Rules contemplated documentation pursuant to Rule 4.19. In this case, there was no agreement prepared between the Parties nor was there a Consent Order or Consent Judgment. Because the Appellant claimed that there was no agreement and did not agree to the terms of the Order, the Court allowed the Appeal and set aside the Order made by the JDR Judge. The Court ordered that the case be returned to the Court of Queen's Bench for the scheduling of a Special Chambers Application.

0738827 BC LTD v CPI CROWN PROPERTIES INTERNATIONAL CORPORATION, 2013 ABQB 499 (HALL J)
Rules 4.22 (Considerations for Security for Costs Order) and 7.3 (Summary Judgment)

The Defendants, except Jamila Premgi and Jamila Premgi Professional Corporation, sought Summary Dismissal of the claims of the CPI Quotavest Investors Steering Committee ("CQSC Plaintiffs"), based on the claims being time barred. Alternatively, the Defendants sought Security for Costs against all of the Plaintiffs. All of the Plaintiffs, including the CQSC Plaintiffs, sought Partial Summary Judgment against the following Defendants: Crown Vista Estates II Ltd., CPI Crown Properties International Corporation, CPI Crown Capital Corporation, and Camrose Crown Care Corporation ("SJ Defendants").

In relation to the limitations issues, the Court held that:

(a) It appeared that the CPI Defendants had delayed providing information to the CQSC Plaintiffs;

(b) Due to the delay, the CQSC Plaintiffs became suspicious; and

(c) The CQSC Plaintiffs then engaged legal counsel to obtain the information (and were successful in doing so).

The Court held that there was a triable issue as to when the CQSC Plaintiffs knew, or ought to have known, that a claim should be brought.

The Defendants sought Security for Costs based on numerous Plaintiffs residing outside of Alberta, and there being no evidence suggesting that those Plaintiffs had assets in Alberta to satisfy a Costs Order. The Court noted that Rule 4.22, unlike former Rule 593, has no provision indicating Security for Costs may be ordered on the basis that a Plaintiff resides outside of Alberta. Instead, the focus under Rule 4.22 is on whether the Party has assets in Alberta against which costs could be recovered. The Court noted that the Action revolved around Alberta real estate projects in which the Plaintiffs had invested. Since the Defendants already had control of these assets, it was likely that the Defendants could enforce an order or judgment against these assets. The Court held that the Defendants had not met the onus to justify Security for Costs.

The Plaintiffs alleged that the SJ Defendants (that were part of the Limited Partnership Agreement ("LPA")) breached the LPA by lending funds to non-arm's length parties (the other SJ Defendants). The SJ Defendants did not enter Affidavit evidence to oppose the Summary Judgment Application. Instead, they argued that the Plaintiffs, as Limited Partners, did not have standing to bring the Summary Judgment Application. The Court held, based on the following section of the LPA, that there was a contractual duty of good faith by the general partner to the limited partners, and that duty had been breached:

> Duty of general partner: the general partner shall exercise the powers and discharge the duties of its office hereunder honestly, in good faith and in the best interests of the limited partners.

The Court held that there was a triable issue in relation to the limitations defence regarding the CQSC Plaintiffs, and Summary Judgment could not be entered. However, the Court noted that the triable issue in respect of the CQSC Plaintiffs should not deprive the remaining CVP II Limited Partners from the benefits of the Decision. In order to give effect to the Decision, and yet recognize the limitations issue, Justice Hall ordered that any funds realised as a result of this Judgment that would be distributable to members of the CQSC were to be paid into Court and not distributed until the limitations issue had been determined.

BILHETE v WONG, 2013 ABQB 514 (READ J)
Rules 4.22 (Considerations for Security for Costs Order) and 10.51 (Order to Appear)

The Defendant, Wong, incorporated the two Defendant corporations – Material Processing Canada Inc. ("MPCI") and Camrose Mining (Alberta) Ltd. ("Camrose") – to purchase lands, the funds for which were advanced by the Plaintiffs. The Plaintiff, Louis Bilhete ("Louis"),

had instructed Wong to make his son, Clinton Bilhete ("Clinton"), the sole shareholder of both corporations. However, Wong failed to make Clinton the sole shareholder for MPCI.

The Defendants brought an Application to have the Plaintiffs found in contempt for failure to answer Undertakings, for dismissal of the Action for delay, or alternatively for the Plaintiffs to provide Security for Costs. The Application to strike for delay was subsequently abandoned at the Hearing. The Application for a finding of contempt alleged that Louis failed to answer Undertakings which were ordered by the Court on two occasions. The Plaintiffs asserted that all Undertakings had been answered to the best of Louis' ability.

On the issue of contempt, Read J. determined that an Order made by Master Wacowich was unambiguous and required actual responses, not just best efforts. The answers provided to the Undertakings were held to be unresponsive and incomplete. Pursuant to Rule 10.51, Read J. directed Louis to be served with Form 47 and to appear before the Court to show cause why he should not be declared in civil contempt for failing to answer the Undertakings he was ordered to answer.

The Order for Security for Costs was granted. Read J. held that the Plaintiffs' case was weak: Louis' evidence was confusing and often contradictory, and the Defendants had a strong Statute of Frauds defence regarding the absence of written documentation. Further, the Plaintiffs provided no evidence to show their ability to pay or that Security was not necessary.

EMPSON v WENZEL DOWNHOLE TOOLS LTD, 2013 ABCA 418 (BERGER, SLATTER and VELDHUIS JJA)
Rules 4.31 (Application to Deal with Delay) and 8.14 (Unavailable or Unwilling Witness)

The Defendant brought an Application in Chambers to dismiss the Action for inordinate and unexplained delay. Despite the fact that a key witness had died during the period of delay, the Chambers Judge dismissed the Defendant's Application. The Defendant appealed.

The Court of Appeal stated that Rule 4.31(2) presumes prejudice when there has been inordinate and inexcusably delay. Specifically, prejudice is presumed if there has been a death of a key witness, but this presumption is rebuttable and each case must be examined on its facts.

The Court of Appeal dismissed the Appeal, noting that that Chambers Judge's findings were entitled to deference and there was no reviewable error. It was further noted that the deceased witness was questioned, he answered Undertakings, and then he was questioned again. Rule 8.14 allows a Party to make use of transcripts from the Questioning of its own witness when the witness has died. Therefore, any prejudice from the death of the witness would be reduced.

FETHERSTON v HILDERMAN, 2013 ABCA 401 (BERGER, O'BRIEN and MARTIN JJA)
Rule 4.33 (Dismissal for Long Delay)

The Appellant appealed an Order granted by the Chambers Judge striking the Appellant's property claim and *lis pendens* which had been attached to the matrimonial home by the Appellant. The Chambers Judge had granted the Order based on a two-year drop-dead rule. The Rule at the time was that the drop-dead rule was only activated when there was no material advancement for five years. Although the Court agreed that the Chambers Judge was mistaken in the granting of the original Application, the Court found that the *lis pendens* was rightly removed because all the issues with the matrimonial property were settled some time ago, and the *lis pendens* had no relationship to the encumbered property. The Court dismissed the Appeal.

1400467 ALBERTA LTD v ADDERLEY, 2013 ABQB 656 (VEIT J)
Rule 5.1 (Disclosure of Information – Purpose of this Part)

The Plaintiff applied for an Order requiring each of the Defendants, except Pro-Canada, to file new Affidavits of Records, containing only Records which were relevant to the issues between that specific Defendant and the Plaintiff.

The Defendant Pro-Canada had filed an Affidavit of Records that was 13,000 pages long. Each of the other Defendants' Affidavits of Records merely adopted Pro-Canada's Affidavit of Records. The Plaintiff argued that this was not appropriate considering that the issues, as defined in the Pleadings, did not involve all of the Defendants in the same way, at the same time, and in connection with the same activities.

The Court noted that the Rules of Court do not specifically address prolixity or provide a remedy for prolixity where it exists. However, Veit J. went on to note that Alberta Courts have an inherent power to ensure that purported compliance with the Rules of Court does not become a technique for unnecessarily increasing the cost of litigation. In addition, Veit J. pointed out that Rule 5.1(2) provides Alberta Courts with the explicit power to advance the objectives articulated in Rule 5.1(1).

Veit J. concluded that the appropriate remedy was to require all of the Defendants, other than Pro-Canada, to amend their previously filed Affidavits of Records by identifying from amongst the 13,000 pages of disclosure those pages which dealt specifically with their own actions.

ROYAL BANK OF CANADA v KADDOURA, 2013 ABQB 630 (MASTER PROWSE)
Rules 5.2 (When Something is Relevant and Material), 5.5 (When Affidavit of Records Must be Served) and 5.6 (Form and Contents of Affidavit of Records)

The primary issue in this Application was whether, in a dispute between a 'straw buyer' and the lawyer who represented the straw buyer, files the lawyer handled for other straw buyers were producible in the litigation. Master Prowse first defined 'straw buyers' and how they drive the fraudulent schemes they are involved in before considering the Affidavit of Records. The Court stated that the Pleadings first had to be examined to determine whether documents were material and relevant for the purpose of production.

After examining the contents of the Parties' Pleadings in detail, Master Prowse considered the relevance and materiality of the previous transactions conducted by the lawyer involved in the transactions with the straw buyers. The key issue in this case was "who knew what", as between the lawyer and the straw buyer. Master Prowse held that documents regarding previous transactions, if they existed, were relevant and producible under Part 5. The Court stated that whether those records ultimately persuaded a Trial Judge was something a Trial Judge would ascertain after hearing the evidence in full; however, at this stage, the documents should be produced so the Trial Judge would have access to the complete "story" at Trial. Master Prowse held the view that the lawyers in question should be required to disclose the existence of previous purchase and mortgage transactions which involved either the same mastermind or agent of the mastermind or loans officer, subject to solicitor and client privilege.

Master Prowse declined to consider the solicitor and client privilege arguments presented by counsel, because if there were no files, the issue did not have to be engaged. The Court directed counsel for the lawyers to include those files in a Supplementary Affidavit of Records, indicating what portions were being claimed as non-producible pursuant to solicitor and client privilege, and the issue could then be addressed based on specific files.

Master Prowse concluded that, subject to solicitor and client privilege, the prior files were relevant and material and producible because they could establish a pattern which distinguished the transaction in question from a *bona fide* transaction.

JABNEEL CONSTRUCTION INC v LAMONT (TOWN), 2013 ABQB 648 (LEE J)
Rules 5.2 (When Something is Relevant and Material) and 5.6 (Form and Content of Affidavit of Records)

The Plaintiffs entered into three development agreements and three master sales agreements for the development of three subdivisions with the Defendant, the Town of Lamont. The Town of Lamont eventually terminated the agreements and the Plaintiffs subsequently filed a Statement of Claim alleging that termination of the agreements was wrongful and that the Defendant, Tom Miller, who was Chief

Administrative Officer of Lamont, acted in bad faith in relation to development delays. The Plaintiffs brought an Application seeking to amend their Statement of Claim and seeking production of the Crown Disclosure from Miller in relation to charges he was facing under the Criminal Code.

The Plaintiffs submitted that the criminal charges and the ongoing investigation went to the heart of the allegations of bad faith against the Defendants. The Defendant, Miller, argued that there was no real connection between the allegations made in the pleadings and the requested Crown Disclosure pertaining to events that occurred three years after the agreements with the Plaintiffs terminated.

Lee J. highlighted that Questioning had not yet occurred and the Application by the Plaintiffs to amend the Statement of Claim was scheduled to be heard in February 2014. The Court was concerned that the Application for an Order for disclosure of Miller's criminal charges was brought too early. Lee J. stated that disclosure on unproven criminal charges at this point in the proceedings seemed to be useful only for character evidence that would tend to show that Miller was more likely to commit improper acts because of the criminal charges. Further, if the charges against Miller resulted in convictions, then those records could be disclosed at that time. Additionally, Lee J. pointed out that there was no prejudice to the Applicants if the Application was not granted, because it could be brought again in February 2014.

The Court held that the Application to obtain Miller's Criminal Disclosure was premature at this point in the proceedings, as it was not directly relevant and material to Miller's liability in the civil proceedings. Lee J. noted that, after Questioning or after the Statement of Claim was amended, such disclosure might then be material and relevant. The Application for disclosure was dismissed.

HAMILTON v LEACH, 2013 ABCA 423 (CÔTÉ, MCDONALD and BIELBY JJA)
Rules 6.3 (Applications Generally) and 6.6 (Response and Reply to Application)

The Parties were parents to a four-year old child. A number of Orders were granted in 2011 and 2012 governing parenting and access, which also required the Appellant father to provide his last three Notices of Assessment. In September 2012, the mother filed a Claim pursuant to the *Family Law Act*, SA 2003, c F-4.5, to vary the existing parenting Orders and for a finding that the father was in contempt for not providing his Notices of Assessment. The father subsequently filed a Claim, pursuant to the *Family Law Act*, SA 2003, c F-4.5, requesting variations in parenting and access. Both Applications were heard on March 12, 2013. The Chambers Judge denied the father's requested parenting arrangement. The terms of the existing parenting Orders otherwise mainly remained unchanged, although the Chambers Judge ordered the father to pay retroactive and ongoing child support.

The Appellant father appealed and asked the Court to quash the Order of the Chambers Judge, reinstate the previous Orders and remit the matter to the Court of Queen's Bench for an expedited hearing. The father argued that the Chambers Judge did not properly apply principles of law with respect to parenting and child support Orders, and that the reasons of the Chambers Judge warranted a review by the Court of Appeal. One of the arguments made by the Appellant father was that the mother's Reply Affidavit filed in respect of her Application at the Court of Queen's Bench raised new issues and allegations that he was not entitled to reply to under Rules 6.3, 6.6(1) and 6.6(2). The Chambers Judge referred to the fact that the father did not deny some of the mother's allegations in his Decision. The Appellant father argued that he had no opportunity to meet the case against him.

The Court held that the Decision of the Chambers Judge was deserving of considerable deference because the matters dealt with therein were fact-based and discretionary. The Court held that the Appellant father's argument was moot. The Appellant father brought his own Cross-Application in January, and could have filed an Affidavit in that matter. Further, the Appellant father never sought leave from the Chambers Judge to file another Affidavit. As such, the Court held that the Appellant father was prepared to proceed before the Chambers Judge on the record as it stood then and, as such, there was no basis to

warrant Appellate intervention. The Appeal was dismissed.

PHOENIX LAND VENTURES LTD v FIC INVESTMENTS USA CORP, 2013 ABQB 614 (GOSS J)
Rule 7.3 (Summary Judgment)

This Action involved a tripartite property transaction in which the vendor sold the property to the Defendant, who sold it on to the Plaintiff, but the title was transferred directly from the vendor to the Plaintiff. The Plaintiff commenced the Action against the Defendant claiming default in the payment due. The Defendant denied the allegations, pleading that the Plaintiff did not disclose certain deficiencies in the environmental reports. The Defendant also counterclaimed against, among others, their transactional solicitor alleging breach of contract and breach of duty of care. The solicitor applied for a Summary Dismissal of the Counterclaim as against him.

On the issue of breach of duty, Justice Goss held that there was conflicting evidence which rendered the matter a triable issue. On the issue of the environmental reports, Justice Goss held that there was evidence relevant to the level of care and skill of the solicitor, rendering the issue triable. The solicitor argued further that the claim against him was statute barred. Her Ladyship opined that the date upon which the limitation period started to run was not plain and obvious, which made the issue triable.

LAKEVIEW DEVELOPMENTS INC v STONY PLAIN (TOWN), 2013 ABQB 619 (MOREAU J)
Rule 7.3 (Summary Judgment)

The Plaintiff applied for Summary Judgment against the Town of Stony Plain (the "Town" or the "Defendant"), on the basis that there were no genuine issues to be tried in relation to its claim.

The Plaintiff was a registered owner of a remainder lot created from a plan of subdivision registered by the Defendant. The Plaintiff acquired the subdivision lands from a foreclosure sale in January, 2011. At that time, the Town claimed to be owed $136,290.18 in outstanding utility charges and penalties.

The charges related to a water leak, which the Town alleged was the responsibility of the owner and sole occupier of the subdivision lands at the time. The Plaintiff, a subsequent purchaser, paid $140,871.54 to the Town under protest to clear its title, and then commenced this Action to recover those funds.

The Court noted that the test for Summary Judgment is the same as under the old Rules, citing *Encana Corp v ARC Resources Ltd*, 2011 ABQB 431. The Court stated that "the Applicant is required to establish that there are no genuine issues for trial". If a Summary Judgment Application is based on "factual merit," then the Applicant must establish "beyond doubt" that there is no genuine issue for trial.

The Court further explained that, if a Summary Judgment Application is based on the interpretation of documents or a statute, the test for Summary Judgment is:

> … whether the issue of law can fairly be decided on the record before the court. If the legal issue is unsettled or complex or intertwined with the facts, it is sometime[s] necessary to have a full trial to provide a proper foundation for the decision.

The Court determined that there were genuine issues for Trial, and dismissed the Plaintiff's Application for Summary Judgment.

JACKSON v CANADIAN NATIONAL RAILWAY, 2013 ABCA 440 (O'BRIEN, MARTIN and O'FERRALL, JJA)
Rule 7.3 (Summary Judgment)

The Appellant Plaintiff was a grain farmer who sued the Respondent Railways for restitution in respect of what he alleged to be excessive freight rates. He claimed that the weight the Respondents charged to move grain included costs for hopper car maintenance which was not actually incurred. The Appellant also sought to certify the Action as a Class Action in respect of other grain farmers in the same position. The Respondents' Application for Summary Judgment was granted by the Case Management Judge, who held that there were no material facts in dispute that

required a Trial. The Case Management Judge held that the legal issue raised by the Claim involved the interpretation of the legislative scheme and, as such, no additional evidence was needed to evaluate the merits of the Claim. The Case Management Judge held that the complex legislative scheme at issue would be rendered meaningless if the interpretation put forward by the Appellant was adopted. The Case Management Judge granted Summary Judgment on the basis that there was no merit to the claim.

The Court of Appeal held that the test for Summary Judgment is met when an Applicant can demonstrate that there is no genuine issue of material fact that requires a Trial. The Court, citing *Canada (Attorney General) v Lameman*, 2008 SCC 14, held that the Summary Judgment Rule serves an important purpose in that it prevents Claims with no chance of success from proceeding to Trial. The Appellant argued that there were disputes with respect to the evidence that precluded Summary Dismissal. The Court rejected this argument and held that the central issue related to the interpretation of the legislative scheme. The process of Discovery was of no assistance in determining the meaning and intent of statutory provisions. In this context, the Court held that there were no genuine issues of material fact that required a Trial. The Court held that the question was whether the issue could be fairly decided on the record before the Court. In Summary Judgment Applications in which the facts are clear and undisputed, the ultimate outcome often depends on the interpretation of a statute or document, or on some other issue of law that arises from undisputed facts. In such cases, the test for Summary Judgment is not whether the issue is beyond doubt. Rather, the test is whether the issue of law can be fairly decided on the record before the Court. If the legal issue is unsettled, complex, or intertwined with the facts, a full Trial may be necessary. However, it is often possible to decide the question summarily. The Court held that the legislative scheme at issue could be interpreted on the record before the Court and, as such, Summary Dismissal could be granted if it was determined that the Plaintiff had no chance of success. The Court of Appeal considered the legislative scheme and upheld the Decision of the Case Management Judge.

MANSON INSULATION PRODUCTS LTD v CROSSROADS C&I DISTRIBUTORS, 2013 ABQB 702 (POELMAN J) Rules 7.5 (Application for Judgment By Way of Summary Trial), 7.6 (Response to Application), 7.8 (Objection to Application for Judgment by Way of Summary Trial) and 7.9 (Decision After Summary Trial)

The Plaintiffs commenced an Action against the Defendants claiming, amongst other things, breach of contract. The Defendants counterclaimed and filed an Application for Summary Trial seeking dismissal of part of the Action against them. One of the Plaintiffs responded with an Objection to the Summary Trial. Justice Poelman, in considering the Rules governing Summary Trials, confirmed that prior case law was still relevant. Based on earlier authorities, Justice Poelman opined that a party is presumptively entitled to a Summary Trial and an Objection to a Summary Trial may be ruled on before or at the Hearing. The issue for consideration was whether the Claim was "suitable" for Summary Trial and whether a Summary Trial would "facilitate resolution of the Claim or a part of it". Justice Poelman observed that the suitability requirements were flexible and that a broad range of factors should be considered. His Lordship noted that Summary Trial was not precluded even where evidence was conflicting or where findings of credibility and reliability were necessary; however, there must be a factual context which the Court could use in order to prefer one party's evidence over the other.

Justice Poelman noted that the Justice hearing the Summary Trial still has the ability, pursuant to Rule 7.9, to dismiss the Application in the event that the Objection to Summary Trial is dismissed before the Hearing. In addition, Rule 7.9(2) requires that Judgment be given unless it would be unjust to decide the issues on a Summary Trial. Justice Poelman differentiated the word "unjust" in Rule 7.9 from the word "suitable" in Rules 7.5 and 7.8.

> … If the difference in words is to mean anything, perhaps there is a higher onus on a judge to make a ruling after the full summary trial has been heard.

Justice Poelman upheld the Objection to Summary Trial,

expressing concerns about the risk of limiting judicial independence or creating contradictory findings in two separate proceedings.

MONCRIEFF v HAYNE, 2013 ABQB 657 (JERKE J)
Rules 7.3 (Summary Judgment), 7.5 (Application for Judgment by Way of Summary Trial) and 7.8 (Objection to Application for Judgment by Way of Summary Trial)

In this estate litigation, the deceased's daughter brought a claim against her brother, the deceased's son, and against the lawyer who drafted the deceased's most recent Will, claiming undue influence and a lack of testamentary capacity. In addition, the daughter claimed an interest in the deceased's land pursuant to an agreement. The deceased's son and the lawyer applied for Summary Judgment and the dismissal of the Plaintiff's entire Claim. In the alternative, they applied to have the matter set down for determination at a Summary Trial.

Jerke J. reviewed the relevant law and found that a defendant seeking Summary Dismissal must prove that there is no genuine issue of material fact requiring Trial. If the defendant does so, the onus shifts to the plaintiff to refute or counter the defendant's evidence by establishing a real chance of success.

Jerke J. found that the deceased's son had established that there was no genuine issue for Trial concerning the claimed agreement respecting the daughter's interest in land. The deceased's daughter had not successfully refuted this evidence and, accordingly, that claim was dismissed. The deceased's daughter had also sought an accounting. However, Jerke J. determined that the administrator *pendente lite* previously appointed by the Court was fully competent and authorized to address this concern.

Finally, the Court addressed the validity of the Will. Jerke J. found that the deceased's daughter had presented sufficient evidence to refute the defendants' contention that there was no genuine issue for Trial and established that the claim had a real chance of success. Accordingly, Jerke J. turned to the question of whether a Summary Trial would be appropriate. With reference to the nine factors set forth in *Bonsma v Tesco Corporation*, 2011 ABQB 620 and *Duff v Oshust* 2005 ABQB 117, Jerke J. found that a full Trial was warranted. The Court noted that "courts should not be hesitant to decide cases by use of a summary trial process, and litigants should not be reluctant to participate". However, the case at bar depended on the success of the deceased's daughter's cross-examination of her brother's witnesses. Consequently, Jerke J. held that justice required a full Trial to determine the validity of the Will.

Jerke J. also included an appendix discussing the process by which parties may apply for Summary Trials set forth in Rules 7.5 - 7.8. The Court noted that the Rules expressly provide the Respondent a right to wait until 5 days before the date scheduled for the Summary Trial to give Notice of Objection. Jerke J. noted that the process the Parties followed in the case before the Court, whereby a ruling as to the propriety of Summary Trial would be obtained in advance of the scheduled date, helped to eliminate uncertainty arising from a strict reliance on the Rules. Jerke J. recommended that parties follow a bifurcated process to first determine the propriety of a Summary Trial in advance of the date for the Summary Trial Hearing.

WESTJET v ELS MARKETING INC, 2013 ABQB 666 (JONES J)
Rules 7.5 (Application for Judgment By Way of Summary Trial), 7.6 (Response to Application), 7.7 (Application of Other Rules), 7.8 (Objection to Application for Judgment by Way of Summary Trial), 7.9 (Decision After Summary Trial) and 7.10 (Judge Remains Seized of Action)

WestJet sued the Defendants (collectively, "ELS") for damages, alleging breach of contract. ELS Counterclaimed against WestJet and also sought, *inter alia*, damages for breach of contract.

WestJet alleged that ELS was in breach of contract by not remitting monies owed in a timely fashion and by not fulfilling its financial record keeping and reporting responsibilities. ELS alleged that WestJet was in breach of contract by terminating their service agreement as of December 31, 2009, having earlier extended it to September 30, 2010.

WestJet applied for Judgment by way of Summary Trial for their claim relating to the monies owed to them, which were being withheld by ELS. The Justice stated that the relevant Rules of Court engaged were Rules 7.5 to 7.10. Justice Jones discussed objections under Rule 7.8, stating:

> In my view, Rule 7.8(3), while purporting to require the applications judge to make a determination regarding the merits of an objection ignores the practical effect of these Rules. The applications judge actually may have to conduct the trial (or a substantial portion of it) in order to make the threshold determination, after the fact, that it was appropriate for the applicant to have sought judgment by way of summary trial.

Jones J. was critical of the new Rules regarding Judgment by way of Summary Trial. His Lordship quoted at length from Madame Justice Veit's Decision in *Islam v Mozumder*, 2012 ABQB 773, where Justice Veit discussed the move from a two-step Summary Trial process (wherein the first step is an Application that can be heard in Morning Chambers as to whether some or all of the issues should proceed by way of Summary Trial, and the second step is the Summary Trial itself) to a one-step process, where the Application for Summary Trial and the Summary Trial proceed simultaneously. Veit J. was strongly of the opinion that the one-step process in the new Rules has in fact made things more difficult and expensive for most litigants, especially where the Respondent objects to the Application. After echoing Justice Veit's comments, Jones J. stated his own thoughts on the matter:

> My understanding of her Ladyship's overall concern with these Rules is that compression of what was a two-step process into one step not only exposes the parties, particularly a respondent who objects,to undesirable and unnecessary expense, delay and uncertainty, but places strain on the Court's ability to achieve a just result. From commencement of the application to and after its conclusion, the application judge has to engage in an ongoing process of considering the limited evidence presented to determine if (i) he or she has enough facts to decide the issues, (ii) it would be "unjust" to award judgment with respect to what is emerging during the course of the summary trial, (iii) the issue being framed during the course of the summary trial appears to be unsuitable for resolution by that mechanism and (iv) the summary trial itself seems to be falling short in facilitating resolution of the issues.

Jones J. then went on to discuss the following proposition arising from the case law respecting Summary Trials:

> It is permissible to hear the request for summary trial, to hear the summary trial itself and to give final judgment in a single proceeding: WA Stevenson & JE Côté, *Civil Procedure Encyclopedia*, Volume 2 (Juriliber, 2003) ("CPE") at p. 31-95. The comments of Justice Veit in *Islam* also reflect that conclusion.
>
> Complexity is not a bar to summary trial: *Compton Petroleum Corp v Alberta Power Ltd*, 1999 ABQB 42, 242 AR 3 (*"Compton"*) at para 18.
>
> A judge hearing a summary trial may decide some but not all of the issues: *Canlan Investment Corp v Gettling*, (1998), 37 BCLR (3d) 140 (CA) at paras 44, 45 and 49. However, conducting a summary trial on part of the suit may be counter-productive, particularly where there is overlap in the key issues: see CPE at p. 31-99, *Prevost v Vetter*, 2002 BCCA 202, 100 BCLR (3d) 44 and *Islam* at para. 19.
>
> While it is not appropriate for the Court to decide a summary trial solely on the basis of a choice between conflicting affidavits, conflicting evidence is not, in and of itself, a bar to summary trial if the conflict can be resolved by reference to other evidence. See *Compton* at para. 13 and *Inspiration Management Ltd v McDermid St Lawrence Ltd* (1989), 36 BCLR (2d) 202 (CA) at pp. 215-216.
>
> Summary trial may be appropriate even in situations where large amounts are sought: *Mattu v Mattu*,

> 2001 BCCA 140, 4 CPC (5th) 55 at paras 9-10; *CIBC v Charbonnages de France International* SA (1994) BCLR (2d) 104 (CA) at para 108.

Justice Jones noted that the application of Rule 7.9(2) required him to answer two questions: 1) was he able to find the facts necessary to decide the issues of fact and law before him; and 2) would it be unjust to decide those issues on the basis of the Summary Trial.

Jones J. then considered the objections raised by the Respondents. ELS objected to the Application for Summary Trial on several grounds. The first ground was that the matter was too complex to be suitable for Summary Trial. The Court rejected this assertion, stating that WestJet was only seeking Summary Trial for its claim of the monies owed to it by ELS pursuant to an agreement and, taken in isolation, WestJet's claim was straightforward.

ELS also objected on the ground that Summary Trials lack necessary procedural safeguards and are not Trials in the full sense of the word. Jones J. conceded that the Summary Trial process is imperfect. However Justice Jones rejected this objection stating that "to refuse an application for judgment by way of summary trial on the basis that the summary trial process itself is flawed would be to render that process altogether unavailable". He further stated that ELS must answer WestJet's application by demonstrating that the Summary Trial process is inappropriate in this particular case.

The final objection was that it would be unjust to determine WestJet's claim without also determining ELS' counterclaim, which could not be done without the benefit of a full Trial process. The Court noted that both Parties to an Application for Judgment by way of Summary Trial must come to Court armed with sufficient evidence to support their positions:

> The one-step process does not allow a respondent merely to object to the matter being heard on a summary basis while declining to provide evidence; he must be prepared for the summary trial to proceed notwithstanding his objection. If that were not the case, raising the possibility of a defence or counterclaim would be sufficient to defeat any application for summary trial. That cannot be the intent of the Rules.

The Court went on to state that, WestJet having engaged the Summary Trial process by applying under Rule 7.5, ELS had a responsibility to present evidence in support of its Counterclaim and its position that a full Trial was needed to resolve the issues before the Court.

In the result, Jones J. granted Judgment in Westjet's favor. Justice Jones also dismissed ELS' Counterclaim, without prejudice to ELS' ability to pursue its Counterclaim in a separate proceeding.

LEWIS ESTATES COMMUNITIES INC v BROWNLEE LLP, 2013 ABQB 508 (BROWN J)
Rules 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges), 10.17 (Review Officer's Authority) and 13.5 (Variation of Time Periods)

The Applicants, being various golf course owners, applied for an Order allowing them to seek review by a Review Officer of accounts for services rendered by the Respondent, Brownlee LLP, notwithstanding that most of the invoices were issued over six months prior to filing the Appointment for Taxation. The Applicants also sought an Order compelling Brownlee to provide them with complete files relating to the matters covered by the accounts.

The Parties agreed that the golf courses were entitled to a review of Brownlee's accounts dated April and March of 2010, but also agreed that an Order was required for a review of Brownlee's accounts going back further. The actual Appointments for Review were filed prior to the adoption of the current Rules of Court; therefore, the Court was required to apply former Rule 647, as it governed the Application at the time it was filed - Brown J. noted that the effect of former Rule 647(d) was the same as the combined effect of current Rules 10.10(2) and 13.5(2)(a).

Whether considering the former Rules or the current Rules, the Applicants were only entitled to a review of lawyers'

charges delivered within the prior six months. Brown J. stated that this limit was meant to balance the right of a client to initiate a review of accounts, which required the lawyer to demonstrate reasonableness, and the right of lawyers to a prompt request by clients for a review. Further, any exercise of judicial discretion to extend the time period beyond six months must weigh the factors relevant to the circumstances of the Application, having regard to established principles and possible injustices.

In this instance, the Court considered several factors, including: the types of accounts Brownlee rendered to the Applicants; the length of the requested extension; the reason for the delay to file the Appointments; whether the delay caused prejudice to Brownlee; whether there was evidence of overcharging by Brownlee; and whether the evidence of the entire relationship between the Parties supported an extension of time. Brown J. stated that no one factor was determinative; however, the first factor considered was the type of accounts rendered by Brownlee, as it was seen to be pivotal to some of the other factors.

Regarding the type of account, the issue was whether Brownlee's periodic accounts were interim or final. Brown J. stated that a periodic account was likely to be considered final if the parties understood that the charges would be based on hours spent at an hourly rate and would not be adjusted at the conclusion of the matter. The Court held in this case that the accounts on their face were final in that they were for services rendered during a specific time period, the total was said to be "due" and the Applicants actions demonstrated that they considered the accounts to be payable immediately, not subject to a later adjustment.

Regarding the length of the extension, the longer the extension, the more the Court felt this factor would militate against granting an extension. In one instance, review was statute-barred pursuant to the *Limitations Act*. Brown J. stated that the Applicants needed a "very good reason" to support an extension of time for reviewing lawyers' charges and expressed two concerns with the evidence provided by the Applicants. First, the Applicants failed to identify their concerns earlier than 2009 and, second, the Applicants failed to provide particularity in their account of the time period between identifying their concerns about possible duplicative work and filing the Appointments.

Regarding prejudice, Brown J. examined whether the Applicants' delay was inordinate and, if so, whether the Applicants rebutted the presumed prejudice to Brownlee. The length of the delay varied with each account, and Brown J. concluded that delay in respect of accounts sent in connection with the 2009 and 2010 matters were not reasonably characterized as inordinate. Regarding the 2007 and 2008 matters, the delay in seeking a review of those accounts was considered inordinate. Where the delay was found to be inordinate, Brown J. held that the Applicants were able to rebut the presumed prejudice to Brownlee, as Brownlee still had the files for those matters in its custody and was therefore able to address the merits of the accounts.

The Court also considered the allegations of overcharging and agreed with Brownlee's submission that the time entries were not necessarily suggestive of overcharging; however, it was held that there was some evidence that could support a finding of overcharging. Finally, Brown J. considered the relationship between the Parties and held that the relationship between Brownlee and the Applicants gave them many opportunities to identify concerns and raise them with Brownlee; therefore, this factor weighed against allowing an extension.

After all of the factors were considered, Brown J. concluded that the interests of justice and public confidence were best served by permitting a review of Brownlee's accounts relating to the 2009 and 2010 assessment matters. The Court extended the Applicants' time for seeking review by six months for those specific matters.

Regarding the Applicants' request for an Order compelling Brownlee to provide them with complete files, Brownlee submitted that the request was premature and unnecessary. Brown J. disagreed, finding that it would be better to ensure that the Applicants had all the file materials in advance of the Review, rather than to adjourn it later. The Court also held that the Review Officer's authority under Rule 10.17(1)(b) was intended to empower the Review Officer.

Brown J. ordered Brownlee to provide the Applicants with the complete files regarding the matters under review.

VAN BRABANT ESTATE (Re), 2013 ABQB 547 (MOEN J)
Rules 10.10 (Time Limitation on Reviewing Retainer Agreements and Charges) and 13.5 (Variation of Time Periods)

The Applicants were five brothers and sisters of a deceased brother who died intestate. The Respondent acted as their counsel in a bitterly fought estate matter, including the successful challenge to the status of an adult interdependent partner claimant. The Applicants applied for an Order pursuant to Rule 13.5 extending the six month time limit created by Rule 10.10, and allowing the Applicants to proceed with a review of accounts rendered by the Respondent.

The Applicants filed their appointment for review of the retainer agreement/lawyer's charges on October 9, 2012. Out of the sixteen accounts rendered by the Respondent, four were within the six month period, and twelve were not.

The Court looked at whether the accounts rendered by the Respondent were interim or final, and cited *Samson Cree Nation v O'Reilly & Associés*, 2013 ABQB 350 for the proposition that the six month time limit occurs after the final account has been rendered to the client. Moen J. analyzed the terms of the retainer letter and the accounts rendered. Moen J. found that the retainer letter was less than transparent with respect to whether the accounts were final or interim, and resolved the ambiguity in favor of the Applicants.

Given that the accounts were interim, and that the last account was rendered within the six month limitation period, Moen J. did not need to address the issue of whether the Court should exercise its discretion to extend the time for filing the appointment pursuant to 13.5. However, Moen J. undertook the analysis, in the event that her determination that the accounts were interim was incorrect.

In determining whether the Court should exercise its discretion to extend the time period in this case, Moen J. considered the following factors.

1. Did the delay in filing the taxation cause prejudice to the solicitor?
2. When did the client express the intent to tax the accounts?
3. Were the accounts part of a continuing file and therefore interim accounts?
4. Was there evidence that there was overcharging and that it was just and equitable that the accounts be taxed?
5. Was there evidence that the parties had come to an agreement as to the amount of the account?
6. Did the evidence of the entire relationship between the solicitor and client support any extension of time?
7. Did the Applicant have a reasonable excuse for failing to seek a review within six months?
8. Was there merit to the client's position that the accounts were excessive?
9. Was the extension request for a significant period of time?

After reviewing these factors, the Court determined that, even if it had been incorrect in characterising the accounts as interim, this was a proper case for the Court to use its discretion to extend the time period.

OLEYNIK v UNIVERSITY OF CALGARY, 2013 ABCA 395 (CÔTÉ JA)
Rules 10.26 (Appeal to Judge) and 10.27 (Decision of Judge) and Part 14 (Appeals)

The Appellant brought a motion to strike a party-party Bill of Costs which had been allowed by the Assessment Officer. The Appellant lost an earlier Appeal of an Interlocutory Order of the Court of Queen's Bench. No Costs were given at the Court of Queen's Bench and the Court of Appeal's Reasons were silent with respect to Costs. However, Costs were awarded to the Respondent pursuant to the Court's Consolidated Practice Directions, Part H, as the Respondent was the winning party. Justice Côté noted that this Notice of Motion was similar to an Appeal from an Assessment

of Costs under former Rule 655 (new Rule 10.26). As provided by Part 14 of the new Rules, the Court of Appeal's analysis was based on the former Rules of Court.

The Appellant made the following complaints in support of the Appeal:

1. No Certificate or Affidavit as to the correctness of the disbursements was sought by the Assessment Officer;

2. The date of the Assessment was held on a day that the Appellant had informed the Court office that he was not available for; and

3. The Assessment was unreasonably delayed.

Regarding the first complaint, Justice Côté noted that former Rule 630 calls for an Affidavit or Certificate as to the correctness of the disbursements sought; however, the Rules do not specify any fixed result for such an omission and the Court has the power to cure defects under former Rule 558. Further, no harm was caused by the omission because the Assessment Officer obtained receipts for the disbursements which were sufficiently strong evidence.

Justice Côté dismissed the Appellant's argument about the date of Assessment because:

1. It was unreasonable for the Appellant to refuse to attend on all Tuesdays and Thursdays of an entire university semester;

2. Former Rule 632 expressly allowed the Assessment Officer to proceed with the Assessment, even if a party served did not show up; and

3. The Appellant received sufficient notice of the Assessment and should have requested an adjournment if he objected to the date.

Regarding the delay of the Assessment, the Appellant relied on former Rules 244 and 244.4 which allowed for a party to move to dismiss an entire Action or have a timetable imposed on it. Justice Côté stated that these Rules applied prospectively, not retroactively. As such, this argument was dismissed because:

1. There was no specific deadline breached;

2. Any delays were reasonably explained;

3. Former Rule 607 permitted Interlocutory Costs payable forthwith, but did not mandate it; and

4. There was no evidence of prejudice to the Appellant from any delay.

The Assessment of Costs was confirmed and the Appeal dismissed.

SHTAIF v VONCINA, 2013 ABCA 397 (BERGER, O'BRIEN and MARTIN JJA)
Rule 10.28 (Definition of "Party")

The Plaintiff Appellants commenced an Action against the Defendant Respondents for investment mismanagement and unauthorized trading. The Appellants filed three Applications to amend their pleadings, one of which was to add a Party who was not previously named as a Defendant, Mr. Horback. The amendment to add Mr. Horback was resisted and the Appellants removed those portions which were objected to, but Mr. Horback sought costs for the Amendment Application nonetheless. The Costs Application and an Application for further document production by the Appellants were heard by a Master and subsequently by the Case Management Judge. The Case Management Judge denied the Application for further production, and held that Mr. Horback was entitled to Costs. The Appellants appealed further. The Court of Appeal held that the Case Management Judge did not err in the Decision not to order any further document production. The Court of Appeal further held that the Costs award, while not one that the Court of Appeal would have made, was a proper exercise of the Case Management Judge's discretion since the additional amendments to the Statement of Claim were unnecessary. The Court did not consider the Rule at length, but noted in *obiter* that, even if Mr. Horback was never served for "strategic reasons", he was a "party" pursuant to

Rule 10.28 and was therefore entitled to Costs. The Appeal was dismissed.

MCDONALD ESTATE (RE), 2013 ABQB 602 (MAHONEY J)
Rules 10.31 (Court-Ordered Costs Award), 10.33 (Court Considerations in Making Costs Award), 10.52 (Declaration of Civil Contempt) and 10.53 (Punishment for Civil Contempt of Court)

The Applicants, Cheryl Mackintosh ("Cheryl") and Michael McDonald ("Michael"), were the co-guardians and co-trustees of a dependent adult, Arlene Mackintosh ("Arlene"). The Applicants sought to finalize remaining probate issues of an estate matter and to declare the former trustee of Arlene, Joan Gusa ("Gusa"), in contempt and a vexatious litigant.

Gusa failed to file any materials in response to the Application and sought a last minute adjournment, which was a tactic she had used in the past. Mahoney J. held that there were no grounds to grant the adjournment and that the request was simply for the purposes of delay. Further, when Court Orders had been made, she failed to comply with the terms.

On the issue of whether Gusa was in contempt of Case Management Orders, Mahoney J. referred to the provisions of Rule 10.52(3) and stated that the purpose of the contempt Rules is to achieve compliance with Court Orders and to uphold the authority of the Court. Gusa was declared to be in contempt, as she had repeatedly failed to respond to, or ignored, Undertakings ordered in eleven Case Management Orders. No reasons were given for the noncompliance, nor did she file any Affidavits to explain what attempts had been made to comply with the Orders.

With respect to the punishment under Rule 10.53 for being in contempt, Mahoney J. considered the fact that Gusa had made no apology or any kind of attempt to purge her contempt, and that the Applicants had incurred significant costs and wasted time as a result of Gusa's failure to comply with the Orders. Gusa was ordered to pay a fine of $1,100.00 – $100.00 for each of the eleven failures to comply.

Mahoney J. furthered reviewed Gusa's conduct throughout the estate matter and declared her to be a vexatious litigant: she failed to follow Court Orders, delayed proceedings, refused to consent to basic steps in administering the estate, and made unfounded allegations of misconduct against third parties. In deciding the appropriate Costs in the circumstances, Mahoney J. held that the Order should "bring home to Ms. Gusa the seriousness of her actions". Gusa was ordered to pay 4 times Column 5 Costs related to the Case Management, contempt and vexatious litigant Applications.

HILL v HILL, 2013 ABCA 289 (CÔTÉ and COSTIGAN JJA, HUGHES J (AD HOC))
Rules 14.1 (Application), 518.1 (Application of Part 12) and 809 (Fees)

This Appeal arose out of a complex and highly contentious claim by a son who had not been given an interest in his father's business. The Action failed at Trial and an Appeal on the merits was dismissed. The Court of Appeal also previously decided an Appeal of Costs ordered at the Court of Queen's Bench level. This Appeal was with respect to Costs of the main Appeal. Counsel were unable to agree on a number of aspects of Court of Appeal Costs and asked the Court to settle such questions. The Respondents had provided the Appellant with a joint Offer to Settle both Appeals. The Offer was made after the Appellant had filed his materials in the main Appeal, but early in the parallel Appeal with respect to Costs at the Court of Queen's Bench. The Offer was rejected, and both Appeals were unsuccessful.

The Appellant made a number of arguments with respect to Appeal Costs. The Appellant argued that the Offer to Settle should be ignored because the Respondents thought that the Appeal had little chance of success. The Court held that such an argument was illogical, and could effectively nullify any Rules respecting the Costs consequences of an Offer to Settle. The Appellant further argued that because his suit was for a large sum of money, no Offer to Settle would have been attractive. The Court rejected this argument on the basis that such reasoning would exempt any lawsuit claiming a large sum from the Rules with

respect to Formal Offers. The Appellant further argued that the Offer should not have an effect on Costs in the main Appeal because the Offer was with respect to both parallel Appeals. However, the Court held that there was no reason to forbid comprehensive Offers. That the Appellant decided to appeal merits and Costs separately should not reduce the Respondents' ability to make a comprehensive Offer.

The Rules with respect to Offers to Settle compare the result after the fact with the result which the Offer would have given. The exception to this approach is an Offer by which the offeror would concede nothing if it were accepted. Such offers will be ignored in the context of Costs. The exception also applies to Offers of only a tiny or nominal concession, on the basis that such Offers do not include a genuine offer of compromise.

The Offer made by the Respondents would have given a credit of $100,000.00 toward the Appellant's Trial Costs, which far exceeded that amount. The Offer would also have forgiven any Costs related to the Appeals. The Offer was open for acceptance for 45 days, pursuant to the former Rules. The Offer also provided that the Appellant would have had his Appeal Costs to the date of service of the Offer, which would have included most of his Costs of the main Appeal. In total, the Offer would have yielded approximately $256,000.00 in cash and setoffs. The Court held that the Offer was genuine and significant. In this context, the Court rejected the Appellant's argument that the Offer did not represent a real concession by the Respondents.

Former Rule 174(1.1) provided that an offeror would receive double fees from the date of service of the Offer if he or she won the suit or Appeal, and the Offer was not accepted. Rule 518.1 applies that Rule to Appeals. As such, the Court held that the Court of Appeal Costs should be doubled from the date of service of the Offer.

The Appellant further argued that, before considering the Offer to Settle, Costs should be calculated on Column 5 of Schedule "C" with no multiple. The Court held that Rule 608 suggests Court of Appeal Costs on the same scale as Court of Queen's Bench Costs, which was the usual practice of the Court of Appeal. It had been determined that a multiple of four times Column 5 was appropriate in the present matter, and that no good reason was provided to depart from the practice and presumption reflected in Rule 608.

The Court held that the Appellant's previous argument on Appeal suggested that the main Appeal was straight forward and that most of the work had already been done in the Court of Queen's Bench. The Court previously rejected that argument, and held that the Appellant's Factum on Appeal "was not always a reliable guide to the facts or the issues". The Court held that, without the Respondents' materials, the Court's task in determining the Appeal would have been enormous. The Court further held that, on Appeal, the Appellant continued to be a moving target and raised new points on which the Trial Judge's views were not available. In this context, the Court held that the Respondents were required to do an unusual amount of work on Appeal and should be compensated. The Court held that punishment of the Appellant was a smaller, but relevant, factor.

The Appellant further argued that, if the Respondents thought any allegations in the Appellant's argument on Appeal were groundless, the Respondents could have simply ignored them. The Court rejected that argument, and held that Appeals do not work in that way. Further, the Respondents could not have known that such arguments were groundless without checking thoroughly.

The Appellant further objected to paying two sets of Costs, one to the individual Respondents and one to the Corporate Respondents. The Court held that it rejected the same objection in its previous Reasons. The Court further held that a second counsel fee was appropriate, given the complexity and volume of material. In this context, the Court held that Costs of the main Appeal would be calculated at four times Column 5 up to the date of service of the Offer, and eight times Column 5 after the date of the Offer.

CARBONE v WHIDDEN, 2013 ABCA 346 (CONRAD JA)
Rule 505 (When Appeal Available) and Court of Appeal Consolidated Practice Directions Part J (Procedural, Maintenance or Children's Rights Appeals)

The Applicant in a medical negligence Action filed a Notice of Appeal from various Orders relating to production of documents, compelling responses to questions during Questioning and scheduling. When the Applicant missed the deadline for filing her Factum, the Appeal was struck from the list. The Applicant moved to restore the Appeal.

Justice Conrad noted that Rule 505(1) allowed an Appeal to the Court of Appeal from any Order emanating from a Justice in Chambers. Her Ladyship then considered Part J of the Consolidated Practice Directions, confirming that Part J procedures were designed to expedite Trials, and they apply to Appeals from those Orders which do not finally determine the issues in dispute. Justice Conrad held that, pursuant to Part J, s. 7(e), the Applicant's Factum was due six weeks after the Notice of Appeal was filed. When the Factum was not filed, the Appeal was properly struck from the list. Justice Conrad rejected the Applicant's argument that the deadline did not apply, stating:

> If all a litigant has to do to avoid the time limits applicable to Part J appeals is to include grounds that require leave, without obtaining leave in her appeal, the usefulness of time limits would end. The factum was due, the appellant knew it was due, and the appeal was properly struck pursuant to the Part J guidelines.

Her Ladyship outlined the factors to be considered when restoring an Appeal to the list, noting particularly that, when considering whether to restore a Part J Appeal, the Court should be alive to the importance of early disposition and the adherence to the short time limits. The Application to restore the Appeal was denied.

CARBONE v WHIDDEN, 2013 ABCA 377 (CONRAD JA)
Rule 505 (When Appeal Available)

The Plaintiff/Appellant applied to restore an Appeal of several Orders of the Case Management Judge. The Plaintiff/Appellant argued that the Appeal should be restored in part because of her confusion about proper process. The Plaintiff/Appellant understood from the Case Management Officer that Leave was required to proceed, and so missed the filing date for the Appeal. Madam Justice Conrad confirmed an earlier Decision that the Plaintiff Appellant was not confused as to the filing date and evidence existed to support the decision to refuse the Appeal.

Her Ladyship noted that the test under Rule 505(6), the Rule governing when an Appeal is allowed, is stated as: "whether there is a possible error of law, a misapprehension of important facts, or the discretion has been unreasonably exercised". Her Ladyship further noted that the presiding Justice is required to examine the original Application for any errors that might alter the decision upon its restoration. Justice Conrad applied the test for restoration and considered whether it was an error of law not to restore the Appeal, noting that the test for restoration is threefold: "one considers the reason for delay, the prejudice and the relative merits of the appeal". In the result, Justice Conrad did not find an error of law and observed that the merit consideration had actually operated in the Plaintiff/Appellant's favour. Further, the Plaintiff/Appellant had failed to convince Her Ladyship that there were any misunderstandings of the facts or arguments that could have resulted in a different decision at the time.

Justice Conrad also observed that this particular Application was a Part J Appeal on interlocutory proceedings and it did not end the Action. The Application was denied.

CANADIAN NATURAL RESOURCES LIMITED v ARCELORMITTAL TUBULAR PRODUCTS ROMAN SA, 2013 ABCA 357 (O'FERRALL JA)
Rule 508 (Stay of Enforcement)

The Applicants were Defendants in an Action over an alleged defective pipe and were the manufacturers of the pipe. The Respondent was the Plaintiff that used the pipe. The Case Management Judge gave an Order which declared certain information relevant and material for the purpose of

Questioning. The Applicants appealed that Declaration and brought the present Application in the meantime to stay the Order of the Case Management Judge, pending Appeal. The Case Management Judge ordered the Applicants to produce any information "relating to defects that [went] to the quality of other A106 Grade B pipe or other A106 Grade B pipe that failed in testing manufactured by the defendants Mittal Steel Roman S.A. at its Roman Mill in 2004-2006", as well as information "relating to actions proposed or taken by the defendants to improve its quality of A106 Grade B pipe at the Roman Mill between 1999-2006".

O'Ferrall J.A. first highlighted that the Case Management Judge did not stay the Order pending Appeal, but rather made an additional Order directing that a Supplementary Affidavit of Records, containing the information ordered to be produced, be sworn by the Defendants prior to the Hearing of the Appeal. O'Ferrall J.A. also noted that a Stay pending Appeal would only be granted if the Applicant satisfied the Court of Appeal Judge that there was an arguable issue to be determined, that the Applicant would suffer irreparable harm if the Stay was not granted, and that the balance of convenience favoured granting the Stay.

In this case, O'Ferrall J.A. stated that it was better that little be said about the merits of the Appeal and held that it could not be said that the Appeal had "no reasonable possibility of success". Regarding irreparable harm, the Applicants argued in oral submissions that no amount of Costs could compensate them for unnecessarily finding and producing the required information; however, O'Ferrall J.A. agreed with written submissions made by the Applicants that failing to grant the stay would render the Appeal nugatory. Finally, the Court held that, on the balance of convenience, there would be harm to the Respondent if the Stay was granted and the litigation schedule was disrupted; however, such harm might not materialize if the Stay was of limited duration. Based on this, O'Ferrall, J.A. granted the Stay until December 5, 2013, and left it up to the Panel hearing the Appeal to decide if the Stay should be continued past that date.

JAMES v NORTHERN LAKES COLLEGE, 2013 ABCA 408 (VELDHUIS JA)
Rule 515.1 (General Appeal List)

The Appellant, Mr. James, sought to restore his Appeal which had been struck, pursuant to Rule 515.1(9.1), due to inactivity for almost one year.

The Appellant was a probationary instructor at the Respondent Northern Lakes College (the "College") between August 18, 2008 and December 15, 2008, and was subject to a collective bargaining agreement between the Board of Governors and the Faculty Association of the College. On November 10, 2010, Mr. James filed a Statement of Claim for wrongful dismissal and other breaches of the collective agreement. The Claim was struck by a Master. Mr. James' Appeal to the Court of Queen's Bench was also unsuccessful. The Appellant filed a Notice of Appeal to the Court of Appeal on October 16, 2012, but took no action for almost one year.

In determining whether to restore the Appeal, the Court considered the following: the Appeal's arguable merit, any explanation for the delay, reasonable promptness in restoring the Appeal, and any prejudice to the respondents: 707739 *Alberta Ltd v Phillips*, 2001 ABCA 219, at para 13; *Garry v Canada*, 2007 ABCA 234, at para 4.

The Parties agreed that the motion hinged on the merits of the Appeal, specifically, whether the Court retained the jurisdiction to hear the merits of the case. The Court narrowed the issue in dispute to the alleged wrongful dismissal of the Appellant. Veldhuis J.A. stated that, although there are rare instances where courts retain residual jurisdiction over labour issues, courts often lack jurisdiction over such claims when they arise from interpretation, application, administration or violation of a collective agreement and are subject to the dispute resolution procedures set out in the collective agreement.

The Court considered the arguments advanced by the Appellant, to determine if the Court retained jurisdiction over the dispute in this case. First, the Appellant, relying on *Quebec (Commission des droits de la personne et des droits*

de la jeunesse) v Quebec (Attorney General), 2004 SCC 39 (*"Morin"*), submitted that a court may take jurisdiction when the dispute involves a discriminatory clause in a collective bargaining agreement (i.e. probationary employees may grieve claims but may not arbitrate them). The Court distinguished the present case from *Morin*, on the basis that *Morin* was based on age discrimination, and specifically stated that employers may provide fewer rights to probationary employees than non-probationary employees without amounting to discrimination.

Second, the Appellant argued that the Court may take jurisdiction where the grievance process fails to provide effective redress. The Appellant's argument that he was denied arbitration as a probationary employee was rejected based on the reasoning in *Vaughan v Canada*, 2005 SCC 11. Veldhuis J.A. stated that arbitration was not necessary for an aggrieved party to have redress and a lack of access to independent arbitration was not sufficient reason in itself for the courts to get involved with labour disputes.

Finally, the Court did not agree with the Appellant's interpretation of ss. 87 and 88 of the *Post-Secondary Learning Act*, SA 2003, c P-19.5 and did not consider the Appellant's argument that he had been improperly classified as a probationary employee, as that argument had not been raised in the Courts below.

The Court found no arguable merit to the Appeal, dismissed the Application to restore the Appeal and awarded Costs to the Respondents in the amount of $1,000.

FORT MCKAY FIRST NATION v ALBERTA ENERGY REGULATOR, 2013 ABCA 355 (SLATTER JA)
Rule 523 (Interlocutory Order)

The Applicant, Fort McKay First Nation ("FMFN"), sought leave to appeal decisions of the Energy Resources Conservation Board and the Alberta Energy Regulator. Brion Energy Corporation argued that the Application for Leave to Appeal on the interlocutory decision regarding constitutionality was filed out of time, as it had to be filed within one month of the decision and returnable within two months. The Application for Leave was filed approximately five months after the decision. The Court held that the preferable procedure is not to seek Leave to Appeal interlocutory matters, but to seek Leave to Appeal once the final decision is rendered. The Court held that the interlocutory decision formed part of the final decision, and thus was not out of time and, if it was out of time, the time should be extended.

FMFN was granted Leave to Appeal on the constitutional issue.

RB NEW CO LTD v 1331440 ALBERTA LTD, 2013 ABQB 659 (VEIT J)
Schedule C – Tariff of Recoverable Fees

The Applicant was previously unsuccessful in seeking partial Summary Judgment. The Applicant then contended that the successful Respondent should have Tariff Costs under the column representing the amount of the partial claim, rather than the amount of the total claim. The Applicant also submitted that the Questioning had taken place long prior to the Summary Judgment Application, and should not be a compensable item in Costs.

The Court held that, on a plain reading of Schedule C, Rule 1(3)(c), in an Interlocutory Application the applicable Costs column is that of the total amount claimed by the Plaintiff. The Court also held that a protective measure was built within Item 5(1) Questioning, as it can only be claimed once per Action. The Court held that the Questioning was a compensable item in Costs in relation to the Summary Judgment Application.